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Comparative Hate Crime Research Report

A report prepared for the Hungarian Civil Liberties Union

April 2014

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In addition, the research co-ordinators would like to thank:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Professor Sandra Fredman** and **Mr Jacob Rowbottom**; and members of the Student Committee, **Shreya Atrey**, **Kate Mitchell**, **Daniel Cashman**, **Max Harris**, **Eleanor Mitchell**, **Lauren Dancer** and **Vrinda Bhandari**, for their support and assistance with the project.

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EXECUTIVE SUMMARY

1. This research report offers a comparative analysis of the application of hate crime laws to victims who belong to non-disadvantaged or majority groups in the surveyed jurisdictions.
2. The research indicates that all hate crime laws surveyed are based on a symmetrical conception of protected grounds. Therefore, the bias element in hate crimes is not defined with regard to the vulnerability or disadvantage of the group to which the victim belongs. This symmetrical conception of hate crime laws is also reflected in the case law of the surveyed jurisdictions: Canada, Czech Republic, France, Germany, Greece, United Kingdom, the United States, Slovakia and South Africa.
3. The general view emerging from the case law is that a racial slur, in and of itself, does not substantiate a bias in motivation that is often required in hate crime laws. However, the research could not establish a clear standard of proof for establishing hate crimes. In some jurisdictions, racist uttering during the commission of the crime might suffice for meeting the criteria of hate crime legislation; in others, mere racial slurs uttered during the commission of the crime, without further evidence, do not suffice for proving a biased motivation.
4. There was only one jurisdiction (the UK) found where the prosecutorial discretion is limited in a way such that the suspicion of bias in motivation automatically triggers the prosecution of hate crimes. However, in all surveyed jurisdictions, secondary sources argue strongly that absolute discretion may be an important reason for deficiencies in the application of hate crime laws.

INTRODUCTION

5. This research was initiated by the Hungarian Civil Liberties Union (HCLU), a Budapest-based human rights and civil liberties NGO. The HCLU has identified major deficiencies in the application of national hate crime laws. These include the national authorities' reluctance to recognise bias in motivation behind crimes committed against members of the most vulnerable minority in Hungary, the Roma people.¹ At the same time, law enforcement officers and courts are prone to apply the special hate crime provision of the Hungarian Criminal Code against Roma perpetrators if they happen to use anti-Hungarian expressions during any violent act.² Thus, according to the HCLU, there seems to be a tendency of using hate crime laws against (rather than in protection of) the most vulnerable minority groups, suggesting a misuse of the law and a double standard in law-enforcement.
6. This research report seeks to provide comparative law research in relation to some of these questions, for the purpose of assisting the HCLU in litigation before the Hungarian Supreme Court in 2014. The litigation concerns an appeal against a second instance Court judgment, which upheld the trial court's judgement that sentenced nine Roma persons for committing a racist crime 'against Hungarians' for attacking the car of alleged far-right activists in the small Hungarian town of *Sajóbábony*. The classification of the act as a hate crime was solely based on testimonies, which attested that there were anti-Hungarian shouts during the act. However, the HCLU argues that it seems reasonable to infer from the circumstances that the defendants attacked the car of the victims out of fear from racist attacks because they believed it belonged to members of the New Hungarian Guard (a far-right, racist group).
7. A note about the methodology pursued in this report is necessary. For the purposes of this report, the 'hate crime' terminology of the Organization for Security and Co-operation in Europe (OSCE) was adopted in consultation with the project partner. The OSCE Guide on hate crimes defines the offence as one composed of a criminal offence and a bias motive.³ As the Guide explains:

¹ About bias motivation see below Report paragraph 7.

² S 216 Hungarian Criminal Code, Act C of 2012.

³ OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crime Laws – A Practical Guide* (2009), 16-17.

[a] bias motive only requires some form of prejudice on account of a personal characteristic. Bias can be felt in respect of a person, or a characteristic or an idea (where the victim symbolizes that characteristic or idea.⁴

As a result of using the OSCE Guide's definition *hate speech laws* more broadly (self-standing offences criminalising expression such as racist slurs) fell outside of the scope of this research.⁵ Furthermore, the research followed the OSCE Guide⁶ in the respect that both models of hate crime legislation were treated equally as hate crimes for the purposes of this research. The substantive offence model consists in a 'separate offence that includes the bias motive as an integral element of the legal definition of the offence'⁷, whereas the aggravating factor model 'increases the penalty for a base offence when it is committed with a bias motive'⁸. Finally, another distinction was adopted from the OSCE Guide between a discriminatory selection model and a hostility model.⁹ The latter requires from the offender some hatred, hostility or enmity based on one of the protected characteristics of the victim, whereas the former only requires that the offender chooses the victim because of his or her protected characteristics.

8. The selection of jurisdictions was determined by the expertise of the OPBP researchers and the development of the countries' hate crime laws. The research covers nine jurisdictions: Canada, Czech Republic, France, Germany, Greece, United Kingdom, the United States, Slovakia and South Africa. The first part of the Report (paragraphs 14 –37) provides an overview of the hate crime legislation of the surveyed countries.
9. Due to the disparity in the availability of relevant case law across the surveyed jurisdictions, the research does not seek to be representative of hate crime laws worldwide. The research questions presented by the project partner could not be answered in respect of every jurisdiction. Where the questions were irrelevant in light of previous findings or there was no information available in the country, we marked that no research was uncovered against the relevant question. Finally, for some jurisdictions the researchers had limited access to the relevant case law, and had to rely on secondary sources. Those instances are clearly flagged in the course of the report.

⁴ *ibid* p 18.

⁵ *ibid* p. 24 'Hate crime laws always prohibit conduct that is first and foremost criminal. And although hate speech and anti-discrimination laws are sometimes confused with laws dealing with hate crime they lack the essential element of a hate crime law: that the same conduct, without a bias motivation, could still be prosecuted as a crime.' This was in line with the wish of the HCLU with regard the scope of the research.

⁶ *ibid*.

⁷ *ibid* p 32.

⁸ *ibid* p 33.

⁹ *ibid* p 46-9.

I. RESEARCH QUESTIONS

10. The original questions posed by the HCLU have been grouped into three categories for the purposes of this report: the conceptual questions; questions related to *mens rea* or motives along with questions of evidence; and the question concerning the prosecutorial discretion in pressing hate crime charges.

a) Conceptual questions

11. In the surveyed jurisdiction, is it relevant in the interpretation of hate crimes whether the victim belongs to a vulnerable or disadvantaged group? Do courts apply hate crime laws in favour of victims who are members of majority groups defined by ethnicity, race or religion?

b) *Mens rea* and evidence related questions

12. In the surveyed jurisdiction, should the offender have a prejudice, bias, enmity against the victim's group or it is enough that the offender chose the victim on the basis of her protected characteristics? What kinds of evidence are generally regarded as sufficient by courts to prove bias motivation?

c) Prosecutorial discretion related question

13. In the surveyed jurisdiction, did you find any discussion by courts (or academic debate) about the extent of prosecutorial discretion in pressing hate crime charges?

Background Information on Hate Crime Laws

I. CANADA

14. There is no self-standing substantive offence of hate crimes in Canada in the sense of the OSCE Guidelines, but hate motivation is an aggravating factor. Nonetheless, the mischief to property offence has a hate crime version located at s 430 (4.1) of the Criminal Code (the *Code*).¹⁰ The ‘mischief relating to religious property offence’ is committed if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin.
15. Crimes, such as assaults or other attacks against persons or property not caught within s 430(4.1), but which are motivated by the offender’s hatred of the victim as a member of an identifiable group, are dealt with in s 718.2(a)(i) of the *Code*.¹¹ That section states that where an offence ‘was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor’, this will be deemed an ‘aggravating factor’ that (according to s 718.2(1)) the court will take into account during sentencing. Section 718.2(a)(i) mandates that, all else being equal, the sentence a Court imposes for a base crime ‘should be increased’ where it is found to have been motivated by hate in a manner which attracts the application of s 718.2(a)(i).¹² The *Code* does not prescribe exactly how much harsher a sentence ought to be where hate motivation is found.

II. CZECH REPUBLIC

16. On 1 January 2010, the new Criminal Code¹³ entered into force in the Czech Republic. The new Criminal Code includes racist motivation as a general aggravating circumstance (article 42(b) for the purposes of sentencing. Furthermore, the new Criminal Code also introduces prohibition of hate speech-related offences that it calls hate crimes. These hate speech-related offences include the defamation of a nation, race, ethnic or other group of persons (article 355), the incitement to

¹⁰ Criminal Code (R.S.C., 1985, C-46) s 430.

¹¹ Criminal Code (R.S.C., 1985, C-46) s 718.2(a)(i).

¹² For ease of reference and in line with common usage, the term ‘hate crime’ will refer to crimes outside those contemplated by ss 318, 319, and 430(4.1).

¹³ Criminal Code, statute no. 40/2009 coll.

racial, national, ethnic, class or religious hatred, and the promotion of restrictions on human rights and freedoms (art 356).

17. Furthermore, the additional aggravating circumstances are introduced in numerous articles of the new Criminal Code for offences motivated by the real or perceived race, ethnic affiliation, nationality, political persuasion, religion or real or perceived lack of religious belief of the victim. These specific aggravating circumstances are set out for the crimes of murder, grievous bodily harm, bodily harm, torture and other inhuman and cruel treatment, false imprisonment, unlawful restraint, kidnapping, blackmail, breach of secrecy of documents held in private, damage to private property, abuse of the authority or an official, violence against a group of persons and against an individual, and some military offences.

III. FRANCE

18. France follows the ‘aggravating factor’ model. Therefore, hate crimes constitute an aggravating factor in the sentencing of a number of criminal offences in the Criminal Code such as homicide, physical assault, property damage etc.¹⁴ Firstly, the existence of an offence has to be proved, and secondly, the motivation will be taken into consideration as an aggravating factor increasing the sentence. The relevant articles in the Criminal Code are article 132-76. For article 132-76 to apply, the crimes must have been committed because of the victim’s ‘actual or supposed membership or non-membership of a given ethnic group, nation, race or religion’.

IV. GERMANY

19. There are no specific laws about hate crimes in Germany, but racist motive works as a general aggravating factor in sentencing for all offences.
20. The law does not, however, mention racist motives explicitly. Section 46 StGB (German Criminal Code) requires the judge to take into account ‘motives and reasons’ of the offender. A legislative initiative to include ‘racist motives’ explicitly into s 46 StGB as an aggravating factor failed in 2012.¹⁵ During the legislative deliberations, the German government reasoned that, since judges already consider racist motives as an aggravating factor in sentencing, a legislative

¹⁴ Code Pénal Art 132-76 only applies as an aggravating circumstance for a certain number of offences only such as extortion(312-2), threats (222-17 et s.), murder (221-4 et s.), Physical Assault (222-9 et s.), Torture (222-1 et s.), Manslaughter (222-7 et s.), Desecration of corpses/graves (225-17 et s.), Property damage (321-1 et s.), Theft (311-1 et s.) when the aggravating circumstances referred to expressly.

¹⁵ See for the legislative initiative: BR-Dr 26/12 (Beschluss).

clarification was not necessary.¹⁶ However, the proposition that racist motives are generally taken into account as an aggravating factor has been challenged in academic literature.¹⁷ These authors claim that most judges do not systematically take into account racist motives for sentencing purposes.

21. It might be relevant for the conception of hate crime in Germany that the *Verbrechensbekämpfungsgesetz*, a recent criminal law that aimed at extending the ‘incitement to hatred’ provision and at enhancing the penalties for physical assaults, was motivated by ‘the violent excesses against foreigners’ according to the explanatory statement of the governing parliamentary parties who introduced the bill.¹⁸ The bill was hence justified by the parties on the ground that it would protect non-nationals that were increasingly targeted by extreme right wing groups.

