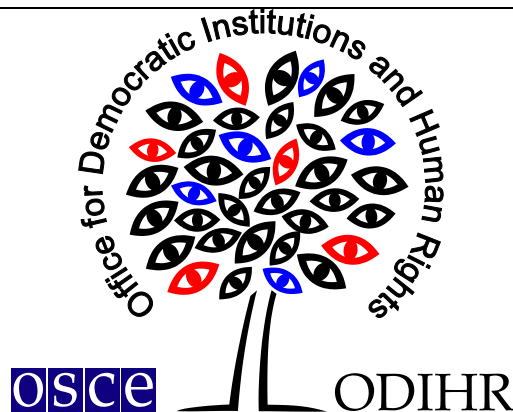


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OPINION ON CERTAIN PROVISIONS OF THE CRIMINAL CODE OF BULGARIA PERTAINING TO BIAS-MOTIVATED CRIME, “HATE SPEECH” AND DISCRIMINATION

**based on an English translation of the Criminal Code
provided by the Ministry of Foreign Affairs of the Republic of Bulgaria**

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*This Opinion is also available in Bulgarian.
However, the English version remains the only official version of the document.*

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I. INTRODUCTION

1. On 8 January 2018, the Deputy Minister of Foreign Affairs of the Republic of Bulgaria sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the Criminal Code of Bulgaria, primarily provisions pertaining to bias-motivated crime, “hate speech” and discrimination (hereinafter “the Criminal Code” or “CC”).
2. On 15 January 2018, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these provisions with OSCE commitments and international human rights standards.
3. This Opinion was 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 The OSCE/ODIHR additionally conducted this assessment within its mandate to “assist participating States, at their request, in developing anti-discrimination legislation, as well as in establishing anti-discrimination bodies”.²

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the sections of the Criminal Code of Bulgaria submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the Criminal Code or the entire legal and institutional framework of criminal law, criminal procedure or anti-discrimination legislation of Bulgaria.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the provisions under review. The ensuing recommendations are based on international standards and practices related to hate crime, expression labelled as “hate speech” and anti-discrimination. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.

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 Annex to Decision No. 3/03 on Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, par 20, available at <http://www.osce.org/odihr/17554?download=true>.

6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women³ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the provisions under review on women and men.⁴
7. This Opinion is based on an English translation of the Criminal Code provided by the Ministry of Foreign Affairs of the Republic of Bulgaria. The excerpts of the Criminal Code which were reviewed are attached to this document as an Annex. Errors from translation may result. This Opinion is also available in Bulgarian. However, the English version remains the only official version of the document.
8. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Bulgaria that the OSCE/ODIHR may wish to make in the future.

III. EXECUTIVE SUMMARY

9. The Opinion appreciates Bulgaria’s efforts to tackle bias-motivated crime, expression labelled as “hate speech” and discrimination, inter alia, through means of criminal legislation. Many of the provisions contain the main elements prescribed for these types of legislation by international human rights standards. However, the protected characteristics should be expanded and made consistent in all provisions dealing with bias-motivated crime. Specific penalty enhancements for a number of crimes which currently do not have such a clause, coupled with a general penalty enhancement explicitly referring to bias motivation would be a way to more effectively combat bias-motivated crimes and consider bias in sentencing for a wide variety of crimes, while specifically emphasizing the importance of correct identification, registration, investigation and punishment of such crimes. It is crucial that all criminal provisions avoid overly vague terms and are sufficiently accessible, specific and foreseeable.
10. More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance the provisions under review:
 - A. To either remove “hooligan” motives from Article 116 and Article 131 or to encapsulate it as a separate aggravating factor; [pars 32-34]
 - B. To replace the term “citizen” with “person” in Article 163 par 1 and Article 165 [pars 36-37 and 61];
 - C. To ensure that cases in which perpetrator mistakenly believes the victim belongs to a protected group, victims by association and mixed motives are consistently covered by provisions dealing with bias-motivated crimes; [pars 38 and 46-47]

³ *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by General Assembly Resolution 34/180 on 18 December 1979. The Republic of Bulgaria signed CEDAW on 17 July 1980 and ratified it on 8 February 1982.

⁴ See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

- D. To expand the protected characteristics in provisions dealing with bias-motivated crime to consistently include religion and non-religious belief, sex, sexual orientation, gender identity and disability; [pars 39-44]
- E. To include specific penalty enhancements for theft, burglary, robbery, arson, sexual violence and harassment, threatening of persons and unlawful deprivation of liberty; [par 49]
- F. To include a general penalty enhancement, applicable at sentencing to all crimes and specifically addressing bias motivation as an aggravated factor; [pars 50- 51]
- G. To rephrase Articles 162 par 1 and 164 par 1 of the Criminal Code to ensure it is sufficiently accessible, foreseeable and specific and to define key terms of the provision; [pars 52-55 and 58]
- H. To delete or, at a minimum, substantively revise Article 166 of the Criminal Code. [pars 62-64]; and
- I. To bring its criminal law provisions in line with the Rome Statute of the International Criminal Court and ensure that the provisions are consistently covered by universal jurisdiction pursuant to Article 6 par 1 of the Criminal Code [pars 66-71].

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

IV. ANALYSIS AND RECOMMENDATIONS

1. International and Regional Standards on Bias-Motivated Crime, “Hate Speech” and Discrimination

- 11. At the international level, protection against bias-motivated crimes derives from general international agreements such as the International Covenant on Civil and Political Rights (hereinafter “ICCPR”)⁵ and the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”).⁶ Article 2 par 1 of the

⁵ UN International Covenant on Civil and Political Rights, adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Bulgaria signed the ICCPR on 8 October 1968 and ratified the Convention on 21 September 1970.

⁶ 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 Republic of Bulgaria signed the CERD on 1 June 1966 and ratified the Convention on 8 August 1966. 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., OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), pages 41-42; 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

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. Moreover, the ICCPR also requires States to prevent, investigate, punish and redress deprivation of life and other acts of violence by adopting legislative and other measures to ensure that every person is effectively protected against such acts.

12. Thematically, specific international human rights conventions, such as the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”)⁷ in its Article 16 par 5 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”.
13. At the regional level, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”)⁸ protects against discrimination in conjunction with the enjoyment of another right protected by the ECHR. The Convention’s Protocol No. 12, which the Republic of Bulgaria is, however, not a signatory of, provides for a general prohibition of discrimination with respect to any right set forth by law. ECRI Policy Paper No. 1 calls upon Council of Europe (hereinafter “CoE”) member States to define “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”.⁹ ECRI has further 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 and/or genocide, racist motivation should constitute an aggravating circumstance.¹⁰
14. 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”.¹¹ Additionally, a number of other OSCE commitments address the prevention of and reaction to “hate crime”.¹²

“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.

⁷ UN Convention on the Rights of Persons with Disabilities, adopted by General Assembly Resolution 61/106 on 13 December 2006. The Republic of Bulgaria signed the CRPD on 27 September 2007 and ratified the Convention on 22 March 2012.

⁸ 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 Republic of Bulgaria ratified the ECHR on 7 September 1992.

⁹ See ECRI General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance, adopted by ECRI on 4 October 1996, Section A on “Law, Law Enforcement and Judicial remedies”, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N1/Recommendation_1_en.as.

¹⁰ ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002, pars 18 and 21, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468.

¹¹ 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>.