V. GREECE

22. Hate crime legislation is relatively recent in Greece. The first provision dealing with this phenomenon was article 23(1) of Law No 3719/2008¹⁹ which added a second indent to article 79(3)(d) of the Criminal Code, according to which ‘[t]he commission of a crime on grounds of national, racial or religious hate or hate because of the different sexual orientation of the victim constitutes an aggravating factor’.²⁰
23. The second leg of article 79(3)(d) of the Criminal Code was recently amended by article 66 of Law No 4139/2013,²¹ which provides that ‘[t]he commission of a crime on grounds of hate caused by the race, colour, religion, genetic origins, national or ethnic origin or sexual orientation or the gender identity of the victim constitutes an aggravating factor and the sentence is not suspended’.

¹⁶ See BT-Dr (explanatory statement) 17/3124, S.8 As evidence the German government provided three Court cases (one of the lower regional court Neuruppin (Urt. v. 6. 3. 2003 – 13 Ns 326 Js 14869/01 (20/02)) and two of the Court Weimar (Urt. v. 14. 2. 2007 – 596 Js 36556/06 2 Ls jug and Urt. v. 4. 9. 2007 – 556 Js 22206/08 2 Ls jug) quoted by Stoltenberg, a former head of section in a federal ministry of justice (in: *Verpflichtung der Ermittlung und Berücksichtigung rassistischer Motive bei der Strafzumessung ZRP 2012, 119*).

¹⁷ For that see Krupna, *Das Konzept der „Hate Crimes“ in Deutschland*, Diss. Frankfurt a. M. 2010, S. 197f and Stoltenberg *Verpflichtung der Ermittlung und Berücksichtigung rassistischer Motive bei der Strafzumessung ZRP 2012, 119*.

¹⁸ Bundestagdrucksache (explanatory statement) 12/6853 page 25.

¹⁹ Law No 3719/2008, Reforms for the family, the child, the society and other provisions, Government Gazette A’ 241/26.11.2008.

²⁰ See also Anastasia Papageorgiou, ‘Crimes against Immigrants: A Theoretical Approach to This Phenomenon’ (2008) *Poinikos Logos* 967, 977 (in Greek).

²¹ Law No 4139/2013, Law on addictive substances and other provisions, Government Gazette A’ 74/20.03.2013.

VI. UNITED KINGDOM

a) England and Wales

24. Hate crime legislation has three limbs in England and Wales that includes both the aggravating factor model and self-standing hate crime offence model.²² Only the first two limbs are relevant for the present report.²³
25. First, the aggravated offences are distinct versions of certain ordinary criminal offences that apply to conduct displaying hostility on racial or religious grounds. Part II of the Crime and Disorder Act 1998 (CDA) created racially aggravated forms of some offences with higher penalties.²⁴ The Anti-Terrorism Crime and Security Act 2001 amended the CDA to include religious aggravation.²⁵ There are also racially or religiously aggravated versions of the following offences:²⁶ assault; assault occasioning actual bodily harm; malicious wounding or grievous bodily harm; criminal damage; and various public order offences such as harassment and putting people in fear of violence. There are no aggravated versions of offences of wounding or causing grievous bodily harm with intent or other crimes with a maximum term of life imprisonment.
26. The second limb is the bias motivation as a general aggravating factor in sentencing (or enhanced sentencing provision). Sections 145 and 146 of the Criminal Justice Act 2003 (CJA) provide that, where any offence (other than those under the CDA²⁷) is aggravated by certain forms of bias motivation, the court must treat that as an aggravating factor in sentencing.²⁸ The relevant forms of hostility for these purposes are wider than those applying to the specific aggravated offences: they include not only race and religion,²⁹ but also disability, sexual orientation and transgender

²² See generally Law Commission, *Hate Crime: The Case for Extending the Existing Offences* (Law Com No 213, 2013), chapter 2.

²³ The third limb concerns hate speech offences. They are to do with the 'stirring up' of hatred by words or other means. These offences do not have a base crime with the addition of bias-motivation; the stirring up of hatred by speech (etc.) is itself the *actus reus* of the offence. These offences therefore fall outside the scope of the present research. For these offences, see Public Order Act 1986, ss 18-23.

²⁴ Crime and Disorder Act 1998, Part II.

²⁵ Anti-Terrorism, Crime and Security Act 1002, s 39.

²⁶ CDA 1998, ss 28-32.

²⁷ Criminal Justice Act 2003, s 145(1). Moreover, where the defendant is charged and acquitted of an aggravated offence, the non-aggravated equivalent of the offence will not be regarded as aggravated at the sentencing stage: *McGillivray* [2005] EWCA Crim 317, [2005] 2 Cr App R (s) 514.

²⁸ CJA 2003, ss 145-146.

²⁹ CJA 2003, s 145.

identity.³⁰ Where an aggravating factor is found, there must also be an open declaration in court to this effect.³¹

b) Scotland

27. The relevant Scottish provisions are similar to those in English law. First, there is a special offence of aggravated harassment under the Criminal Law (Consolidation) (Scotland) Act 1995, as amended by the CDA (the 1995 Act).³² This provision is different from the aggravated offences under English law but performs a similar function. Under what is now s 50A of the 1995 Act, it is an offence to pursue a racially aggravated course of conduct which amounts to harassment or to act in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress. The tests for a course of conduct being racially aggravated are similar to the tests in English law. The objective test provides that: ‘immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person’s membership (or presumed membership) of a racial group’.³³ The subjective test is that: ‘the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group’.³⁴ The subjective and objective tests are alternatives; only one needs to be met to establish aggravation. It should be noted that the subjective test seems to require that ‘malice and ill-will’ be directed not merely toward the victim on account of his race but to ‘members of a racial group’ more broadly. A ‘racial group’ is given the same definition as in English law³⁵ and, as in English law, what counts is presumed membership.³⁶ Membership may also include association with members of the group.³⁷
28. Further, bias motivation is used as an aggravating factor in sentencing much as it is in England and Wales. ‘Aggravation’ is used in the same way as in the special aggravated offence. There are provisions dealing with racial aggravation³⁸ and religious aggravation (though the concept is slightly wider than in English law).³⁹ The Offences (Aggravation by Prejudice) (Scotland) Act

³⁰ CJA 2003, s 146.

³¹ CJA 2003, s 145(2)(b), s 146(3)(b).

³² CDA 1998, s 33; Criminal Law (Consolidation) (Scotland) Act 1995, s 50A.

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*, s 50A(6).

³⁶ *ibid.*, s 50A(3).

³⁷ *ibid.*

³⁸ CDA 1998, s 96.

³⁹ Criminal Justice (Scotland) Act 2003, s 74.

2009 makes provision for aggravation based on disability, sexual orientation and transgender identity.⁴⁰ The Act explicitly states that sexual orientation refers also to heterosexuals.⁴¹

29. A significant proportion of religion-based hate crime in Scotland is sectarian – aimed at Catholics or Protestants by members of the other group. A Scottish Government report notes that, ‘[t]he religious beliefs or affiliations of the accused or the victims of the offence ... are not relevant to the definition of the crime in the law.’⁴² The Scottish Solicitor General Frank Mulholland QC said in 2013 that ‘Scotland’s prosecutors have a zero-tolerance approach towards prejudice and hatred which finds expression in criminal behaviour.’⁴³ He is also quoted as saying that, ‘[i]n all cases, there is a *strong* presumption that the public interest should be in favour of prosecution where evidence of prejudice exists.’⁴⁴

c) Northern Ireland

30. Northern Ireland has legislation mirroring that in England and Wales, which provides for hostility on various grounds to be an aggravating factor in sentencing. The Criminal Justice (No. 2) (Northern Ireland) Order⁴⁵ mirrors the corresponding provisions applicable in England and Wales. The objective and subjective tests for hostility are the same.⁴⁶ However, no provision is made for hostility on the basis of transgender identity.⁴⁷ There is no equivalent to the CDA aggravated offences in English law.⁴⁸
31. The prevalence of sectarian (Protestant/Catholic) hate crime in Northern Ireland was a major impetus for the Order. As the Explanatory Note describes, ‘[r]ecent years have seen an increase in the number of racist incidents recorded by police in Northern Ireland and although the actual number of attacks may seem small, Northern Ireland has a higher ratio of racist incidents for the size of the ethnic minority population compared with England and Wales.’⁴⁹ Sectarian hate crime represents about 50 per cent of the total.⁵⁰

⁴⁰ The Offences (Aggravation by Prejudice) (Scotland) Act 2009, ss 1-2.

⁴¹ The Offences (Aggravation by Prejudice) (Scotland) Act 2009, s 2.

⁴² The Scottish Government, *Religiously Aggravated Offending in Scotland 2012-2013* (Scottish Government Social Research, 2013) 15.

⁴³ ‘Race Crime in Scotland Falls to Lowest Level in 10 Years’ (BBC News Online, 14 June 2013) <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-22904552>> accessed 19 January 2014.

⁴⁴ Quoted in Institute for Conflict Research, *Criminal Justice Responses to Hate Crime in Northern Ireland* (2012) 24 (emphasis in original).

⁴⁵ Criminal Justice (No. 2) (Northern Ireland) Order, SI 2004/1991.

⁴⁶ Criminal Justice (No. 2) (Northern Ireland) Order, SI 2004/1991, Art 2.

⁴⁷ Criminal Justice (No. 2) (Northern Ireland) Order, SI 2004/1991, Art 2(3).

⁴⁸ Though see the Public Order (Northern Ireland) Order 1987 for examples of ‘stirring up’ offences in Northern Irish law.

⁴⁹ Criminal Justice (No. 2) (Northern Ireland) Order, SI 2004/1991, Explanatory Note, para 2.

⁵⁰ Institute for Conflict Research, *Criminal Justice Responses to Hate Crime in Northern Ireland* (2012).

32. Hostility based on a protected characteristic is listed by the Northern Irish Public Prosecution Service as a public interest factor in favour of prosecution.⁵¹

VII. UNITED STATES

33. Hate crimes are prohibited under federal and state law in the US. At the federal level, hate crimes are addressed under three primary laws:⁵²
- a. *The Civil Rights Act of 1968* makes it an offence for any person to assault, intimidate, or interfere with any person, or attempt to perform any of those acts, ‘because of the victim’s ‘race, colour, religion or national origin’ where the victim seeks to engage in a federally protected activity listed in the statute, including attending school, serving on a jury, or applying for a job.⁵³
 - b. *The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard & Byrd Act) of 2009* introduced an extended definition of hate crimes that criminalises violent crime committed against persons ‘because of’ their actual or perceived race, colour, religion, national origin, gender, sexual orientation, gender identity, or disability.⁵⁴ This goes further than the definition of hate crimes under the Civil Rights Act of 1968 by including gender, sexual orientation, and gender identity and by dispensing with the requirement that the victim must be engaged in a federally protected activity.
 - c. *The Violent Crime Control and Law Enforcement Act of 1994* required the United States Sentencing Commission to revise the sentencing guidelines to provide for more severe sentences for all federal crimes that amount to hate crimes.⁵⁵ The revised US Sentencing Guidelines provide that a hate crime is committed where the offender ‘intentionally selected any victim or any property as the object of the offence because of the actual or perceived race, colour, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person’.⁵⁶

VIII. SLOVAKIA

⁵¹ Public Prosecution Service, *Hate Crime Policy* (Belfast, 2010) 18.