¹² 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 8, available at

15. As a member State of the European Union (hereinafter “EU”), Bulgaria is bound by 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 (hereinafter 2008 Framework Decision)¹³ and 2012 EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime recognizes “hate crime victims” as a specific category of victim deserving special treatment.¹⁴
16. With respect to genocide, the 1948 UN Convention on the Prevention and Punishment of Genocide defines the crime of genocide and outlines key state responsibilities in this regard.¹⁵ Thus, Article II defines genocide as killing or causing serious bodily or mental harm to members of a national, ethnical, racial or religious group with the intent to destroy, in whole or in part, such group, as well as deliberately inflicting upon the group life conditions intended to physically destroy it, preventing births from the group, or forcibly transferring its children to another group. Article V requires states to enact the necessary legislation to give effect to the Convention, and to provide effective punishment for persons found guilty of genocide or other acts enumerated in the Convention. Bulgaria is also a State Party to the Rome Statute of the International Criminal Court, which has jurisdiction over genocide, war crimes and crimes against humanity, including persecution and the crime of apartheid.¹⁶
17. While bias-motivated crime requires a base offence, meaning an action which is in and of itself prohibited and sanctioned by means of criminal law, some forms of “hate speech” are independently sanctioned on the international level. As freedom of expression is a crucial human right which features in all universal and regional human rights treaties, there are a lot of differing approaches within the OSCE area as to what kind of content is prohibited and only the most extreme cases are covered by international conventions.¹⁷ Whereas Article 20 par 2 of the ICCPR contains a more general clause stating that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”, Article 4 (a) of the CERD, within the specification of the Convention, obliged States Parties “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another

<http://www.osce.org/mc/19382>; 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.

¹³ 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>. Article 4 states “[f]or offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.”

¹⁴ 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, Article 22 par 3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>.

¹⁵ UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948 as General Assembly Resolution 260. The Republic of Bulgaria acceded to the Convention on 21 July 1950.

¹⁶ Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002. The Republic of Bulgaria ratified the Rome Statute on 11 April 2002.

¹⁷ *Op. cit.* fn 6 (“2009 ODIHR Practical Guide on Hate Crime Laws”), pages 25-26.

- colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.
18. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence provides recommendations on how legislation dealing with “hate speech” should be tailored.¹⁸
 19. On the regional level, Article 1 of the 2008 Council Framework Decision obliges member States to take necessary measures to ensure that “hate speech” is punishable. ECRI General Policy Recommendation No. 15 on Combatting Hate Speech provides practical recommendations for states for preventing and countering “hate speech” and supports its victims.¹⁹
 20. The European Court of Human Rights (hereinafter “ECtHR”), in its jurisdiction, uses two approaches in cases dealing with “hate speech”. First, comments amounting to “hate speech” directed against the underlying values of the ECHR are excluded from the protection of the Convention, in particular, from Article 10 ECHR, pursuant to Article 17 of the ECHR.²⁰ In cases in which the remarks do not amount to the negation of the Convention’s underlying values, interference with Article 10 can nevertheless be justified if it is prescribed by law, pursues legitimate aims as listed in Article 10 par 2 and is necessary in a democratic society in order to achieve these aims.²¹
 21. Anti-discrimination provisions are at the heart of all general and many thematically specific human rights treaties. Article 26 of the ICCPR and Article 2 par 2 of the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”)²² contain the principle of non-discrimination. Article 18 of the ICCPR protects the freedom of thought, conscience and religion, a right of relevance to several of the provisions under review. Article 2 of the Convention on the Rights of the Child contains a general non-discrimination clause within the thematic focus of the Convention. CEDAW, CRPD, the Discrimination (Employment and Occupation)

¹⁸ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hereinafter “Rabat Plan of Action”); Addendum to the Annual report of the United Nations High Commissioner for Human Rights (11 January 2013) A/HRC/22/17/Add.4, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

¹⁹ ECRI General Policy Recommendation No. 15 on Combatting Hate Speech, 8 December 2015, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf.

²⁰ Article 17 ECHR states “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”; see eg *Seurot v. France* ECtHR Decision on Admissibility of 18 May 2004, Application No 57383/00, available at <http://hudoc.echr.coe.int/eng?i=001-45005>; *Norwood v United Kingdom* ECtHR Second Section Decision on Admissibility of 16 November 2004, Application No. 23131/03, available under <http://hudoc.echr.coe.int/eng?i=001-67632>; *M’Bala M’Bala v France* ECtHR Decision on Admissibility of 10 November 2015, Application No. 25239/13.

²¹ See eg *Sürek v. Turkey* ECtHR Grand Chamber judgment of 8 July 1999, Application No. 26682/95, available at <http://hudoc.echr.coe.int/eng?i=001-58279>; *Vejdeland and Others v Sweden*, ECtHR judgement of 9 February 2012, Application No. 1813/07, available at <http://hudoc.echr.coe.int/eng?i=001-109046>; *Perinçek v Switzerland* ECtHR Grand Chamber judgment of 15 October 2015, Application No. 2751/08, available at <http://hudoc.echr.coe.int/eng?i=001-158235>.

²² UN International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly Resolution 2200A (XXI) on 16 December 1966. The Republic of Bulgaria signed the ICESCR on 8 October 1968 and ratified the Covenant on 21 September 1970.

Convention of the International Labour Organization (hereinafter “ILO Convention”),²³ the UNESCO Convention against the Discrimination in Education (hereinafter “CDE”) deal with the protection from discrimination within the areas of their respective subject-matters.

22. Article 9 (freedom of thought, conscience and religion) and Article 11 (freedom of assembly and association) and, in connection to both these rights, Article 14 (prohibition of discrimination) of the ECHR are also relevant in the context of the provisions to be reviewed. Additionally, the Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “Istanbul Convention”)²⁴ is of significance and the Framework Convention for the Protection of National Minorities (hereinafter “Framework Convention”)²⁵ contains an anti-discrimination provision in its Article 4.
23. As an OSCE participating State, the Republic of Bulgaria committed to “respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion” in the Helsinki Final Act.²⁶ Colour, political or other opinion, national or social origin, property, birth or other status were added in the Vienna Document as grounds in the non-exclusive lists of grounds which shall not impede the enjoyment of human rights and fundamental freedoms.²⁷
24. Finally, as a EU member State, Bulgaria is bound by EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter “Race Equality Directive”);²⁸ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;²⁹ and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.³⁰

²³ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its forty-second session on 25 June 1958. The Republic of Bulgaria ratified the Convention on 22 July 1960.

²⁴ Istanbul Convention (CETS No. 210 entered into force on 1 August 2014). The Republic of Bulgaria signed the Istanbul Convention on 21 April 2016, but has not yet ratified the Convention.

²⁵ Council of Europe, Framework Convention for the Protection of National Minorities, adopted on 1 February 1995. The Republic of Bulgaria signed the Framework Convention on 9 October 1997 and ratified it on 2 May 1999.

²⁶ Questions Relating to Security in Europe: 1. (a) “Declaration on Principles Guiding Relations between Participating States – Principle VII”, Helsinki, 1975, available at <https://www.osce.org/helsinki-final-act?download=true>.

²⁷ Questions Relating to Security in Europe: Principles, Vienna, 1989, pars 13.7 and 13.8

²⁸ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 29 June 2000, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0043>.

²⁹ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 27 November 2000, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078>; while Directive 2000/43/EC aims to protect from discrimination based on racial or ethnic origin, Directive 2000/78/EC prohibits employment- or occupation-related discrimination based on religion or belief, disability, age or sexual orientation.

³⁰ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, 13 December 2004, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32004L0113>.

2. Bias-Motivated Crimes

2.1 The Concept of Bias-Motivated Crimes

25. The term “bias-motivated crimes” (or “hate crimes”) implies criminal offences committed with a bias motive.³¹ Any crime, be it a crime against a person, his/her life, bodily integrity or property, will be a bias-motivated crime if at least one of the motives for committing the base crime are certain presumed or actual characteristics on the part of the victim. In hate crime legislation, “protected characteristics” are immutable or otherwise fundamental to the person’s sense of self or identity, such as nationality, national or ethnic origin, language, religion or belief, sexual orientation, gender identity, disability or similar ground.³²
26. Even though these types of crimes are often referred to as “hate crimes”, the feeling of hatred or contempt on part of the perpetrator towards his or her victim is not a constitutive element of bias-motivated crime. As a bias motive, like any motive is internal and subjective, the establishment of a bias-motivated crime depends on its outward manifestation. What is necessary is that the perpetrator intentionally selects the victim at least partly based on one or several presumed or actual protected characteristics. This selection can be evidenced by written or spoken words, images, objects, actions, demonstrations of hostility, or other direct or indirect evidence of bias. In the absence of evidence of intentional targeting, the mere existence of a protected characteristic is not sufficient to establish a bias-motivated crime. In all cases of violent incidents, authorities need to take all reasonable measures to investigate whether the above-mentioned elements exist.
27. 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.³³ Bias-motivated crimes thus have the potential to threaten public order and security by creating tensions between different groups, which could lead to interethnic or social unrest. In order 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”³⁴ and as such, ultimately, to protect public order, a crime committed with a bias motive is punished more severely than the same crime committed without bias motivation.
28. 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”.³⁵ This

³¹ See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, Preamble, available at <http://www.osce.org/cio/40695?download=true>. See also OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), page 16, available at <http://www.osce.org/odihr/36426?download=true>.

³² *Op. cit.* fn 6 (2009 ODIHR Practical Guide on Hate Crime Laws), page 38.

³³ *Ibid.* page 17.

³⁴ European Union Agency for Fundamental Rights, *Hate crime in the European Union*, page 1.

³⁵ *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

holds true for all bias-motivated crimes (including, specifically, cases where they are committed with anti-religious,³⁶ homophobic,³⁷ “racial”³⁸ or political motives³⁹), also in cases of verbal threats⁴⁰ and where the treatment which is in violation of the ECHR is inflicted by private individuals.⁴¹

2.2 Specific Penalty Enhancements for Murder and Bodily Injury

29. While murder, pursuant to Article 115 of the CC, is generally punishable with ten to twenty years of imprisonment, murder committed due to “hooligan, racist or xenophobic motives” (Article 116 par 1 (11) of the CC) is to be punished with fifteen to twenty years of imprisonment, or life imprisonment (with or without the possibility of commuting the sentence, depending on the severity of the crime). As such, these specific motives are considered an aggravated factor in cases of murder. Other aggravated factors set out in Article 116, and leading to the same range of punishments, are murders of public figures, murders committed by a public figure or by a parent against his/her child, murders of pregnant women, minors or more than one person, of a person in a helpless state, where the manner of committing the act is particularly dangerous or cruel, for a ‘venal goal’, to facilitate or conceal another crime, for the purposes of body organ transplants, committed with premeditation, committed at the order of a criminal group, or constituting a case of “dangerous recidivism”.
30. Under Article 131 of the CC, the above-mentioned special circumstances (which are the same as in Article 116 of the CC) will lead to aggravated punishments in cases of severe (three to fifteen years of imprisonment), medium (two to ten years of imprisonment) or ‘trivial’ bodily injury (up to three years of imprisonment, or up to one year or corrective labour). The usual punishment for severe, medium or trivial bodily injury is, respectively, three to ten years of imprisonment, up to six years of imprisonment, and up to two years or six months, corrective labour, or fines. Hooligan, racist and xenophobic motives are mentioned as aggravated circumstances in par 1 (12) of Article 131 of the CC.
31. It is generally welcome that the bias motivation is considered as an aggravated factor. This reflects the serious nature of bias-motivated crimes as “message crimes”. Racist motives will presumably target any other “racial” or ethnic group, and xenophobic

<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.

³⁶ *Milanovic v. Serbia*, ECtHR judgment of 14 December 2010, Application No. 44614/07, available at <http://hudoc.echr.coe.int/eng?i=001-102252>.

³⁷ *Op. cit.* fn 35 (*Identoba and Others v. Georgia*).

³⁸ *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>.

³⁹ *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>.

⁴⁰ *R.B. v. Hungary*, ECtHR judgement of 12 April 2016, Application No 64602/12, par 83, available at <http://hudoc.echr.coe.int/eng?i=001-161983>.

⁴¹ *Op. cit.* fn 35 (*Šečić v. Croatia*), par 67.

motives will mean that the respective crime is caused by a negative bias directed at persons from other countries and nationalities; in both cases, the defining characteristics (a person’s “race” or ethnic background, or his/her nationality or citizenship) will be visible, or in any case immutable, and fundamental for their ‘sense of self’ (see more on this point in pars 39-45 *supra*).

32. By contrast, crimes committed with ‘hooligan motives’ do not cover bias motivation in the above-mentioned sense. Under Article 325 of the Criminal Code, ‘hooliganism’ is described as involving cases where a person commits “indecent acts, grossly violating the public order and expressing open disrespect for society”. While this also has an important public order connotation, this type of criminal act would appear to be directed at society as a whole, rather than targeting a person because of certain (perceived or actual) characteristics. Moreover, the term ‘indecent acts’ would appear to be quite general, and could be subject to differing opinions and changing social mores. The same holds true for other terms used in Article 325, namely ‘gross violations of public order’ and ‘expressing open disrespect for society’. Even though the term “hooliganism” has long been established within the criminal legal system of Bulgaria, it is at least questionable whether this provision is specific enough to be compliant with the principle of legality, which requires that legislation to be accessible, clear and foreseeable, in order for an individual to know which behavior is permissible, and which is not and to avoid discretionary interpretation of the law. When it comes to punishment by means of criminal law, States are additionally bound by the principle *nullum crimen, nulla poena sine lege* (no crime, no punishment without law) which contains enhanced requirements on the accessibility, specificity and foreseeability of criminal provisions. This principle is reflected in Article 15 of the ICCPR and Article 7 of the ECHR.
33. When applying the definition for hooliganism set out in Article 325 of the CC to the wording of Article 116 par 1 (11) of the CC, this means that murder committed with the aim of committing an “indecent act” while “grossly violat[ing] the public order” and “express[ing] open disrespect for society” will be punished with more severe sanctions than other cases of murder. Given the lack of bias motive, and the lack of a clear and identifiable target group, such acts will, however, not be qualified as a bias-motivated crime. **For these reasons, and given the conceptual inconsistency of “racist and xenophobic” on one hand, and “hooligan” motives on the other hand, it is recommended to remove the term ‘hooligan motives’ from Article 116 and to, if needed, encapsulate it in a separate aggravating instance under Article 116. A similar recommendation is made with respect to the aggravated circumstance of inflicting bodily injury out of “hooligan, racist or xenophobic motives” in Article 131 par 1 (12).**
34. The vagueness of the definition of hooliganism is particularly problematic with respect to Article 116 par 1 (11), given the harsh penalties that this article imposes on convicted persons. Potentially, certain cases involving similar acts could be treated differently (as simple murder or as aggravated murder), depending on the subjective interpretation of the term ‘hooligan motives’ by individual courts. While it is understandable that murders committed during acts that greatly affect the public order may need to be met with harsher punishments than other cases of murder, it would be advisable for the legislator and relevant decision-makers to debate, and then clarify in the Criminal Code, which cases exactly this would involve. Instances where the perpetrator caused a situation that could potentially lead to numerous casualties would thereby appear to be already covered by Article 116 par 1 (6), which considers murders committed in a way

or a means dangerous for the life of many to constitute an aggravating factor. The legislator would then need to consider which other behavior involving murder in combination with violations of the public order would be sufficiently serious to constitute a separate aggravating factor that, if proven, could lead to life imprisonment.