⁵² See further, Zachary J Wolfe, *Hate Crimes Law* (West 2013). Other laws address hate crimes in the context of police brutality, access to housing, and damage to religious property.

⁵³ Codified at 18 USCA § 245(b)(2).

⁵⁴ Codified at 18 USCA § 249.

⁵⁵ Codified as note to 28 USCA § 994.

⁵⁶ United States Sentencing Guidelines, § 3A1.1(a).

34. On 1 January 2006 the new Criminal Code (statute no. 300/2005 coll.) entered into force in Slovakia, acknowledging racist motivations as aggravating circumstances, but also introducing a prohibition on hate crimes. The provisions on aggravating circumstances apply, inter alia, to murder, manslaughter, grievous bodily harm and actual bodily harm, threats as well as the desecration of cemeteries.

IX. SOUTH AFRICA

35. South African law does not recognise a specific category of crimes as hate crimes. Nonetheless, hate motivations can be taken into account at the sentencing stage based on common law principles and on s 28 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).⁵⁷ Section 28(1) states: ‘If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.’ While it has been pointed out that this provision simply confirms what is already possible under the court’s sentencing discretion in terms of the common law,⁵⁸ its main contribution is its insistence that courts ‘must’ consider such unfair discrimination as a factor in sentencing. However, it may be seen as disappointing that s 28(1) limits the protected grounds to race, gender and disability instead of referring to a wider variety of grounds as encompassed by the s 1 definition of ‘prohibited grounds’.⁵⁹
36. It is a well-established principle of common law that a trial court has wide sentencing discretion⁶⁰ in respect of the triad of factors to be considered: the circumstances of the crime, the position of the offender and the interests of society.⁶¹ During the sentencing phase of a criminal trial, the prosecution may introduce evidence of bias motivation and the court may take this into account as an aggravating factor in sentencing. Moreover, courts arguably have a constitutional duty to address the discriminatory element of a crime when exercising sentencing discretion. Section 39(2) of the South African Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common

⁵⁷ Section 28 of PEPUDA is entitled ‘Special measures to promote equality with regard to race, gender and disability’.

⁵⁸ Kerry Williams, *Legal Brief on Hate Crimes in South Africa* (2010) Consortium for Refugees and Migrants in South Africa (CORMSA) at 6.10.

⁵⁹ Prohibited grounds are defined in s 1 of PEPUDA.

⁶⁰ *S v Rabie* 1975 (4) SA 855 (A).

⁶¹ *S v Zinn* 1969 (2) SA 537 (A).

law.⁶² Courts must therefore exercise their sentencing discretion for punishing bias-motivated crimes in a way that affirms basic constitutional values such as dignity, equality and non-discrimination.

37. It appears that there are no reported judgments that have relied on s 28(1) of PEPUDA,⁶³ and there are only a handful of cases in which the court has exercised its common law discretion to recognise bias motivation as an aggravating factor in sentencing. There are some recent initiatives currently to reform hate crime legislation, such as the Department of Justice and Constitutional Development's draft Policy Framework on Combating Hate Crimes, Hate Speech and Unfair Discrimination (Policy Framework).⁶⁴ The legislation proposed would 'introduce a further category of newly-defined hate crimes in instances where the conduct would otherwise constitute an offence recognised at common law or by statute, and where there is evidence of a discriminatory motive on the basis of characteristics such as race, nationality, religion, sexual orientation and the like'.⁶⁵

⁶² The exact wording of section 39(2) is as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

⁶³ Kerry Williams, *Legal Brief on Hate Crimes in South Africa* (2010) Consortium for Refugees and Migrants in South Africa (CORMSA) at 6.10.

⁶⁴ Speech by Jeff Radebe, the Minister of Justice and Constitutional Development on the occasion of the panel discussion under the theme 'Imagine a World Without Hate!' on 25 August 2013 in Johannesburg.

⁶⁵ *ibid.*

Question 1: Conceptual Enquiry

I. CANADA

38. There is no legal requirement for the application of hate crimes in relation to the victim belonging to a vulnerable or disadvantaged group. However, in practice, most of the victims affected by crimes under s 430(4.1) or s 718.2(a)(i) of the *Code*, are in fact members of vulnerable or disadvantaged groups.
39. It is noteworthy that for the application of the constitutional equality provision in s 15 of Canada's Charter of Rights and Freedoms, one relevant 'contextual factor' for determining whether differential treatment is 'discriminatory' consists in determining if the party alleging unequal treatment is a member of a 'historically disadvantaged' group, or whether that group is 'analogous' to those explicitly protected under s 15.⁶⁶ However, even here historical disadvantage is neither a necessary nor a sufficient condition for a positive finding on either question.⁶⁷
40. The hate crime laws in Canada are symmetrical: that is, they are applied in cases where the victims come from non-minority groups. In practice, too, while the vast majority of so-called hate crime prosecutions are brought against offenders who are alleged to have been motivated by hatred of a minority and/or vulnerable group, hate crimes against majority groups are indeed recognised. For instance, according to Statistics Canada, a government body, in 2010, 5 per cent of hate crimes were committed against Caucasians.⁶⁸
41. No case law has been found that specifically focussed on whether it might be inappropriate to regard a crime motivated by hatred of a majority group as constituting a hate crime. Nonetheless, s 718.2(a)(i) is notable for the fact that it is open-ended, in the sense that it holds open the possibility that it might apply to cases where the offender was motivated by hatred of the victim based on 'other similar factor[s]' to those enumerated. There is a dearth of case law on how this phrase might be applied, though a few cases suggest that it might be open to broad interpretation. In *R v J.S.*⁶⁹ the court found that an offence motivated by bias, prejudice or hatred towards 'peeping toms' or sexual voyeurs triggered the application of s 718.2(a)(i), on the

⁶⁶ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁶⁷ *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835.

⁶⁸ Statistics Canada, *Police-reported hate crime in Canada, 2010* <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11635-eng.htm>> accessed 14 April 2014.

⁶⁹ [2003] B.C.J. No. 2877.

grounds that voyeurism is a ‘sexual lifestyle’. Additionally, in *R v Kulak*⁷⁰ the court indicated that it would have applied s 718.2(a)(i) to offences motivated by a hatred of environmental groups if the evidence had supported the conclusion that the accused persons were in fact motivated by hatred for the victims based on their membership in such groups.

II. CZECH REPUBLIC

42. According to the Commentary on the Criminal Code, it is not relevant in the interpretation of either aggravating circumstances or hate crimes whether the victim belongs to a vulnerable or disadvantaged group or not.⁷¹
43. The Commentary to the Criminal Code states that protection against defamation is given to any nation, race or ethnic group and this protection is given also to groups of persons belonging to a nationality, race or ethnic group, or having political or religious beliefs or lack thereof.⁷² This group does not need to be territorially defined; their members do not need to have nationality of the Czech Republic or nationality of any other State.⁷³
44. The Czech courts also apply hate crimes laws in favour of victims who are members of majority groups in the Czech Republic. One of the most well-known cases was the attack by two Roma youths in April 2010 when the 14 year-old and 17 year-old perpetrators attacked a 12 year-old boy belonging to the white majority group. The victim was robbed, beaten and sexually abused. Moreover the offenders were reported to have asked him: ‘Do you know what Hitler did with Roma during the war? So that’s what we are going to do with you now.’ In November 2010, the Court declared the attack to be racially motivated and sentenced the older offender to 12 years’ imprisonment while the younger was placed in the young offender institute. In March 2011, the 12-year sentence was reduced to ten years.⁷⁴

⁷⁰ [2001] B.C.J. No. 448.

⁷¹ P. Šámal (ed.), *Criminal Code* (second edition, 2012, C.H.Beck, Prague) 3303.

⁷² *ibid.*

⁷³ *ibid.*, p 3304.

⁷⁴ The case report was not found. Secondary sources about the case: a newspaper report: http://zpravy.idnes.cz/utok-na-chlapce-v-krupce-0s8-/krimi.aspx?c=A110317_172817_usti-zpravy_zep; and a Roma right NGO’s account: <<http://www.romea.cz/cz/zpravy/vrchni-soud-snizil-trest-mladikovi-ktery-zbil-a-znasilnil-chlapce>> Both were accessed on 8 April 2014.

III. FRANCE

45. In France, it is not the vulnerability or the disadvantaged character of the group that the victim belongs to that is emphasised in the statute. What is instead required is that the motivation of the crime was the actual/supposed membership/non-membership of a group. The ECtHR in *Nachova and Others v Bulgaria* referred precisely to the French provision as an ‘objective definition of racism’.⁷⁵ With reference to the report of the European Monitoring Centre on Racism and Xenophobia⁷⁶ the ECtHR noted that ‘laws began to recognise that crime could be “racially motivated”’. In particular, racist motivation was increasingly being considered as an aggravating factor for sentencing purposes under the legislation of some member States. [...] In particular, article 132-76 of the French Criminal Code, which was introduced in February 2003, provides in its second paragraph for an “objective” definition of racism as an aggravating circumstance leading to an increase in sentence.’⁷⁷
46. In addition to hate crimes, in French criminal law, discrimination as such in relation to some activities (for example in employment) is an autonomous offence. Article 225-1 of the Criminal Code states that any distinction made between individuals constitutes a criminal offence under some circumstances defined in Article 225-2 (e.g. providing services or hiring). Article 225-1 enumerates a broad list of prohibited grounds of discrimination. Even though this part of the statute is mainly referred to in the context of labour relations, it shows that a symmetrical conception of discrimination law is present not just in civil but also in criminal law.
47. No requirement of historical disadvantage is expressly referred to in the legislation or in the case law. Nevertheless, it is interesting to note that the statute introducing article 132-76 into the Criminal Code in 2003 (Statute n°2003-88) increased the penalties for offences with a racist, anti-Semitic or xenophobic character.⁷⁸ Moreover an express reference to anti-Semitism, separate from ‘racism’, is a recurring element in the French legal vocabulary.
48. Seven relevant cases were found in the *Dalloz* database, referring to an aggravating circumstance under 132-76, none of which concerned victim relating to a majority group.⁷⁹ However, French

⁷⁵ *Nachova and Others v Bulgaria* App nos 43577/98 and 43579/98 (ECHR GC, 6 July 2005) para 82.

⁷⁶ Available at <http://fra.europa.eu/sites/default/files/fra_uploads/1934-CS-RV-05-SUM-PL.pdf> accessed 8 April 2014.

⁷⁷ *Nachova* (n 75) para 82.

⁷⁸ Loi n° 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xenophobe.

⁷⁹ Seven relevant cases were found in the *Dalloz* database referring to an aggravating circumstance under 132-76: Cour d’Appel (CA) Douai, 13 juin 2007, n° 06/03288 (the defendant threatened the Muslim victim with a knife because of his ethnic origins). CA Pau, 6 août 2009, n° 08/00993 (physical assault between teenagers). CA Lyon, 23

courts seemingly do not differentiate between majority or minority groups in the application of criminal law generally.

IV. GERMANY

49. According to the general provisions that deal with aggravating factors, there is no difference between victims belonging to vulnerable and non-vulnerable groups. Nonetheless, the legislative intent was clear for adopting the *Verbrechensbekämpfungsgesetz*. In that instance the legislators were specifically concerned with crimes against non-nationals by offenders belonging to the extreme right, as the explanatory statement to the draft bill to the *Verbrechensbekämpfungsgesetz* by the CDU/CSU demonstrates.⁸⁰ The legislators stated that the changes made by the *Verbrechensbekämpfungsgesetz* to s 130 StGB and the enhancement of penalties for physical assault were partly motivated by ‘the violent excesses against foreigners’.⁸¹ In this context it should also be noted that the German words ‘xenophobe’ (*fremdenfeindlich*) and ‘hostile against foreigners’ (*ausländerfeindlich*) are both used by the German Parliament in its explanation of the *Verbrechensbekämpfungsgesetz*. While ‘*fremdenfeindlich*’ could also include racist motivation against the majority group, ‘*ausländerfeindlich*’ explicitly refers to foreigners. It can therefore be concluded that generally this legislation is concerned with crimes against foreign minority groups (the word is generally not used in a technical sense – the meaning of ‘hostile to foreigners’ includes citizens with a different origin but who have acquired the German nationality).
50. The synonymous use of the two words has been criticised by a judge of the Regional Court of Hamburg because it creates confusion with regard to racist motivation against non-foreign-born Germans. Judge Bertram claims that xenophobia should be the appropriate word of usage in order to include racist motivation against non-foreign-born Germans. According to Judge Bertram this is ‘a long overdue conception’ of hate crime.⁸²
51. There is considerable evidence that the legislature has been especially concerned with anti-Semitic hate crimes. In the explanatory statement to the draft bill of the

novembre 2006, n° 05/01212 (physical offence with racial bias). Cour de cassation, Chambre criminal, 25 juin 2013 (racist threats and physical assault against a Muslim victim). CA Caen, 14 mars 2008, n° 07/00423 (racist threats and physical assault). CA Toulouse, 17 mai 2006, n° 05/01356 (physical assault because of the victim’s ethnic group). CA Amiens, 25 octobre 2006, n° 06/00738 (Sarah K. and Louisa K. were provoked and threatened by a white lady because of their an ethnic origins).

⁸⁰ See *Verbrechensbekämpfungsgesetz* Drucksache (explanatory statement) 12/6853.

⁸¹ See Bundestagdrucksache (explanatory statement) 12/6853 page 25.

⁸² Judge Bertram, Regional Court of Hamburg, ‘Verpflichtung der Ermittlung und Berücksichtigung rassistischer Motive bei der Strafzumessung’ ZRP 2012, 188.

Verbrechensbekämpfungsgesetz the proposing parties in the German parliament expressly stressed that the changes made to ss 130 and 131 of the German Criminal Code shall enhance the protection of the foreign population, Jewish citizens, and the asylum seeking population.⁸³ Moreover, the changes to s 130 StGB made in the 1960s too were a reaction to anti-Semitic events.⁸⁴

V. GREECE

52. The explanatory memorandum to Law No 3719/2008 made no reference to article 23(1) thereof. According to the explanatory memorandum to Law No 4139/2013: ‘There is a sharp increase in the racist attacks against foreign people who live in our country – attacks which have very dangerous characteristics’. Both this legislative amendment and the proposed hate speech legislation primarily aim to deal with racist acts perpetrated by members and supporters of the Greek neo-Nazi party ‘Golden Dawn’, which managed to enter the Greek Parliament following the general election of 2012.
53. To date, there has not been a reported case in which a Greek court has made use of the second leg of article 79(3)(d) of the Criminal Code in relation to either a majority or minority group. A public prosecutor of District Court judges, writing extracurricularly, has argued that: ‘It is however accepted that these crimes, even though they are primarily committed against minority groups, can also be committed against the majority groups in society’.⁸⁵

⁸³ *Verbrechensbekämpfungsgesetz* Drucksache (explanatory statement) 12/6853 page 24.

⁸⁴ See Schönke, Schröder introduction to § 130 StGB 28. Auflage 2010, para 1.

⁸⁵ George Voulgaris, ‘Hate Crimes’ (2010) 13 *Poiniki Dikaosini* 711 (in Greek).

VI. UNITED KINGDOM

54. There is generally no requirement that the group to which a victim belongs be disadvantaged and the law reflects a symmetrical conception of hate crimes. For example, a religious group is ‘a group of persons defined by reference to religious belief or lack of religious belief.’⁸⁶ A racial group is ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.’⁸⁷ Similarly, hostility based on ‘a particular sexual orientation’⁸⁸ is what counts as an aggravating factor; there is no requirement for victims to have been from sexual minorities.
55. In these areas, as Garland and Chakraborti note, ‘anyone can potentially be the victim of a hate crime: thus the law also protects those belonging to majority communities from being victimized by those from minority ones.’⁸⁹ As they argue, this approach may be best captured by the notion of ‘targeted victimisation’ according to which hate crimes are viewed as attacks on individuals who have been chosen because of their identity rather than attacks against vulnerable groups as such.⁹⁰
56. The legislative background of this the CDA is relevant. In a House of Commons debate on the CDA in 1998, Jack Straw, the then-Home Secretary, said, ‘our amendments make it clear that, whatever racial group the perpetrator believes the victim to be from, an offence will be racially aggravated if racial hostility or motivation is proved. ... The Bill does not protect some groups and not others; it protects everyone from racist crimes.’⁹¹
57. However, there are two exceptions to the above approach. It counts as an aggravating factor at the sentencing stage if the defendant demonstrates hostility towards the victim based on their disability.⁹² However, there is no equivalent aggravating factor for offences that might display hostility based on the victim being able-bodied. Similarly, it is an aggravating factor if there is hostility based on the victim’s transgender identity,⁹³ but there is no aggravation where there is hostility towards non-transgender (cisgender) persons.

⁸⁶ CDA 1998, s 28(5).

⁸⁷ CDA 1998, s 28(4).

⁸⁸ CJA 2003, s 146(2)(b)(i).

⁸⁹ J Garland and N Chakraborti, ‘Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union’, *European Journal of Criminology* (2012) 44.

⁹⁰ *ibid* 46.

⁹¹ Hansard (HC Debates) 23 June 1998, col 893.

⁹² CJA 2003, s 146(2)(a)(ii).

⁹³ CJA 2003, s 146(2)(a)(iii).

58. In the case law there is ample evidence to substantiate the symmetrical nature of hate crime legislation. For example, in *Johnson v DPP*,⁹⁴ a black man who was using threatening language said to two white parking attendants, ‘why don’t you get up Dore with your white aunties and uncles’. The High Court unanimously held that this was capable of displaying racial hostility under the CDA. Richards LJ held that, ‘The language used and the court’s findings as to the meaning of the words used make clear that the appellant was presenting the matter in racial terms by reference to colour. He was telling the parking attendants to leave the black community alone, to get out of the black area where they were and to go to white areas, and he was telling all this as a black person addressing two white people. The words were capable of demonstrating racial hostility.’⁹⁵ No reference was made either in the judgment or in arguments to the majority status of the victim. There is no indication that the court regarded it as relevant. Nor do the courts appear to consider matters such as the vulnerability or disadvantage of the group of which the victim is a member; it is sufficient that the group falls within the relevant statutory definition, as being, for example, racial or religious.
59. Two cases are particularly instructive. In *Rogers*,⁹⁶ an altercation took place in which the defendant shouted ‘bloody foreigners’ and ‘go back to your own country’ at three Spanish women. It was held that ‘foreigners’ constituted a ‘racial group’ within the meaning of CDA s 28(4). A racial group was capable of being defined exclusively (i.e. as all those who are *not* members of a certain group) as well as inclusively. For present purposes, Lady Hale’s judgment is important for several reasons. First, it assumes that there is no requirement that the protected group be disadvantaged. The House assumed, and it was accepted on all sides, that ‘had [the defendant] called [the victims] ‘bloody Spaniards’ or any other pejorative word associated with natives of the Iberian peninsula, he would have been guilty.’⁹⁷ Whilst Spanish people are a minority in the UK, there was no argument to the effect that they were a disadvantaged group and there is no suggestion that such an argument would have been required. Second, Lady Hale identified the policy behind the legislation as follows: ‘The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as other.’⁹⁸ There was no indication that the House regarded such harms as only existing where the victim was a member of a disadvantaged or minority group. Third, while noting that group membership for the purposes of CDA includes

⁹⁴ *Herald Johnson v Director of Public Prosecutions* [2008] EWHC 509 (Admin), (2008) 105(10) L.S.G. 27.

⁹⁵ *ibid* [11].

⁹⁶ *Rogers* [2007] UKHL 8, [2007] 2 AC 62.

⁹⁷ *ibid* [8].

⁹⁸ *ibid* [12].

association with members of a group, Lady Hale stated that this would ‘undoubtedly cover, for example, a white woman who is targeted because she is married to a black man’.⁹⁹ Whilst this comment only relates to association with a group (which is counted under the Act as being capable of amounting to *membership* of it) it is indicative of the courts’ general approach that Lady Hale regarded it as obvious that a victim of racial hostility may include a white woman.

60. *R v White*¹⁰⁰ highlights the difficulties in relation to the identity of the offender and the potential inter-ethnic dimension of hate crime. In that case, a black man originating from the West Indies referred to a black woman from Sierra Leone as a ‘stupid African bitch’. The defendant argued, inter alia, that his offence could not be racially aggravated because he was a member of the same ethnic group as the victim. The Court of Appeal dismissed this argument briefly, stating, ‘we see no basis for holding that such hostility cannot in law be shown.’¹⁰¹ It is notable that the court did not consider the relative statuses of perpetrator and victim.
61. The Crown Prosecution Service (‘CPS’) guidance on disability as an aggravating factor stresses the distinction between vulnerability of individual victims and hostility based on group membership. It notes that: ‘... not all crimes committed against disabled people are disability hate crimes – some crimes are committed because the offender regards the disabled person as being vulnerable and not because the offender dislikes or hates disabled people.’¹⁰² Therefore, the CPS seems to suggest that enmity is a necessary feature of hate crimes as opposed to the victim’s vulnerability, which is irrelevant for the purposes of hate crime application.
62. According to a study of the Home Office One quarter of victims of racist hate crimes were white in the period between the entrance of CDA into force till 2002; in these cases the suspects were in 42 per cent of cases African-Caribbean and in 14 per cent Indian/Pakistani.¹⁰³ The Police regarded it as beyond doubt that white people could at times also be the victims of hate crimes. However, ‘[t]here was some confusion amongst police officers as to whether the law applied to white (majority) victims’.¹⁰⁴ Burney and Rose’s 2002 Home Office report concluded that the data ‘seems to indicate that cases are pursued with equal vigour whatever the ethnicity of the suspect’. In one case, a Christian church and church hall were targets of Muslim graffiti and the desecration of bibles was involved; this was treated by the Police as a racist incident after the

⁹⁹ *ibid* [15].

¹⁰⁰ *R v White* [2001] EWCA Crim 216, [2001] 1 WLR 1352.

¹⁰¹ *ibid* [20].

¹⁰² Crown Prosecution Service, *Policy for Prosecuting Cases of Disability Hate Crime* (2007).

¹⁰³ E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002).