2.3. Substantive Offences Requiring Bias Motivation

35. Article 162 par 2 punishes “[a]nyone who uses violence against another person or damages his/her property because of the persons [sic] race, nationality, ethnic origin, religion or political convictions” with imprisonment, monetary fines or public censure. **It is unclear how this provision relates to Article 131 of the Criminal Code and how the term “violence against another person” is defined in this context. If the action taken against another person results in bodily injury, it is presumed that Articles 128, 129, 130 together with 131 par 1 (12) would be *leges speciales* to Article 162 par 2 at least in cases of “hooligan, racist or xenophobic motives”. The term “violence against a person” should be clarified accordingly**
36. Persons who participate in a crowd, either as aider and abettors or in other capacities, “rallied to attack groups of the population, individual citizens or their property in connection with their national, ethnic or racial affiliation” are punished pursuant to Article 163 par 1 of the Criminal Code. Additionally, Article 165 par 3, which deals with crimes against religious denominations, states that for acts under Article 163 par 1 committed in connection to religious affiliation the same punishments apply.
37. The term “citizens” is too narrow in this provision as it is not apparent why only individual citizens should enjoy enhanced protection against physical attacks perpetrated by a group, in particular, as the provision also applies to “groups of the population” thereby making no distinction between citizens and non-citizens. While the restriction of rights to apply to only citizens is legitimate for some rights (ie rights regarding certain aspects of political participation), most human rights and fundamental freedoms are available to any person present on State territory. All persons being present on the territory of a State have the right to be protected on an equal footing against bias-motivated attacks threatening their bodily integrity. **Hence, the term “citizen” in Article 163 par 1 should be replaced with “person”.**
38. While Article 162 par 2 states that an attack has to be perpetrated “because of the persons [sic] race, nationality, ethnic origin, religion or political convictions”, Article 163 speaks of an attack “in connection with their national, ethnic or racial affiliation”. As such, Article 163 seems to also apply to cases in which the attacker wrongly assumes a victim belongs to a certain group or cases in which the victim is not himself or herself a member of the group but somehow associated with the group and/or its members. This is welcome and **there is no apparent reason in the difference of scope of the two provisions. It is recommended that the two provisions are unified to ensure that any crime which is motivated by the perpetrator wrongly assuming that the victim has certain protected characteristics should be classified as a bias-motivated crime.**⁴²

⁴² *Op. cit.* fn 6 (“2009 ODIHR Practical Guide on Hate Crime Laws”), pages 50-51.

2.4 Protected Characteristics

39. 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.⁴³ The most common protected characteristics in national legislation within the OSCE area are "race", national origin, ethnicity and religion.⁴⁴ In addition, other characteristics such as colour, language, belief, sexual orientation, gender identity, or disability also deserve enhanced protection from bias-motivated crimes. While Articles 116 par 1 (11) and 131 par 1 (12) of the CC speak of "hooligan, racist and xenophobic motives", Articles 162 par 2 and Article 163 par 1 of the CC list "race, nationality, ethnic origin, religion or political convictions" and "national, ethnic or racial affiliation" as protected grounds respectively. **In order to ensure that the provisions are applied in practice, it is of utmost importance that the characteristics protected in the provisions are consistent and the logic underlying them is congruent.**
40. While colour and language may be an indication of person's "race", ethnicity and/or nationality, it is noted that the above-mentioned articles do not or not consistently cover cases where a murder or bodily injury is committed out of bias for a person's religion or belief, sex, sexual orientation, gender identity or disability. **At a minimum, it is recommended that these protected characteristics are included in Articles 116 par 1 (11), 131 par 1 (12), 162 par 2 and 163 par 1 of the CC.**
41. The Bulgarian Criminal Code contains an entire Section II on crimes against religious denominations (under Chapter Three on Crimes against the Rights of Citizens). While not all provisions in this section relate to bias-motivated crimes, Article 164 pars 1 and 2 of the CC punishes individuals for propagating or instigating discrimination, violence or hatred on religious grounds, and damaging religious places of worship or commemoration (Article 164 pars 1 and 2 of the CC), and for hindering citizens from freely practicing their faith or performing religious rituals or services (Article 165 of the CC). Moreover, individuals forming a political organization on religious grounds or using religion for "propaganda against the rule of the people and its undertakings" are held criminally liable under Article 166 of the CC. Article 162 par 2 of the CC penalizes violence against a person or damages to his/her property based on, among others, his/her religion (though not his/her belief).
42. Given this recognition of an individual's right to freedom of religion or belief and the need to protect religious groups, their places of worship and their rituals and services, it is surprising that crimes based on the perpetrator's bias against a certain religion or belief are not also considered an aggravating circumstance under Bulgarian criminal law. While religion or belief is not immutable and it is possible to change one's religion or belief, it is as fundamental to a person's self as his/her ethnicity, nationality or citizenship and included in the vast majority of national laws dealing with bias-motivated crime. **It is therefore recommended to include religion as a protected characteristic consistently in the above-mentioned articles. Equally, not only**

⁴³ *Op. cit.*, fn 6 (2009 ODIHR Practical Guide on Hate Crime Laws), page 38.

⁴⁴ *Ibid.* page 40.

religious belief but also non-religious belief should be included as a protected characteristic.

43. As for sexual orientation and gender identity, it is noted that CoE Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity recommends legislative and other measures to counter “hate crime” and “hate speech” against lesbian, gay, bisexual or transgender (hereinafter “LGBT”) persons due to the discrimination, marginalization and violence that LGBT persons have been exposed to in the past.⁴⁵ Moreover, a person’s sexual orientation or gender identity is fundamental to his/her self, and equally immutable. **For this reason, and also to demonstrate that bias-motivated crimes, and especially serious ones such as murder or bodily injury, committed based on the victims’ sexual orientation and/or gender identity will not be tolerated in Bulgaria, it is recommended to include both as protected characteristics under Article 116 par 1 (11).** This is particularly important in light of the ECtHR’s judgment in *M.C and A.C v Romania* in which the court held that an investigation into a potential homophobic motive was “indispensable” when investigating cases against members of the LGBT community who faced hostility in the respondent State and had stated that an attack against them was accompanied by homophobic “hate speech”.⁴⁶ The court stated that this could have been done despite the fact that incitement to “hate speech”, which accompanied the physical assault, was not punishable in national legislation as the authorities could have assigned the “a legal classification that would have allowed the proper administration of justice. Without such a rigorous approach from the law - enforcement authorities, prejudice-motivated crimes would inevitably be treated on an equal footing with cases involving no such overtones, and the resultant indifference would be tantamount to official acquiescence to, or even connivance with, hate crimes”.⁴⁷
44. **Additionally, it is noted that cases where persons are victimized because of a disability are not reflected in the Criminal Code. It would be advisable to add reference to such cases to the list of protected characteristics set out in Article 116 par 1 (11), Article 131 par 1 (12), 162 and 163 of the CC.**
45. Article 162 par 1 of the CC includes political conviction as a grounds of protection. While this is done in some national legislation and while political convictions can be considered fundamental to a person’s identity, they are not immutable and unchangeable in a way which is usually required of protected characteristics in the context of bias-motivated crime. It is also a vague term that might be difficult to prove as a motivation in practice. **It is therefore recommended to remove political conviction from Article 162 par 1 of the CC or, at a minimum, to change it to “political affiliation”.**
46. **It is recommended for the Criminal Code, in all instances to refer to the motives of the attacker rather than the actual possession of a protected characteristic on part of the victim, so that also cases in which the attacker mistakenly believes the victim to have such a characteristic are covered, as well as to consistently protect victims**

⁴⁵ Council of Europe 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&BackColorIntern et=](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)5&Language=lanEnglish&Site=COE&BackColorIntern et=)

⁴⁶ *M.C. and A.C v Romania*, ECtHR judgment of 12 April 2016, Application No12060/12, par 124, available at <http://hudoc.echr.coe.int/eng?i=001-161982>, par 124.