¹⁰⁴ *ibid*, p 30.

members of the congregation said that that was how they perceived it. The working definition of a race hate crime used by the Association of Chief Police Officers and the Crown Prosecution Service is ‘any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s race or perceived race.’¹⁰⁵ However, they noted that ‘[i]ndignation had been aroused among ethnic minority spokespeople ... when one of the very first cases brought under the Act was the prosecution of a black man for racist abuse against a white officer.’¹⁰⁶

VII. UNITED STATES

63. Victims do not need to be members of a vulnerable or disadvantaged group for hate crime laws to apply. However, membership of a vulnerable group may be relevant at the sentencing stage.
64. As reflected in the wording of the hate crime legislation outlined above, hate crimes in the US are defined in symmetrical terms, meaning that they apply to dominant and vulnerable groups alike. This is reflected in the Federal Bureau of Investigation’s (‘FBI’) annual report on hate crime statistics, which shows that a substantial number of hate crime convictions involved victims from dominant, advantaged groups. For example, the 2012 statistics show that:
 - a. 16.3 per cent of all racially motivated crimes involved ‘anti-white bias’;
 - b. 3.4 per cent of religiously motivated crimes involved ‘anti-Protestant bias’; and
 - c. 1.2 per cent of sexual orientation-based crimes involved ‘anti-heterosexual bias’.¹⁰⁷
65. In addition, the FBI’s 2012 hate crime statistics show that 23.3 per cent of offenders were black, while black people make up only 12.6 per cent of the US population.
66. There has been extensive academic debate over whether hate crimes should protect members of advantaged or majority groups, particularly in the context of racially motivated crimes against white people.¹⁰⁸ However, the US courts have either ignored or dismissed this issue. For instance, the US Supreme Court’s leading decision on the constitutionality of hate crimes, *Wisconsin v Mitchell*,¹⁰⁹ involved so-called ‘black-on-white’ violence. The Supreme Court made no

¹⁰⁵ True Vision, *The Agreed Definition of ‘Monitored Hate Crime’ for England, Wales and Northern Ireland* (2013).

¹⁰⁶ *Ibid*, p 31.

¹⁰⁷ FBI, ‘Statistics on Hate Crimes in 2012’ (FBI 2013) <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final> accessed 16 January 2014.

¹⁰⁸ See, for example, Marc Fleisher, ‘Down the passage which we should not take: The folly of hate crime legislation’ (1994) 2 *Journal of Law and Policy* 1; 48-50; James Jacobs and Kimberly Potter, ‘Hate Crimes: A Critical Perspective’ (1997) 22 *Crime and Justice: A Review of Research* 1.

¹⁰⁹ *Wisconsin v Mitchell* 508 US 476 (1993).

issue of the identity of the victim and perpetrators in upholding Wisconsin's hate crime laws. In *US v Ebens*,¹¹⁰ the Sixth Circuit forcefully rejected the argument that Congress intended to limit the application of the hate crime provision of the Civil Rights Act of 1968 'exclusively to vindicate the rights of blacks and white civil rights workers who aid blacks.'¹¹¹

67. While the vulnerability of the victim is not considered relevant in interpreting hate crime laws, vulnerability is relevant at the sentencing stage. The US Sentencing Guidelines provide that the sentence should be increased '[i]f the defendant knew or should have known that a victim of the offence was a vulnerable victim'.¹¹² A 'vulnerable victim' is defined as a person who is 'unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.'¹¹³
68. Membership of a vulnerable or disadvantaged group is relevant to determining whether someone is a 'vulnerable victim', but does not decide the matter. Zachary Wolfe comments that courts 'have resisted adopting a presumption that the vulnerable victim adjustment applies in all cases involving a victim who is black or a member of a minority group.'¹¹⁴ Where race or other grounds have been considered relevant, this was because the grounds had a direct bearing on the victim's vulnerability, making them more susceptible to the crime in some way. For example, in *US v Long*¹¹⁵ and *US v Salyer*¹¹⁶ race was considered relevant in establishing the vulnerability of black families who were victims of cross burnings. In both cases, the courts held that because the victims were the only black families living in white neighbourhoods, their race contributed to their isolation within their communities and made them more vulnerable to attack.

VIII. SLOVAKIA

69. In Slovakia it is not relevant to the interpretation of hate crimes whether the victim belongs to a vulnerable or disadvantaged group. The Criminal Code prohibits incitement to violence or hatred directed against a group of persons or an individual because of their affiliation with any race, nation, nationality, colour, ethnic group, origin or of their religion belief.

¹¹⁰ *US v Ebens* 800 F2d 1422 (6th Cir 1986).

¹¹¹ *ibid* 1429.

¹¹² US Sentencing Guidelines, § 3A1.1(b)(1).

¹¹³ US Sentencing Guidelines, § 3A1.1(b)(1), comment n 2.

¹¹⁴ Wolfe (n 52) 257.

¹¹⁵ *US v Long* 935 F2d 1207 (11th Cir 1991).

¹¹⁶ *US v Salyer* 893 F2d 113 (6th Cir 1989).

70. The Slovak courts apply hate crimes laws in favour of victims who are members of majority groups in Slovakia, even though there are not many such cases.¹¹⁷ One such case of homicide occurred recently in the Slovakian countryside: the racially motivated attack of two Roma persons on a 63 year old man who died in hospital two weeks after. The attack occurred at the local festival in the village of Madunice in August 2011. Shortly before the attack the offenders were shouting that they were going to destroy the whole amphitheatre and eliminate all whites, so that everybody in the village knew ‘who was boss’. Even though the offenders denied the racial motivation in the court and insisted that they were of the same white race as the victim and had Slovak nationality, the court dismissed their claims on the basis of other evidence. They were sentenced to 13 and 6 years of imprisonment.¹¹⁸

IX. SOUTH AFRICA

71. Since there is no legislation which comprehensively regulates hate crime, the conceptual understanding of bias motivation in South African law is fraught with uncertainties. Nonetheless, a handful of cases are available for scrutinising the application of bias motivation in sentencing.¹¹⁹
72. Overall, it seems that when courts recognise protected grounds (for example race) in relation to hate crimes, they have applied them symmetrically through the exercise of their sentencing discretion. This is particularly clear in the cases of racial bias, where both majorities (black) and minorities (whites), as well as politically powerful (whites) and previously disadvantaged (black) groups have been protected from racial bias. On a more concerning note, however, it has been suggested that the South African courts might contribute to perpetuate a ‘prejudice hierarchy’¹²⁰ because, while readily acknowledging racial hostility as a protected ground, they have given scant attention to other grounds of discrimination. For instance, ‘corrective rape’ and other crimes motivated by prejudice on the basis of sexual orientation have only once led to the an aggravated sentence. Similarly, the prosecutions initiated as a direct response to the xenophobic violence in

¹¹⁷ For the purposes of this research the researcher only had access to Criminal Code Commentary and the ECRI report on Slovakia.

¹¹⁸ The case was not available from law reports at the time of the research. A Slovakian news report is available online at <<http://www.cas.sk/clanok/259221/kauza-zabitie-dochodcu-v-maduniciach-za-mrezami-sedi-uz-aj-druhy-mladik.html>> accessed 8 April 2014.

¹¹⁹ *S v Matela* 1994 (1) SACR 236 (A); *S v Van Wyk* 1992 (1) SACR 147 (NmS); *S v Salzwedel and Others* 2000 (1) SA 786 (SCA); *S v De Kock* 1997 (2) SACR 171 (T); *S v Combrink* 2012 (1) SACR 93 (SCA); *S v Madubaduba and 2 Others (OUT LGBT Wellbeing Intervening)* (unreported).

¹²⁰ B Harris *Arranging Prejudice: Exploring Hate Crime in Post-Apartheid South Africa* (2004) Race and Citizenship in Transition series.

2008 were prosecuted as normal crimes without particular reference to the hostility towards so-called ‘*makwerekwere*’ (foreigners) that clearly motivated those crimes.

73. In *S v Matela*,¹²¹ the accused were active members of the African National Congress and regarded as leaders within their township community. They had chased down and attacked a car that was driving past the township, setting the car on fire and brutally murdering and mutilating the four white passengers. The accused were convicted and sentenced to death for each of the murders. In this case, the protected group against whom racial hostility was condemned was white South Africans, who are numerically a minority but who, at the time of the murders in 1990, enjoyed political dominance under the apartheid regime.
74. Importantly, there have been cases where courts have condemned racially motivated crimes against black people, who form the numerical majority of South Africans but who were oppressed under the institutionalised discrimination of apartheid. In *S v Van Wyk*,¹²² the accused had been convicted of murder after brutally assaulting a black man and leaving him for dead on a rubbish dump. Similarly, in *S v Salzwedel and Others*,¹²³ the Supreme Court of Appeal held that the racist motivation behind a crime is an aggravating, not a mitigating, factor in sentencing. The accused, who were associated with the *Afrikaner Weerstand Beweging* (‘Afrikaner Resistance Movement’), had taken it upon themselves to patrol certain white areas of East London ‘with the object of indiscriminately attacking any black persons they found in these areas’.¹²⁴ Mahomed CJ emphasised that courts must exercise their sentencing discretion in a way that sends:

[a] strong message to the country that the courts will not tolerate the commission of serious crimes in this country perpetrated in consequence of racist and intolerant values inconsistent with the ethos to which our Constitution commits our nation and that courts will deal severely with offenders guilty of such conduct.¹²⁵

75. The prejudice regarding sexual orientation which has motivated crimes against LGBT people, such as ‘corrective rape’, has consistently been ignored by the courts. There are two high-profile cases that serve as striking examples of this non-recognition of bias motivation in crimes where the victims were targeted because of their sexual orientation. First, in the case of *S v Madubaduba and 2 Others (OUT LGBT Wellbeing Intervening)*,¹²⁶ concerning the assault of Deric Duma

¹²¹ 1994 (1) SACR 236 (A).

¹²² 1992 (1) SACR 147 (NmS).

¹²³ 2000 (1) SA 786 (SCA).

¹²⁴ *ibid* para 7.

¹²⁵ *ibid* para 18.

¹²⁶ This unreported case was heard in the Germiston Magistrate’s Court, with the sentencing judgment being handed down on 9 March 2012.

Mazibuko, Magistrate Monaledi failed to acknowledge the homophobic aspect of the crime. Not only was there compelling evidence of prejudice during the assault, but the accused also continued to show contempt towards gays and lesbians during the trial, with one of the accused even wearing a T-shirt with a homophobic slur. Second, in the trial relating to the rape and murder of the openly lesbian sportswoman Eudy Simelane, the court failed to acknowledge the apparent bias motivation. At the sentencing of one of the accused, Thato Mphiti, Justice Mavundla declared Simelane's sexual orientation of no significance.¹²⁷ While his judgment forcefully condemned the attack, the judge did not recognise the bias which motivated the crime.¹²⁸ Third, there has been only one decision where the violent intolerance of the victim's sexual orientation was recognised as being the motivation for the crime and was accordingly given weight as an aggravating factor in sentencing – this was the landmark judgment handed down by Magistrate Whaten in the Khayelitsha Regional Court for the sentencing of four men convicted of murdering Zoliswa Nkonyana.¹²⁹ Magistrate Whaten was 'satisfied that the motive behind the murder of Zoliswa Nkonyana was driven by hatred, it was driven by intolerance of her difference, and the sequence of events preceding her murder certainly confirms and supports this contention'¹³⁰ with the result that it was acknowledged as an aggravating factor in sentencing.

¹²⁷ N Mkhize, J Bennett, V Reddy and R Moletsane, *The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans* (2010 HSRC Press Cape Town) page 49.

¹²⁸ *ibid.*

¹²⁹ Case number RCB 216/06. The main judgment was delivered on 7 October 2011 and the sentencing judgment on 1 February 2012.

¹³⁰ *ibid.*, sentencing judgment delivered on 1 February 2012.

Question 2: Enquiry about Motives

I. CANADA

76. Both sections 718.2(a)(i) and 430(4.1) of the Criminal Code explicitly require that the offender must have been ‘motivated by bias, prejudice, or hate’ based on an identifying characteristic of the victim. In general, the prosecution will attempt to lead evidence that shows first that the offender harboured bias, prejudice, or hate based on a protected characteristic, and secondly that such bias, prejudice or hate must reasonably be regarded as having played at least some role in motivating the offender’s action.
77. As for the evidence required by courts in order to prove such motivation, there is no generally agreed upon standard for what counts as sufficient. For instance in *R v J.R.B.*¹³¹ the use of a racist slur was found dispositive. Nonetheless, it is doubtful whether the mere fact that an offender used a racist slur while attacking his or her victim is sufficient to prove that his action was motivated by bias, prejudice, or hate.¹³²
78. The types of evidence put forward to this end can usefully be divided into three categories:¹³³ evidence relating to the circumstances of the offence (including evidence pertaining to the specific *actus reus*, the date of the offence, or the location of the offence); evidence relating to the circumstances of the offender (including words spoken during the offence, the offender’s appearance, items in the offender’s possession at the time of the offence or found later at his home,¹³⁴ or the offender’s membership in any hateful groups); and evidence relating to the circumstances of the victim (including the victim’s group membership or whether the victim engaged in activities associated with members of that group).
79. In respect of hate crimes based on colour, ethnicity, or national origin, prosecutors often lead evidence of the offender’s racist tattoos in order to show that offender harboured bias, prejudice or hate.¹³⁵ It is also common for the offender’s motivation to be inferred from a message or tract left with the victim or at the scene of the crime.¹³⁶

¹³¹ [2004] N.J. No. 101.

¹³² In *R. v. Vrdoljak*, [2002] O.J. No 1332, for instance the court did not treat this as sufficient.

¹³³ See Michelle Lawrence, *Sentencing Hate: An Examination of the Operation and Effect of Section 718.2(a)(i) of the Criminal Code*. (2009) <<http://summit.sfu.ca/item/9623>> accessed 25 March 2014.

¹³⁴ *R. v. Soles*, [1998] O.J. No. 5061.

¹³⁵ *R. v. Vrdoljak*, [2002] O.J. No. 1332; *R. v. Soles*.

¹³⁶ *R. v. El-Merhebi*, [2005] J.Q. no 110; *R. v. A.B.*, [2012] N.S.J. No. 227.

80. Most often, prosecutors have to rely on circumstantial evidence to prove motivation. Where circumstantial evidence is insufficient, prosecutors may have to rely on character evidence, including evidence regarding the offender's reputation or prior acts. Character evidence 'may also take the form of expert psychiatric testimony relating to the defendant's disposition and tendencies.'¹³⁷
81. There is some uncertainty in the case law about the degree to which the offender's bias, prejudice, or hatred must have motivated the offence. There is case law in support of the position that hatred must be a significant motivating factor.¹³⁸ However, it seems relatively settled that in fact the offence need only be motivated in part by bias, prejudice, or hate.¹³⁹ The guidelines for Crown counsel pertaining to the prosecution of hate crimes in the provinces of Ontario and Alberta, for instance, adopt the latter view.¹⁴⁰

II. CZECH REPUBLIC

82. The offender has to have a bias motivation for the crime to be classified as a hate crime. The motive of the offender has to be hatred against the nationality, race or ethnic or other group based on the characteristics of that group¹⁴¹ in order for the crime to be classified as racially motivated. Courts generally regard as sufficient to prove bias motivation the shouting of the offender before or during the commission of the crime. On one occasion a trial courts even found sufficient the shouting of the offenders that 'they go for some Gypsies' before fatally beating the Roma victims up in his home to establish the bias motive.¹⁴²

¹³⁷ Patrick dos Santos, *The Canadian Criminal Legislative Response to Hate Crimes* (2005), 80.

<http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=83948&local_base=GEN01-MCG02> accessed 25 March 2014.

¹³⁸ See *Baxter* 1997, Ont. Prov. Ct., *Nash* 2002, Ont. Ct. Just., *Gholamreza zadehsirazi* 2003, Alta. Prov. Ct.).

¹³⁹ See *Gabara* 1997, B.C. Prov. Ct., *Howald* 1998, Ont. Sup. Ct. (Gen. Div.), *Sandouga* 2002, Alta. C.A., *Vrdoljak* 2002, Ont. Ct. Just., *Van-Brunt* 2003, B.C. Prov. Ct., *Hockin* 2005, Ont. Ct. Just. *J.V.* 2006, Ont. Ct. Just.

¹⁴⁰ In respect of Ontario: 'Describing a criminal offence as a hate crime does not require that the offence be motivated entirely by hate or bias against a victim because of his/her membership in a group. Even a crime partially motivated by hate or bias may be construed as a hate crime and treated as such.' *Crown Policy Manual: Hate Crime and Discrimination* <www.attorneygeneral.jus.gov.on.ca/.../HateCrimeDiscrimination.pdf> accessed 25 March 2014. In respect of Alberta: '...the offender's criminal act must have been motivated, in whole or part, by his/her bias (AHCC *Guidelines for the Investigation of Hate and Bias Crimes* <www.albertahatecrimes.ca/index.php?pg=Hate%20Crimes> accessed 25 March 2014.

¹⁴¹ Šámal, P. et al. *Criminal Code*, 2nd ed., Prague: C.H.Beck, 2012, p. 3304.

¹⁴² 'Second Periodic Report of States parties due in 1996: Czech Republic,' CERD/C/289/Add.1 para. 41-42; 'Roma in the Czech Republic: Foreigners in their Own Land,' Human Rights Watch, 1 June 1996.

III. FRANCE

83. According to article 132-76 of the Criminal Code the specific offence (aggression, murder, etc.) becomes an aggravated crime if the commission of the crime was ‘preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim on account of their actual or supposed membership of ... a group.’
84. The duty to bring evidence of the racist bias rests on the claimant, and this evidence has to be brought separately, in addition to evidence of the initial crime. In the dozen cases that have been decided by the French courts since the 2003 statute, there is little mention of the type of evidence regarded as sufficient by the courts. In majority of the cases, and in particular two decisions delivered in 2006¹⁴³ and 2007,¹⁴⁴ the Court of Appeal found that the offender’s assumed racism and confession were sufficient evidence, in addition to some Nazi relics found in the offender’s house. In contrast, in a 2013 Cour de Cassation case¹⁴⁵, it was held that racist speech pronounced before and during the aggressions was sufficient for being considered as hate crime.

IV. GERMANY

85. No research was uncovered on this issue.

V. GREECE

86. No research was uncovered on this issue.

VI. UNITED KINGDOM

87. There are two alternative tests for ‘aggravation’, the same concept that applies in the context of the aggravated offences and in the context of the enhanced sentencing provisions.¹⁴⁶ The first is that ‘at the time of committing the offence, or immediately before or after doing so, the offender demonstrates hostility towards the victim based on the victim’s membership (or presumed

¹⁴³ CA Toulouse, 17.05.2006, n°05/01356.

¹⁴⁴ CA Douai, 13.06.2007, n°06/03288.

¹⁴⁵ Cass.Crim. 25.06.2013, n°12-84.790.

¹⁴⁶ CDA 1998, s 28; CJA 2003 s 145(3), s 146(2).

membership)' of the group in question.¹⁴⁷ The second is that 'the offence is motivated (wholly or partly) by hostility towards members of a group based on their membership of that group'.¹⁴⁸ Membership of a group includes association with members of that group.¹⁴⁹ The first test for aggravation is objective (no state of mind regarding the display of hostility need be proved) whereas the second is subjective (the defendant must actually hold the hostile motivation).¹⁵⁰

88. The requirement of hostility – demonstrated either objectively or subjectively – means that merely choosing victims *because of* their protected characteristics is not sufficient in itself. For example, picking a victim based on a stereotype that members of the group in question would be more passive in response to an attack would not demonstrate hostility.¹⁵¹ There must be hostility based on these characteristics.
89. However, there is no requirement that hostility be directed towards the victim's *whole group* as such. In the context of racial and religious hostility, the provisions only require that the hostility is based on the *victim's membership* of the group in question. The provisions for sexual orientation, disability and transgender identity use slightly different language – referring to protected characteristics rather than group membership – but in these cases, too, there is no requirement that hostility be directed towards the whole group in question. In practice, of course, hostility towards a victim on the basis of his membership of a protected group will often involve hostility towards the whole protected group – but no proof of this is required.
90. Hostility is generally proved by statements made by the defendant immediately before, during or after the conduct in question. This evidence is instrumental to prove hostility (the objective test) or motivation of hostility (the subjective test). Because no mental state with regard to hostility need be proved under the objective test, it may be easier to establish than the subjective test. However, the use of vulgar language and racial epithets may not themselves prove hostility, even on the objective test.¹⁵² A 2002 Home Office study notes that: 'It is clear that many cases fall down in court as the result of doubts over "where to draw the line" between racial epithets that do and do not demonstrate hostility – a term left undefined in the legislation'.¹⁵³

¹⁴⁷ The wording is from CDA 1998, s 28 and is incorporated *mutatis mutandis* into the relevant sections of the CJA 2003.

¹⁴⁸ *ibid.*

¹⁴⁹ CDA 1998, s 28(2).

¹⁵⁰ *Jones v DPP* [2010] EWHC 523 (Admin), [2011] 1 WLR 833.

¹⁵¹ N Bamforth, M Malik and C O'Conneide, *Discrimination Law: Theory and Context* (1st edn, Sweet & Maxwell, 2008) 495.

¹⁵² *Rogers* (n 96) [17]; see also *Director of Public Prosecutions v Richard Howard* [2008] EWHC 608 (Admin), [12].

¹⁵³ E Burney and G Rose, *Racially Aggravated Offences - how is the law working?* (Home Office Research Study 244, Jul 2002) 14.

91. In *Pal*,¹⁵⁴ the Asian defendant referred to another Asian man as a ‘brown Englishman’ and a ‘white man’s arse-licker’. This was held not to be racially motivated because it was motivated instead by his anger at being asked to leave a youth centre and by his resentment of the victim’s conduct. However, this decision’s correctness has been doubted by the House of Lords.¹⁵⁵ Moreover, in *McFarlane*,¹⁵⁶ *Pal* was said to be ‘heavily dependent on its own particular facts’.¹⁵⁷ It is irrelevant to a finding of aggravation that hostility was also based to any extent on any other factor.¹⁵⁸
92. The higher the level of aggravation, the more the sentence will be increased. The Law Commission notes several factors that might be relevant to finding a high level of aggravation: ‘... that the element of aggravation ... was planned; the offence was part of a pattern of offending by the offender; the offender was a member of, or was associated with, a group promoting hostility based on [one of the protected characteristics]; or the incident was deliberately set up to be offensive or humiliating to the victim or to the group of which the victim is a member.’¹⁵⁹ It follows that evidence of these factors would be relevant.

VII. UNITED STATES

a) General

93. Under federal hate crime laws, a hate crime is committed where a person is targeted ‘because of’ their actual or perceived membership of a protected group. Proof of prejudice, enmity, or other emotional states is not necessarily required. In contrast, several state laws appear to require proof of some form of prejudice towards the victim’s group.¹⁶⁰
94. Proof that a crime was committed ‘because of’ the victim’s actual or perceived membership of certain groups is notoriously difficult and is often cited as a cause of the relatively low rate of convictions for hate crimes. Some of the factors identified by the courts as being relevant to proving the requisite *mens rea* include:

¹⁵⁴ *DPP v Pal* [2000] Crim LR 756.

¹⁵⁵ *Rogers* (n 96) para 17.

¹⁵⁶ *DPP v McFarlane* [2002] EWHC 485 (Admin).

¹⁵⁷ *ibid* [13].

¹⁵⁸ CDA 1998, s 28(3).

¹⁵⁹ Law Commission, *Hate Crime: The Case for Extending the Existing Offences* (Law Com No 213, 2013) para 2.163 (footnote omitted).

¹⁶⁰ See *Wolfe* (n 52) 303, fn 6. Examples include Connecticut, Iowa, Michigan, Oklahoma, and Mississippi, among others.