⁴⁷ Ibid.

by association. This is in line with the ECtHR’s decision in *Škorjanec v. Croatia*, where the court held that the obligation of State authorities in cases of suspected racist violence, to take all reasonable action to ascertain whether a bias motivation underlies a specific crime “concerns not only acts of violence based on a victim’s actual or perceived personal status or characteristics but also acts of violence based on a victim’s actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic”.⁴⁸

47. **Finally, the Criminal Code should clarify that also cases in which the perpetrator is only partly motivated by bias and has additional other motives (cases of so-called “mixed motives”) are considered as hate crimes.**⁴⁹

2.5 Gaps in Protection

48. Additional to instances outlined above, which are not currently covered as bias-motivated crimes in the Bulgarian Criminal Code due to missing protected characteristics, the current Bulgarian legislation does, in some places, lack consistency which could manifest itself in further protection gaps.
49. **The current legal framework in place in Bulgaria misses specific penalty enhancements for some of the most common base offences for bias-motivated crimes. These are, in particular, property crimes like, for example, theft, robbery, burglary and arson. Specific penalty enhancements could also be foreseen in provisions targeting sexual violence and sexual harassment, threatening of persons as well as unlawful deprivation of liberty.**
50. Article 54 par 1 of the Criminal Code states “the motives for crime perpetration” shall be considered by the court as aggravating or attenuating circumstances. This means that courts have the opportunity, within the range of punishments provided for each offence to consider bias motivation for all of the offences listed in the Criminal Code as an aggravated offence.
51. **While it is welcome that courts have the opportunity to consider the motivation of any perpetrator, it is recommended to introduce a general penalty enhancement, either in Article 54 of the Criminal Code or in a separate provision, specifically addressing bias motivation in order to oblige a court to consider whether the crime in question was motivated by bias and emphasize the significance of these crimes as hate “message” crimes. A two-tier system with a general penalty enhancement for bias motivation in the commission of all crimes could supplement the specific penalty enhancements for certain crimes (see under pars 29-34 *infra*) to more effectively combat bias-motivated crimes and consider bias in sentencing for a wide variety of crimes. Additionally, in criminal justice systems with a general penalty enhancement for bias motivation, it is recommended that the law specifies that courts need to put on record the reasons assuming or dismissing a bias**

⁴⁸ *Škorjanec v Croatia*, ECtHR judgment of 21 February 2017, Application No 25536/14, pars 54-56, available at <http://hudoc.echr.coe.int/eng?i=001-172327>.

⁴⁹ Ibid par 55; see also *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> where the court stated in par 70 that perpetrators may be influenced by “situational factors equally or stronger than by their biased attitude towards the group the victim belongs to”; *op. cit.* fn 6 (2009 ODIHR Practical Guide on Hate Crime Laws), pages 53-54.

motivation as this data collection plays an important part in the identification and the prevention of bias-motivated crimes.

3. “Hate Speech”

52. Article 162 par 1 of the CC states that “[a]nyone who, by speech, press or other media, by electronic information systems or in another manner, propagates or incites discrimination, violence or hatred on the grounds of race, nationality or ethnic origin shall be punishable [...]” Given the crucial importance of freedom of expression as a fundamental right, any limitation of said right would need to be prescribed by law, follow a legitimate aim and be necessary in a democratic society.
53. While it is acknowledged that Article 39 par 1 of the Bulgarian Constitution guarantees the right to freedom of expression as well as, in Article 39 par 2, the limitations to the exercise of this right, the propagation and incitement of discrimination alone, without any qualifying factors, outlining the circumstances in which these are propagated or the kind of discrimination, violence or hatred which is furthered make the used terms overly broad and vague. This means they could apply to a vast number of situations and statements, which creates problems in terms of accessibility, legal certainty and foreseeability (see also par 32 *supra*). Given that the overly broad terms in which Article 162 par 1 is phrased will make it hard for a person to understand, even when seeking expert advice, which statements are allowed and which are sanctions by means of criminal law and to align their behavior accordingly.⁵⁰ **Article 162 par 1 of the CC is formulated in a way which does not contain the necessary degree of accessibility, foreseeability and specificity, and therefore, fails the “prescribed by law” test for permissible limitations on the freedom of expression.**
54. Article 20 of the ICCPR prohibits “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” and, as such, is more concrete than Article 162 par 1 of the CC. Additionally, according to the recommendations of the Rabat Plan of Action “States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant (“...advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...”), and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others.”⁵¹
55. **It is therefore recommended to bring Article 162 par 1 of the CC in line with the more concrete “hate speech” provisions in either the ICCPR or the ICERD and to define by law some of the key terms used in Article 162 par 1 of the CC in accordance with the Rabat Plan for Action.**
56. As a separate matter, some attention should be given to the punishment of incitement or propagation “by electronic information systems” as is provided by Article 162 (1) of the CC but also in relation to religious denominations, as in Article 164 of the CC. The

⁵⁰ *Groppera Radio AG and Others v Switzerland*, ECtHR judgment of 28 March 1990, Application No 10890/94, par 68 where the court clarifies that “the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed” and states that the predictability of consequences might require the advice of an expert.

⁵¹ *Op. cit.* fn 18 (“Rabat Plan for Action”), par 21.

ECtHR has most recently examined the admissibility of cases of “hate speech” online where conviction of the authors of speech online was deemed to lawful as a result of the fact that it amounted to “hate speech” and thus did not attract the protection of Article 10 of the ECHR (on freedom of expression).⁵²

57. What needs to be underscored, however, is that online “hate speech” differs from “hate speech” through traditional media outlets (also listed in Articles 162 and 164 of the CC) as a result of the nature of the medium which is being used. The Internet allows for (anonymous) speech through Internet Service Providers (hereinafter “ISP”) which do not create the content, but merely host it. However, through very limited case law, the ECtHR has acknowledged that ISPs, while not being traditional media outlets (and thus devoid of the traditional rights and obligations of the media) and enjoying the right to freedom of expression themselves, may in certain cases attract liability for the “hate speech” they host⁵³ and have a duty to monitor and remove (in particular, where notified) “hate speech” of its users.⁵⁴ Importantly, the ECtHR stopped short of any liability of pre-moderating of online speech by users by ISPs, which could amount to an infringement of their freedom of expression, instead emphasizing the need for better reactionary tools in the take down and removal of “hate speech”. The potential liability of ISPs however, does not and should not in any way detract from the need to investigate the actual authors of the “hate speech”, understood as being addressed by Article 162 par 1 and 164 par 1 of the CC, yet the ISPs’ role in various cases of facilitating such speech is worthy of future consideration.
58. Article 164 par 1 of the CC also contains a few points which are worth mentioning separately. Due to the way it is formulated, it is not immediately clear whether Article 164 par 1 of the CC applies to only discrimination, violence or hatred propagated or instigated against a certain person or group of persons because of their religion, or whether it is also applicable to “hate speech” publicized by a religious community, a religious group of persons or by an individual on religious grounds or using a religious justification. While Section II of Chapter Three in which this provision is located is entitled “Crimes against Religious Denominations” it also contains other provisions which seem to rather be aimed at punishing a person who commits a criminal act while invoking the right to freedom of religion (most notably Article 166, see pars 62-64 *infra*). **In light of the need, as outlined above, for criminal law to be clear, accessible, precise and foreseeable, it is recommended to clarify the content of Article 164 par 1.** In this context, it should also be considered that the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has specifically cautioned against “vague and overbroad legal provisions prohibiting incitement to hatred, which can be abused to censor discussion on matters of legitimate public interest”.⁵⁵

⁵² *Smajić v Bosnia and Herzegovina*, ECtHR judgment of 18 January 2018, Application no. 48657/16, available at <http://hudoc.echr.coe.int/eng?i=001-180956>.