- a. *Previous statements or declarations*: In *Wisconsin v Mitchell*,¹⁶¹ the Supreme Court indicated that previous statements or declarations can be relevant to determining that the crime was committed because of the victim's group membership, subject to the usual evidentiary rules.
- b. *Statements made during the commission of the crime*: For example, in *People v Schutter*,¹⁶² a case of racially-based 'road rage', the Michigan Court of Appeals considered the defendant's use of racial epithets during the assault to be a clear indication that the assault was racially motivated.
- c. *Victim selection*: The fact that a minority victim was selected out of a crowd of people has been held to be relevant.¹⁶³

95. The American Prosecutors Research Institute's *A Local Prosecutor's Guide for Responding to Hate Crimes*¹⁶⁴ helpfully lists considerations that have been considered relevant in establishing *mens rea* in hate crime cases:

- a. Did the offender(s) use words, symbols, or acts that are or may be offensive to an identifiable group?
- b. Are the victim and offender members of different racial or ethnic groups? If so, has there been past hostility or tension between these two groups? Has the victim's group been subject to prior similar criminal acts or harassment?
- c. Is the victim the sole member of his or her group, or one of a small number of members living or present in the neighbourhood where the crime occurred?
- d. Has the victim recently moved to the area in which the incident took place?
- e. Does the incident appear timed to coincide with any holiday or observance of significance to a certain group or community, such as religious holiday or ethnic celebration?
- f. Has the victim or victim's group been involved in recent public or political activity that makes the individual a likely target for hate-motivated violence?
- g. Does the offender appear to belong to or does the manner of the commission of the crime appear to involve an organized hate group such as the Ku Klux Klan or Neo-Nazi organization?
- h. Does the defendant, in a post-arrest interview or in statements made before or during the commission of the crime, recognize the victim to be a member of a potential 'target' group?
- i. Has there been recent news coverage or media exposure of similar events?
- j. Does the defendant have a prior history involving hate-motivated conduct?
- k. Is the attack particularly vicious?¹⁶⁵

¹⁶¹ *Wisconsin v Mitchell* (n 109) 2201-2202.

¹⁶² *People v Schutter* 265 Mich App 423 (2005).

¹⁶³ See, for example, *State v Hart* 677 So 2d 385 (Fla Dist Ct App 4th Dist 1996).

¹⁶⁴ American Prosecutor's Research Institute, *A Local Prosecutor's Guide for Responding to Hate Crimes* (APRI 2000).

¹⁶⁵ *ibid* 26.

96. In addition, the courts have indicated that the victim's group membership need not be the only reason for the crime or even the primary reason, provided it can be proved that it was a reason motivating the action.¹⁶⁶

b) Racial slurs as evidence

97. Questions of evidence are worth considering on the US state level due to the extended hate crime case law. Most of the US state courts have interpreted their state hate crime legislation in such a way that 'a causal connection between the protected characteristics enumerated in the statute and the criminal conduct' is required.¹⁶⁷ The specific question of the use of racial epithets (or slurs) as evidence for that causal connection will be briefly explored here.

98. There is support in both literature and case law for the position that the use of racial epithets or racist slogans constitutes *insufficient evidence* for proving bias motive in hate crimes. Zachary J. Wolfe forcefully argues that '[t]he mere fact that a defendant uttered racial slurs during or after commission of the crime may not, however, prove that he was motivated by bias in committing the crime.'¹⁶⁸ US state case law adds force to this argument. In *Dobbins v State*,¹⁶⁹ a Jewish youth was beaten by several members of a skinhead group. During the beating, the defendants shouted 'Jew boy' and 'Die Jew boy'. On the question of racial epithets, the District Court of Appeal of Florida ruled that:

[t]he statute requires that it is the commission of the crime that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient. In the present case the jury was required to find that the beating, based on the background and relationship between the participants and the statements made during the beating, evidenced that Daly was the chosen victim because he was Jewish. Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a 'Jew boy' could not enhance the offence.¹⁷⁰

It follows from the above quotation that under the laws of Florida, as interpreted by the courts, racial slurs are *per se* insufficient to prove the commission of a bias-motivated crime.

¹⁶⁶ *US v Eben* 800 F2d 1422 (6th Cir 1986) 1429; *US v Johns* 615 F2d 672, 675 (5th Cir 1980).

¹⁶⁷ Wolfe (n 52) 303.

¹⁶⁸ *ibid* 30 fn 39.

¹⁶⁹ *Dobbins v. State*, 605 So. 2d 922 (Fla. 5th DCA 1992).

¹⁷⁰ *ibid* at 923.

99. The Florida case of *Richards v State*¹⁷¹ serves to further illustrate the complication of relying on racial epithets as evidence for hate crimes. *Richards* stands for showing that the racial epithets during the commission of a crime might as well be conscious and unconscious, and that some court attach importance to this. The defendant was convicted for aggravated battery against a black man and for simple battery against his black companion. He sought to argue that the impugned racial slurs were ‘blurted out in the heat of passion during a highly emotional altercation’. The District Court of Appeal of Florida held that it was ‘entirely unclear whether the required “prejudice” under the statute must be conscious or unconscious’.¹⁷² It then went on to rule that the relevant legislation was unconstitutionally vague and therefore void because it did not define with sufficient due process particularity when the commission of a felony or misdemeanour ‘evidences prejudice’ based on the protected characteristics enumerated in the statute. One of the reasons listed for that conclusion was that ‘it is not clear whether a conscious prejudice is even required apart from the proscribed act itself’.¹⁷³ Such a ruling of unconstitutionality is not unique in US state case law.¹⁷⁴

VIII. SLOVAKIA

100. As noted above, the offender has to have a bias motivation for the crime to be classified as hate crime: specifically, the motive of the offender has to be hatred against a certain race, nation, nationality, colour, ethnic group or religious belief. Courts generally regard proclamation or shouting of the offender shortly before or during committing the crime as sufficient to prove bias motivation. As in the case mentioned in paragraph 78, the court found sufficient the publicly made proclamations of offenders shortly before the crime.

IX. SOUTH AFRICA

101. South African case law does not set out what kind of evidence is required for proving bias motivation. Therefore, it is not clear whether mere discriminatory selection is sufficient or whether substantial prejudice must be established for bias motivation to function as an aggravating circumstance in sentencing. About future legislative plans: the Minister of Justice and Constitutional Development has stated that the proposed legislation introducing the category of

¹⁷¹ *Richards v. State*, 608 So. 2d 917 (Fla. Dist. Ct. App. 3d Dist. 1992) (disapproved of by, *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994)) and decision revised on other grounds, 638 So. 2d 44 (Fla. 1994).

¹⁷² *ibid* at 923.

¹⁷³ *ibid* at 921.

¹⁷⁴ American Prosecutor’s Research Institute, *A Local Prosecutor’s Guide for Responding to Hate Crimes* (APRI 2000) 11-15.

hate crimes would operate ‘where there is evidence of a discriminatory motive on the basis of characteristics such as race, nationality, religion, sexual orientation and the like’.¹⁷⁵

102. The case law discussed above suggests that South African courts generally consider bias motivation to be proved if it is shown that the perpetrator chose the victim on the basis of his or her protected characteristics. In *S v Van Wyk*¹⁷⁶ for instance, there was no evidence that the assault was accompanied by any overt expression of racial hostility, yet the court in *S v Van Wyk* concluded that the crime was racially motivated because it was thought to be ‘in the highest degree unlikely that the attack would have taken place on a person of the same size and age if he had been white’. Ackermann AJA did, however, emphasise that not every crime committed across race, colour or ethnic lines is an offence motivated by racism, but rather that ‘[r]acial motivation will have to be specifically proven in any case before it can be taken into account as an aggravating circumstance’, though he did not elaborate on what kind of evidentiary burden this would involve. Similarly, in *S v Salzwedel*¹⁷⁷ the court found that the accused’s association with the *Afrikaner Weerstandsbeweging* and the fact that they were patrolling white areas of the city ‘with the object of indiscriminately attacking any black persons they found in these areas’¹⁷⁸ was sufficient to prove racial motivation without a need for further evidence of racist insults that might have occurred during the assault. In the sentencing judgment relating to the murder of Zoliswa Nkonyana, Magistrate Whaten described the accused as having been ‘driven by hatred, [...] driven by intolerance of her difference’ but also that the victim’s life had been taken away ‘just by virtue of her own beliefs and life choices’.¹⁷⁹ The bias motivation was rather described as a form of prejudice and hostility towards the victim on the basis of her sexual orientation.

¹⁷⁵ Speech by Jeff Radebe, the Minister of Justice and Constitutional Development on the occasion of the panel discussion under the theme ‘Imagine a World Without Hate!’ on 25 August 2013 in Johannesburg.

¹⁷⁶ 1992 (1) SACR 147 (NmS).

¹⁷⁷ 2000 (1) SA 786 (SCA).

¹⁷⁸ *ibid* at para 7.

¹⁷⁹ Case number RCB 216/06. The sentencing judgment was delivered on 1 February 2012.

Question 3: Enquiry about Prosecutorial Discretion

I. CANADA

103. There have been very few cases that discussed the question of prosecutorial discretion. One exception is *Chen v Alberta (Attorney General)*,¹⁸⁰ where the court found that a refusal to bring a hate crime charge under s 319 of the Criminal Code was within ‘the core area of prosecutorial discretion’ and as such could only be set aside by a court on the grounds of ‘flagrant impropriety’ - which the court did not find to have occurred.
104. There has been limited academic debate about the issue.¹⁸¹ One discussion of hate crimes in Canada appears in an LLM thesis¹⁸² that suggested that prosecutors have too much discretion as to whether to bring charges in case of suspected hate crimes. It argued that prosecutors are influenced to use their discretion to refuse to bring such charges in light of the controversial nature of hate crime trials and the high evidential bar that must be surpassed in showing that the offender was actually motivated by bias, prejudice, or hate.
105. Many of the guidelines for Crown counsel explicitly limit prosecutors’ discretion by declaring that where a hate crime prosecution has a substantial likelihood of success, prosecution will be in the public interest.¹⁸³

II. CZECH REPUBLIC

106. Discussion about prosecutorial discretion ensued after the hate crime attacks of Roma youngsters against a 12-year-old non-Roma boy. The research reports of Czech NGOs including the League for Human Rights¹⁸⁴ and European Commission against Racism and Intolerance¹⁸⁵

¹⁸⁰ [2007] A.J. No. 458.

¹⁸¹ See eg J.V. Roberts & A.J.A. Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2 (a) (i) of the Criminal Code’ (2001) 27 Queen’s L. J. 93; for a brief mention of prosecutorial discretion in British Columbia and how guidelines for British Columbia’s crown counsel provide some direction for how to exercise discretion with regard to hate crimes, see C.S. MacMillan, M.G. Claridge & R. McKenna, ‘Criminal Proceedings as a Response to Hate: The British Columbia Experience’ (2002) 45 Crim. L.Q. 419.

¹⁸² See Dos Santos (n 137).

¹⁸³ In respect of Manitoba: < www.gov.mb.ca/justice/prosecutions/policy/pdf/hate_crimes.pdf >; in respect of British Columbia: *End Hate Crime: BC Hate Crime Team Roles and Responsibilities* < www.ag.gov.bc.ca/prosecution-service/pdf/EndHateCrimes_booklet.pdf >; in respect of Ontario: *Crown Policy Manual: Hate Crime and Discrimination*, n 6. Accessed 25 March 2014.

¹⁸⁴ League for Human Rights, Shadow Report to the Committee on the Elimination of Racial Discrimination for the Czech Republic, February 5, 2007, <<http://www.fidh.org/IMG/pdf/LIGA.pdf>> accessed 25 March 2014.

show that hate crimes against minority populations are prosecuted rather reluctantly and that the offenders are often sentenced leniently. The Shadow Report to the Committee on the Elimination of Racial Discrimination ('Shadow Report'), prepared by NGOs, finds that cases of racially motivated violence are not always vigorously pursued by the relevant authorities.¹⁸⁶ According to the report, police have sometimes played down the gravity of the violence and there were reported cases where the police refused to pursue hate crime charges where no *substantial* bodily harm was caused, despite the fact that *any* use of violence on a person may trigger hate crime charges.¹⁸⁷

107. A case from Jeseník, which features in the Shadow Report, illustrates the reluctance with which public officials pursue cases of racial violence. The court gave the three perpetrators relatively mild sentences for assault, which were criticised by the victims, Roma organisations and several government officials. The district state attorney refused to file an appeal even when ordered to do so by a superior regional state attorney. As a result, the regional state attorney had to order a transfer of the case to a state attorney in the neighbouring district of Bruntál so that the case could be properly investigated.¹⁸⁸
108. Another case listed in the Shadow Report is the *Jičín* case, where off-duty police officers entered in the house of a Roma family and insulted them verbally with racist overtones. Nonetheless, the attorney refused to investigate the case's racial dimension, and instead opted for pressing charges for the less severe crime of 'forced entry into a dwelling'.¹⁸⁹

III. FRANCE

109. No research was uncovered on this issue.

IV. GERMANY

110. At present, there is no special requirement concerning prosecutorial discretion. It was claimed as an argument in favour of changing s 46 StGB that the discretion of judges would be reduced if

¹⁸⁵ ECRI Report on the Czech Republic (Fourth Monitoring Cycle) <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/czech_republic/CZE-CbC-IV-2009-030-ENG.pdf> accessed 25 March 2014.

¹⁸⁶ League for Human Rights, Shadow Report to the Committee on the Elimination of Racial Discrimination for the Czech Republic, February 5, 2007, p 12, <<http://www.fidh.org/IMG/pdf/LIGA.pdf>> accessed 25 March 2014.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid* 13.

¹⁸⁹ *ibid* 8. A reference number for the case was not available.

the law explicitly identified bias motivation as an aggravating factor. Hate crimes are not mentioned in the general guidelines by the Federal Ministry of Justice concerning the criminal process.

V. GREECE

111. No research was uncovered on this issue.

VI. UNITED KINGDOM

112. Prosecutorial discretion is limited for hate crimes due to the prosecutorial policy of the CPS. The CPS is the body responsible for bringing prosecutions for criminal offences in England and Wales, and deciding whether to charge.
113. Where the police reasonably suspect that a crime was racially or religiously motivated, they are required to report it to the CPS for a charging decision.¹⁹⁰ In order to determine whether to bring a prosecution the CPS assesses whether there is sufficient evidence and whether a prosecution would be in the public interest. Crimes involving racial or religious (etc.) hostility will ‘almost always’ meet the public interest test.¹⁹¹ The victim’s views about whether to prosecute are taken into account but are not decisive, and the more serious the case, the more likely it is the CPS will go ahead with the prosecution even against the victim’s wishes.¹⁹²

VII. UNITED STATES

114. There is a small but growing body of academic literature on the topic of prosecutorial discretion in relation to hate crimes.¹⁹³ Many authors note that rates of prosecution of hate crimes are highly variable and that black men are disproportionately prosecuted for and convicted of hate crimes. The FBI’s 2012 hate crime statistics show that 23.3 per cent of offenders were black, while black people make up only 12.6 per cent of the US population. However, there is limited empirical analysis of the causes of these phenomena.¹⁹⁴ Anecdotal evidence considered in

¹⁹⁰ Crown Prosecution Service, *Racial and Religious Crime – CPS Prosecution Policy* (CPS, 2010).

¹⁹¹ See eg Crown Prosecution Service, *Racial and Religious Crime – CPS Prosecution Policy* (CPS, 2010).

¹⁹² Crown Prosecution Service, *Policy for Prosecuting Racially and Religiously Aggravated Crime* (CPS, 2009).

¹⁹³ For an extensive review of the relevant literature, see Brian Byers and others, ‘Predictors of Hate Crime Prosecutions: An Analysis of Data from the National Prosecutors Survey and State-Level Bias Crime Laws’ (2012) 2 *Race and Justice* 203, 204 ff.

¹⁹⁴ FBI Statistics (n 107).

academic literature suggests that prosecutorial bias against minority groups may have some role in explaining the variability.¹⁹⁵ Other authors point out that the quality of police investigations is a substantial factor determining whether hate crimes are prosecuted.¹⁹⁶

115. In 2000, the American Prosecutors Research Institute released *A Local Prosecutor's Guide for Responding to Hate Crimes* to assist prosecutors in prosecuting hate crimes. As outlined above (paragraph 95), the Guide contains an extensive set of considerations to assist prosecutors in deciding whether to prosecute under hate crime laws.¹⁹⁷

VIII. SLOVAKIA

116. The Committee on the Elimination of Racial Discrimination's report on Slovakia includes that it is not uncommon for prosecutors to charge the offenders under the easier to prove assault charge to increase the likelihood of conviction.¹⁹⁸ This practice results in the perpetrators avoiding the heavier sentence which they would incur under the relevant provisions of the Criminal Code.¹⁹⁹ The Slovak authorities have indicated to ECRI that proving the racist motivation of a crime has turned out to be difficult in practice.²⁰⁰

IX. SOUTH AFRICA

117. On the one hand, there are no particular rules for prosecutors to specifically investigate bias motivation. On the other hand, there are signs in case law that currently the police, prosecutors and the judiciary fail to acknowledge and condemn bias motivation sufficiently in cases that are reported, investigated, prosecuted and adjudicated.²⁰¹
118. In *S v Madubaduba and 2 Others (OUT LGBT Wellbeing Intervening)*,²⁰² the prosecutor initially decided not to prosecute the case because the crime was framed as a tavern fight. This decision was successfully reviewed upon application to the National Prosecuting Authority by the NGO

¹⁹⁵ See, for example, Fleisher (n 109); Tanya Katerí Hernández, 'Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"' (1990) 99 Yale Law Journal 845.

¹⁹⁶ See eg Jeannine Bell, *Policing Hatred* (NYU Press 2002).

¹⁹⁷ *A Local Prosecutor's Guide for Responding to Hate Crimes* (n 164).

¹⁹⁸ ECRI Report on Slovakia (Fourth Monitoring Cycle), published on 26 May 2009, p 27, <http://hudoc.ecri.coe.int/XML/ECRI/ENGLISH/Cycle_04/04_CbC_eng/SVK-CbC-IV-2009-020-ENG.pdf> accessed 25 March 2014.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ For the role of the South African Police Service in the xenophobic violence of May 2008, see J Steinberg 'Security and Disappointment: policing, freedom and xenophobia in South Africa' (2012) 52(2) *British Journal of Criminology*.

²⁰² This case was heard in the Germiston Magistrate's Court, with the sentencing judgment being handed down on 9 March 2012.

OUT.²⁰³ Furthermore, despite OUT intervening as an *amicus curiae* to present comprehensive evidence during sentencing about the particularly detrimental effects of homophobic hate crimes, Magistrate Monaledi dismissed their unchallenged evidence, giving ‘no reasons for rejecting the evidence beyond her own sense of the effect of ordinary crimes’.²⁰⁴ The prosecution of the case relating to Zoliswa Nkonyana’s murder experienced similar troubles. Were it not for the contribution of organisations like Triangle Project, which worked closely with the prosecution throughout the trial and presented evidence at the sentencing hearing, the prejudice towards the victim’s sexual orientation which motivated the murder would not have come to light.²⁰⁵

²⁰³ Kerry Williams, “Dip me in chocolate and throw me to the lesbians”: Homophobic hate crimes, the state and civil society’ (2012) 42 SA Crime Quarterly 39, 40.

²⁰⁴ *ibid* 43.

²⁰⁵ Ingrid Lynch and Mikki van Zyl, *Justice Delayed: Activist Engagement in the Zoliswa Nkonyana Trial* (2013 Triangle Project).

CONCLUSIONS

119. The research indicates that hate crime laws are based on a symmetrical conception of protected grounds. Personal characteristics such as race, religion or nationality are equally protected, irrespective of whether victims belong to majority and advantaged groups or disadvantaged and vulnerable groups. Therefore, as a matter of law, the bias element is not defined by reference to the vulnerability or disadvantage of the group to which the victim belongs. For instance, the leading American case of *Wisconsin v Mitchell*²⁰⁶ involved a white victim and two black perpetrators. In fact, our research has not uncovered any case law where a court excluded a victim from the coverage of hate crime laws because he or she belonged to the majority or an advantaged or majority group.
120. It is noteworthy that the distinction between majority and minority groups does not carry considerable weight in all surveyed jurisdictions. South Africa's history of racial discrimination has left the white minority in a privileged position relative to the black majority. Similarly, in Scotland and Northern Ireland, where hate crime laws seek to prevent sectarian violence, the sectarian divisions resist easy categorisation to majority and minority.
121. It is not possible to decipher clear answers to the questions concerning *mens rea*. From two jurisdictions (Germany and Greece) there was no information available at all and from two others (France and South Africa) there was no convincing evidence available due to an absence of case law. Following the OSCE's categorisation of hate crime laws into hostility and discrimination models²⁰⁷ the research found that four jurisdictions could be classified as subscribing to the hostility model (Canada, Czech Republic, the UK, and Slovakia), whereas the US and France subscribed to the discrimination model.
122. On the question of evidence, some jurisdictions impose a stricter standard of proof than others. For instance in the UK, some racist uttering during the commission of the crime might suffice for meeting the criteria of hate crime legislation, whereas in the US and Canada, generally speaking, mere racial slurs uttered during the commission of the crime, without further evidence,

²⁰⁶ *Wisconsin v Mitchell* (n 109). See Report paragraph 66.

²⁰⁷ OSCE Guide (n 1) 47-48. 'In the hostility model, the offender must have committed the offence because of hostility or hatred based on one of the protected characteristics.' (ibid, p 47.) 'In the discriminatory selection model, the offender deliberately targets the victim because of a protected characteristic, but no actual hatred or hostility is necessary to prove the offence.' (ibid, p 48).

do not suffice for proving bias motivation.²⁰⁸ The general conclusion that can be drawn from the case law is that the utterance of a racial slur, in and of itself, does not establish the bias motive.

123. The UK is the only jurisdiction where prosecutorial discretion is limited such that the suspicion of bias motivation is regarded as a matter of high public interest, to the extent that it automatically triggers the prosecution of hate crimes.²⁰⁹ This legal position is in line with the seminal European Court of Human Rights (ECtHR) decision in *Nachova and others v Bulgaria*²¹⁰ which set out the positive duty for Member States to investigate the racist motivation of crimes. Nonetheless, in all other jurisdictions, a high number of secondary sources argue strongly that extensive discretion may be an important reason for the deficiencies in the application of hate crime laws. Prosecutorial discretion may be one of the contributing factors to the phenomenon that alleged hate crimes are prosecuted for less serious offences (such as in Canada, Czech Republic and Slovakia), and hence could have led to fewer hate crime cases overall. In South Africa, recent high profile cases suggest that prosecutors have often failed to take into account the apparent homophobic motives of the perpetrator in homicide cases.²¹¹

²⁰⁸ See Report paragraphs 76-81 and 93-99.

²⁰⁹ See Report paragraphs 112-113.

²¹⁰ *Nachova* (n 75).

²¹¹ See Report paragraph 118.