⁵³ *Delfi AS v Estonia*, ECtH judgment of 16 June 2015, Application No.64569/09, available at <http://hudoc.echr.coe.int/eng?i=001-155105>; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* ECtHR judgment of 2 February 2016, Application no. 22947/13, available at <http://hudoc.echr.coe.int/eng?i=001-160314>.

⁵⁴ *Ibid.* (*Delfi AS v Estonia*).

⁵⁵ UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report on Hate Speech and Incitement to Hatred, A/67/357, 7 September 2012, par 52, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/67/357&Lang=E>.

59. In any case, binding international legal standards provide for the protection not just of religious faith but also of non-religious convictions.⁵⁶ **The provision should be expanded to cover not only religion but also non-religious belief.**
60. While on the face of it, this provision is very similar to Article 162 of the CC, the punishment is slightly lower – under Article 164 par 1 of the CC, punishment is the same, but also possible on probation. Also, here (in both pars 1 and 2), public censure is not mentioned as a punishment. Under Article 164 par 2, desecration, destruction or damaging a religious temple is also punished by slightly lower prison sentences (up to three years, as opposed to one to four years in Article 162 par 2, and the possibility of on probation) and slightly lower fines (minimum 3000 BGN as opposed to 5000 BGN in Article 162 par 2). While this may be justified with respect to the crimes of damaging property (after all, the property mentioned in Article 162 par 2 is private property), this would also signify that calling for discrimination, violence or hatred on religious grounds is less serious than doing so based on “race”, nationality or ethnic origin of the victims. **It is recommended to adapt the provisions and ensure that the punishment available to similar actions protected by different characteristics remains within the same range.**

4. Discrimination

61. Pursuant to Article 165 of the CC a person who “by force or threat hinders the citizens from freely practising their faith or from performing their religious rituals and services, which do not violate the laws of the country, the public order and morality” will be punished by imprisonment for up to one year. As outlined above, most human rights and fundamental freedoms with few exceptions are available to any person present on state territory. Freedom of religion or belief in its *forum internum* (the right to have a religion) and *forum externum* (“communication of spiritual subject matter to the world at large and defence of a conviction in public”⁵⁷) is a human right of every person (“everyone” as stated in Article 18 par 1 of the ICCPR and Article 9 of the ECHR) and should not be limited to citizens. As a consequence, where the obstruction of practicing of religion or belief and of performing religious rituals is sanctioned by means of criminal law, this should be the case no matter if the person or group of persons who are the victim of such acts are citizens or non-citizens in order not to unjustly discriminate against persons based on their nationality. **Article 165 of the Criminal Code should be amended accordingly, to clarify that it protects both citizens and non-citizens within its scope and include not religious belief and its manifestation within its ambit.**
62. Section II of Chapter Three of the Criminal Code contains a provision punishing “[a] person who forms a political organisation on religious basis or who by speech, through the press, action or in another way, uses the church or religion for propaganda against the rule of the people or its undertakings” (Article 166 of the CC). This provision seems problematic in the context of several fundamental rights.

⁵⁶ See eg UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18 of the ICCPR), 27 September 1993, par 2, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRe v.1%2fAdd.4&Lang=en.

⁵⁷ Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd edition (2005), page 411.

63. Many of the terms used in the provisions are vague. It is not apparent if “political organization” refers to political parties only or to any association whose aims and goals are of a political nature or organizations which seek to achieve their aims through political lobbying and advocacy. It is also not clear what using “the church or religion for propaganda against the rule of the people or its undertakings” refers to. Freedom of expression entails the right to propagate ideas and opinions, including advocating for a change of the government or the political system. While a “direct call to violent overthrow of the government in an atmosphere of political unrest or propaganda for war”⁵⁸ can justify national security as grounds for restricting freedom of expression, **the terms used in Article 166 are too vague to provide for the clarity, accessibility, foreseeability and specificity needed for criminal provisions. The provision also seems, at least partly, unnecessary as Article 407 of the Criminal Code already contains a prohibition of propaganda for war. If the purpose is to sanction persons forming associations or parties whose statutes or statements violate the constitution and other laws, then this should be clarified in the text.**
64. Additionally, the provision raises concerns with regard to freedom of association. Freedom of association is a fundamental human right protected on the universal (Article 22 ICCPR) and regional levels (Article 11 ECHR). All persons are free to establish an association and determine its objectives and activities free from discrimination and state interference.⁵⁹ Limitations to the right to freedom of association need to adhere to the criteria set by the ECHR, should be narrowly construed and are permissible only based on one or several legitimate aims as listed in Article 11 par 2 of the ECHR.⁶⁰ The right to freedom of association is also guaranteed by the Constitution of Bulgaria (Article 44 par 1). Article 44 par 2 states that an organization’s “activity shall not be contrary to the country's sovereignty and national integrity, or the unity of the nation, nor shall it incite racial, national, ethnic or religious enmity or an encroachment on the rights and freedoms of citizens; no organization shall establish clandestine or paramilitary structures or shall seek to attain its aims through violence.” However, as a means to safeguard one or several of these aims, Article 166 in its current form lacks the necessary precision to serve as a basis for a justified interference with the freedom of association. **It is therefore recommended to delete Article 166 or, at a minimum, revise it substantially and clarify its key terms, scope and the action it penalizes taking into account the above-mentioned criteria.**
65. Finally Article 172 prescribes the punishment of a person “who intentionally impedes another to take a job, or compels him to leave a job because of his nationality, race, religion, social origin, membership in a trade union or another type of organization, political party, organisation, movement or coalition with political objective, or because of his or of his next-of-kin political convictions”. **Such provision is, in principle, welcome. It would however, be advisable to expand the list and add non-religious belief, sexual orientation, gender, gender identity and disability as protected grounds. The Republic of Bulgaria could also consider ratifying Protocol 12 to the ECHR to enhance individual protection against discrimination.**

⁵⁸ Ibid. page 464.

⁵⁹ See Principles 2,4 ad 5 of the OSCE/ODIHR and Venice Commission, Guidelines on Freedom of Association (2015), <<http://www.osce.org/odihr/132371>> (hereinafter “2015 Guidelines on Freedom of Association”).

⁶⁰ These aims are national security or public safety, the prevention of disorder or crime, the protection of health or morals or for the protection of the rights and freedoms of others.

5. Provisions related to Crimes under International Law

66. **At the outset it is noted that the Republic of Bulgaria as a State Party to the Rome Statute of the International Criminal Court should bring its provisions dealing with crimes under international law in line with the Rome Statute so that they cover genocide, crimes against humanity, war crimes and the crime of aggression. All these crimes should then also be consistently covered by universal jurisdiction pursuant to Article 6 par 1 of the Criminal Code.**
67. While Chapter Fourteen of the Criminal Code dealing with provisions on crimes under international law is entitled “Crimes against Peace and Humanity”, crimes against humanity are not currently included in the Criminal Code in the manner prescribed for by international law. Some of the modalities of crimes against humanity, such as apartheid, are penalized explicitly under Chapter Fourteen, and others, like murder, bodily injury or rape, are defined as ordinary crimes by the Criminal Code, however, these modalities lack the chapeau element necessary for crimes to be qualified as crimes against humanity, namely a widespread or systematic attack directed against any civilian population.
68. Article 416 of the Criminal Code penalizes genocide. As opposed to the Genocide Convention and the Rome Statute, Article 416 a) defines one alternative of the *actus rea* of genocide as the causation of “death, severe bodily injury or permanent derangement of the consciousness of a person belonging to such a group”. This means that it would technically suffice to kill one person for a murder to constitute genocide as long as the perpetrator had genocidal intent. Whereas the Genocide Convention requires “mental harm”, the Criminal Code speaks of “permanent derangement of the consciousness” thereby adding an additional requirement of permanence which is not required by either the Genocide Convention or the Rome Statute. Pursuant to Article 416 b) placing “the group under living conditions such that lead to its full or partial physical liquidation” is punishable as genocide which seems to relinquish the requirement of the internationally acknowledged definition of genocide which requires “*deliberately* inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.
69. While Article 416 par 2 and 3 punishes incitement and preparation of genocide, the ancillary crimes of attempt and conspiracy to commit genocide is not specifically covered. However, some aspects might be covered through Section II (Preparation and Attempt) or Section III (Conspiracy) of Chapter Two of the Criminal Code.
70. **It is recommended to bring the definition of genocide in the Criminal Code fully in line with the internationally acknowledged definition of the crime of genocide in the Genocide Convention and the Rome Statute.**
71. Articles 418 and 419 both deal with the crime of apartheid and are based on the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.⁶¹ **Both of these articles should be brought in line with the Rome Statute so that persecution and apartheid are separated from each other more clearly and a widespread or systematic attack against a civilian population is introduced as a**

⁶¹ International Convention on the Suppression and Punishment of the Crime of Apartheid adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entered into force 18 July 1976. The Republic of Bulgaria signed the convention on 27 June 1974 and ratified it on 18 July 1974.

chapeau element to the crimes. Additionally, other substantive offences that can constitute of crimes against humanity should be added under a specific provision dealing only with crimes against humanity.

[END OF TEXT]

ANNEX:

Criminal Code of the Republic of Bulgaria [Excerpts]

Article 54

- (1) The court shall mete out punishments within the limits provided by law for the crime committed, guided by the provisions of the general part of this Code and taking into consideration the following:
the degree of social danger of the act and the perpetrator,
the motives for crime perpetration, and other attenuating or aggravating circumstances.
- (2) The attenuating circumstances shall condition the infliction of a milder punishment, and the aggravating ones of a severer punishment.

Article 115

A person who deliberately kills another person shall be punished for murder by imprisonment for ten to twenty years

Article 116

- (1) (Previous Article 116, SG No. 62/1997) For murder:
1. (supplemented, SG No. 28/1982, amended, SG No. 62/1997) of an official, of a representative of the public, as well as of a serviceman, including one of an allied or friendly state or army, during or in connection with the performance of his duty or function, or of a person enjoying international protection;
 2. (amended, SG No. 27/2009) by an official, as well as by a representative of the public, a police authority during or in connection with the performance of his duty or function;
 3. of father or mother, as well as of one's own son or daughter;
 4. (supplemented, SG No. 62/1997) of a pregnant woman, of a minor or of more than one person;
 5. of a person in helpless state;
 6. in a way or by means dangerous for the life of many, in a particularly painful manner for the victim or with particular cruelty;
 7. for a venal goal;
 8. for the purpose of facilitating or concealing another crime;
 - 8a. (new, SG No. 84/2013) for the purpose of dispossessing the victim of a body organ, tissue, cell or body fluid;
 9. performed with premeditation;
 10. (new, SG No. 92/2002) committed by an individual acting at the orders or in implementing a decision of an organized criminal group;
 11. (renumbered from Item 10, SG No. 92/2002, supplemented, SG No. 33/2011, effective 27.05.2011) committed by hooligan, racist or xenophobic motives, and
 12. (renumbered from Item 11, SG No. 92/2002) representing a case of dangerous recidivism or performed by a person who has committed another intentional murder under the preceding or this article, for which no sentence has been pronounced,
- (amended, SG No. 28/1982, supplemented, SG No. 50/1995, amended, SG No. 153/1998, SG No. 92/2002, effective 1.01.2005 in respect of the punishment of probation -

amended, SG No. 26/2004, effective 1.01.2004, SG No. 103/2004) the punishment shall be imprisonment for fifteen to twenty years, life imprisonment or life imprisonment without a chance of commuting.

- (2) (New, SG No. 62/1997, amended, SG No. 153/1998, amended and supplemented, SG No. 103/2004, supplemented, SG No. 43/2005, amended, SG No. 27/2009, SG No. 33/2011, effective 27.05.2011, supplemented, SG No. 61/2013) For murder of a judge, prosecutor, examining magistrate or a police body, an investigating police officer, a public enforcement agent, a private enforcement agent or an assistant private enforcement agent, a customs officer, a revenue officer, an officer of the Executive Forestry Agency, or an officer of the Ministry of Environment and Waters performing a control activity or a medical specialist, a teacher (tutor) in the course of or in relation to carrying out his/her duties or functions, the punishment shall be imprisonment for twenty to thirty years, life imprisonment or life imprisonment without a chance of commuting.

Article 131

(Amended and supplemented, SG No. 95/1975, supplemented, SG No. 28/1982)

(1) (Previous Article 131, SG No. 62/1997) For inflicting bodily injury:

1. (amended, SG No. 62/1997) to an official, a representative of the public, a serviceman, including such of an allied or friendly state or army, in the course of or in connection with the fulfilment of his duty or functions, or to a person enjoying international protection;
 2. (amended, SG No. 27/2009) by an official, a representative of the public, a police authority in the course of or in connection with the fulfilment of his duty or function;
 3. to a mother or to a father;
 4. (supplemented, SG No. 62/1997) to a pregnant woman, a minor or to more than one person;
 5. in a manner particularly painful for the victim;
 6. by a person who has intentionally inflicted another severe or medium bodily injury under Articles 128 and 129 or under this article, for which no sentence has been pronounced;
 7. for a second time, if the bodily injury is severe or medium;
 8. (new, SG No. 92/2002) by a person acting at the orders or in implementing a decision of an organized criminal group;
 - 8a. (new, SG No. 84/2013) for the purpose of dispossessing the victim of a body organ, tissue, cell or body fluid;
 9. (new, SG No. 92/2002) using means and ways dangerous to the life of many or with particular cruelty;
 10. (new, SG No. 92/2002) with a venal goal in mind;
 11. (new, SG No. 92/2002) in view of facilitating or concealing another criminal act;
 12. (new, SG No. 92/2002, amended, SG No. 26/2010, supplemented, SG No. 33/2011, effective 27.05.2011) out of hooligan, racist or xenophobic motives the punishment shall be imprisonment: for three to fifteen years for severe bodily injury; for two to ten years for medium bodily injury; for up to three years for trivial bodily injury under Article 130, paragraph (1), and for up to one year or corrective labour under Article 130, paragraph (2).
- (2) (New, SG No. 62/1997, amended and supplemented, SG No. 103/2004, supplemented, SG No. 43/2005, amended, SG No. 27/2009, SG No. 33/2011, effective 27.05.2011, supplemented, SG No. 61/2013) For bodily injury inflicted on a judge, a prosecutor, an examining magistrate, a police body, an investigating officer, a public enforcement

agent, a private enforcement agent or an assistant private enforcement agent, as well as on a customs officer, a revenue officer, an officer of the Executive Forestry Agency, or an officer of the Ministry of Environment and Waters performing a control activity or a medical specialist, a teacher (tutor) in the course of or in relation to carrying out his/her duties or functions, the punishment shall be imprisonment:

1. from five to fifteen years in the case of severe bodily injury;
2. from three to ten years in the case of medium bodily injury;
3. from one to five years in the case of trivial bodily injury under Article 130, paragraph (1);
4. up to three years in the case of trivial bodily injury under Article 130, paragraph (2).

Chapter Three

CRIMES AGAINST THE RIGHTS OF THE CITIZENS

Section I

Crimes Against the Equality of All Citizens (Title amended, SG No. 33/2011, effective 27.05.2011)

Article 162

- (1) (Amended, SG No. 27/2009, SG No. 33/2011, effective 27.05.2011) Anyone who, by speech, press or other media, by electronic information systems or in another manner, propagates or incites discrimination, violence or hatred on the grounds of race, nationality or ethnic origin shall be punishable by imprisonment from one to four years and a fine from BGN 5,000 to 10,000, as well as public censure.
- (2) (Amended, SG No. 27/2009, SG No. 33/2011, effective 27.05.2011) Anyone who uses violence against another person or damages his/her property because of the persons race, nationality, ethnic origin, religion or political convictions, shall be punishable by imprisonment from one to four years and a fine from BGN 5,000 to 10,000, as well as public censure.
- (3) (Amended, SG No. 27/2009) A person who forms or leads an organisation or group which has set itself the objective of committing acts under paragraphs (1) and (2) or systematically allows the performance of such acts, shall be punished by imprisonment for one to six years and a fine from BGN ten thousand to thirty thousand and by public censure.
- (4) A person who is a member of such an organisation or group shall be punished by imprisonment for up to three years and by public censure.
- (5) (New, SG No. 28/1982, amended, SG No. 92/2002, effective 1.01.2005 with respect to the punishment of probation - amended, SG No. 26/2004, effective 1.01.2004, repealed, SG No. 103/2004).

Article 163

- (1) (Supplemented, SG No. 27/2009) The persons who take part in a crowd rallied to attack groups of the population, individual citizens or their property in connection with their national, ethnic or racial affiliation, shall be punished:
 1. the abettors and leaders - by imprisonment for up to five years;

2. all others - by imprisonment for up to one year or by probation.
- (2) If the crowd or some of the participants are armed, the punishment shall be:
 1. for the abettors and leaders - imprisonment for one to six years;
 2. for all others - imprisonment for up to three years.
- (3) If an assault has been made which has resulted in severe bodily injury or death, the abettors and leaders shall be punished by imprisonment for three to fifteen years, and all others - by imprisonment for up to five years, if they are not liable to more severe punishment.

Section II

Crimes Against Religious Denominations

Article 164

(Amended, SG No. 27/2009)

- (1) (Supplemented, SG No. 74/2015) A person who propagates or instigates discrimination, violence or hatred on religious basis by speech, through the press or other mass media, through electronic information systems or in another way, shall be punished by imprisonment for up to four years or probation and a fine from BGN five thousand to ten thousand.
- (2) A person who desecrates, destroys or damages a religious temple, a house of prayer, sanctuary or an adjoined building, their symbols or gravestones, shall be punished by imprisonment up to three years or by probation, and a fine from BGN three thousand to ten thousand.

Article 165

- (1) A person who, by force or threat hinders the citizens from freely practising their faith or from performing their religious rituals and services, which do not violate the laws of the country, the public order and morality, shall be punished by imprisonment for up to one year.
- (2) The same punishment shall also be imposed upon a person who in the same way compels another to take part in religious rituals and services.
- (3) For the acts under Article 163, committed against groups of the population, individual citizens or their property, in connection with their religious affiliation, the punishments provided therein shall be applied.

Article 166

(Supplemented, SG No. 28/1982, amended, SG No. 92/2002, effective 1.01.2005 with respect to the punishment of probation - amended, SG No. 26/2004, effective 1.01.2004, SG No. 103/2004, SG No. 27/2009)

A person who forms a political organisation on religious basis or who by speech, through the press, action or in another way, uses the church or religion for propaganda against the rule of the people or its undertakings, shall be punished by imprisonment for up to three years, if he is not subject to more severe punishment.

Section VI

Crimes Against the Labour Rights of the Citizens

Article 172

(Amended and supplemented, SG No. 28/1982, amended, SG No. 1/1991, SG No. 10/1993)

- (1) (Amended, SG No. 10/1993, amended and supplemented, SG No. 92/2002) A person who intentionally impedes another to take a job, or compels him to leave a job because of his nationality, race, religion, social origin, membership in a trade union or another type of organization, political party, organisation, movement or coalition with political objective, or because of his or of his next-of-kin political convictions, shall be punished by imprisonment for up to three years or by a fine of up to BGN 5,000.
- (2) An official who fails to carry out an order or a court decision that has entered into force for re-instating at work of a wrongly dismissed worker or employee, shall be punished imprisonment for up to three years.

Section III

Liquidation of Groups of the Population (Genocide) and Apartheid (Heading supplemented, SG No. 95/1975)

Article 416

- (1) A person who, for the purpose of liquidating, completely or in part, a certain national, ethnic, racial or religious group:
 - a) causes death, severe bodily injury or permanent derangement of the consciousness of a person belonging to such a group;
 - b) places the group under living conditions such that lead to its full or partial physical liquidation;
 - c) takes measures aimed at checking the birth rate amid such a group;
 - d) forcefully transfers children from one group to another,(amended, SG No. 153/1998) shall be punished for genocide by imprisonment for a term of from ten up to twenty years or by life imprisonment without a chance of commuting.
- (2) (Previous Article 417, SG No. 95/1975) A person who commits preparation for genocide shall be punished by imprisonment for two to eight years.
- (3) (Previous Article 418, SG No. 95/1975) A person who openly and directly incites genocide, shall be punished by imprisonment for one to eight years.

Article 417

(New, SG No. 95/1975)

A person who with the aim of establishing or maintaining domination or systematic oppression of one racial group of people over another racial group of people:

- a) causes death or severe bodily injury to one or more persons of such a group of people, or
- b) imposes living conditions of such a nature as to cause complete or partial physical liquidation of a racial group of people,

(amended, SG No. 153/1998) shall be punished for apartheid by imprisonment for a term of from ten up to twenty years or by life imprisonment without a chance of commuting.

Article 418

(New, SG No. 95/1975)

A person who for the purpose under the preceding article:

- a) unlawfully deprives of liberty members of a racial group of people or subjects them to compulsory labour;
 - b) puts into operation measures for hindering the participation of a racial group of people in the political, social, economic and cultural life of the country, and for intentional creation of conditions hampering the full development of such a group of people, in particular by depriving its members of the basic freedoms and rights of citizens;
 - c) puts into operation measures for dividing the population by racial features through setting up of reservations and ghettos, through the ban of mixed marriages between members of different racial groups or through expropriation of real property belonging thereto;
 - d) deprives of basic rights and freedoms organisations and persons, because they are opposed to apartheid,
- shall be punished by imprisonment for five to fifteen years.

ADDITIONAL PROVISIONS

(Title amended, SG No. 33/2011, effective 27.05.2011)

Article 419

In accordance with the differentiation under the preceding article punished shall be also a person who consciously allows his subordinate to commit a crime provided for in this Chapter.

Article 419a

- (New, SG No. 33/2011, effective 27.05.2011) (1) Anyone who justifies, denies or grossly palliates a crime committed against peace and humanity and thereby poses a risk of violence or instigates hatred among individuals or groups of people united on the grounds of race, colour, religion, origin, national or ethnic origin shall be punishable by imprisonment from one to five years.
- (2) Anyone who abet another person to commit a crime under Paragraph 1 shall be punishable by imprisonment of up to one year.