



Economic and Social Council

Distr.: General
4 March 2019

Original: English

Commission on Crime Prevention and Criminal Justice

Twenty-eighth session

Vienna, 20–24 May 2019

Item 5 of the provisional agenda*

Thematic discussion on the responsibility of effective, fair, humane and accountable criminal justice systems in preventing and countering crime motivated by intolerance or discrimination of any kind

Guide for the thematic discussion on the responsibility of effective, fair, humane and accountable criminal justice systems in preventing and countering crime motivated by intolerance or discrimination of any kind

Note by the Secretariat

Summary

In its decision 2016/241, the Economic and Social Council decided that the prominent theme for the twenty-eighth session of the Commission on Crime Prevention and Criminal Justice would be “The responsibility of effective, fair, humane and accountable criminal justice systems in preventing and countering crime motivated by intolerance or discrimination of any kind”. The present note by the Secretariat presents, as a guide for the thematic discussion, background information on the issue of crime motivated by intolerance or discrimination, including definitions, relevant international and regional standards, national legislation, data collection, preventive efforts and responses by the criminal justice system. It raises questions and issues that the Commission may wish to discuss.

* E/CN.15/2019/1.



I. Introduction

1. In its decision 2016/241, the Economic and Social Council decided that the prominent theme for the twenty-eighth session of the Commission on Crime Prevention and Criminal Justice would be “The responsibility of effective, fair, humane and accountable criminal justice systems in preventing and countering crime motivated by intolerance or discrimination of any kind”.
2. At its reconvened twenty-seventh session, held on 6 and 7 December 2018, the Commission endorsed the proposal of the Chair on the organization of the thematic discussion at its twenty-eighth session.
3. The Secretariat has prepared the present note in accordance with Commission decision 18/1, entitled “Guidelines for the thematic discussions of the Commission on Crime Prevention and Criminal Justice”, in which the Commission decided that the discussion on the prominent theme would be based on a discussion guide including a list of questions to be addressed by participants.
4. In order to prepare the present guide the Secretariat requested, by note verbale of 27 December 2018, information from United Nations bodies, international and regional organizations and institutes of the United Nations crime prevention and criminal justice network on their major initiatives. At the time of writing of the present note, the Secretariat had received responses from the European Commission, the European Agency for Fundamental Rights (FRA), the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), the Commonwealth Secretariat, the Inter-American Development Bank, the Korean Institute of Criminology, the International Fund for Agricultural Development (IFAD), the Gulf Cooperation Council and the Office of the United Nations Commissioner for Human Rights. The following organizations responded that they did not have any input to provide: the European Institute for Crime Prevention and Control, affiliated with the United Nations, the United Nations Commission on International Trade Law, the United Nations Industrial Development Organization, the World Food Programme and the World Trade Organization (WTO). In addition, the United Nations Office on Drugs and Crime (UNODC) conducted its own research using international and national sources, including through its field office network.
5. On 18 January 2019, the Secretary-General, outlining his priorities for the year ahead, explained that the United Nations needed to focus on engaging societies to put an end to the rise of hate speech, xenophobia and intolerance. “Hate speech and hate crimes are direct threats to human rights, sustainable development and peace and security”, he stated, announcing that his Special Adviser on the Prevention of Genocide, Adama Dieng, had been tasked with leading the development of a United Nations-wide strategy and urgent global plan of action against hate speech and hate crimes.
6. The Commission’s thematic discussion therefore comes at a crucial moment to provide direction on the role of UNODC in this system-wide effort as it relates to crime prevention and criminal justice, as well as to guide Member States in their implementation of international standards and good practices in this regard.

II. Setting the stage for the thematic discussion: definitions and current situation

A. Definitions

7. “Crime motivated by intolerance or discrimination of any kind” is a broad concept, and that description is often used interchangeably with “hate crime” or “crime motivated by bias”. There is no global definition of the notion of crime

motivated by intolerance and discrimination, and in particular no agreement on which characteristics of persons should be protected by specific legislation and policies. The scope of the protected characteristics varies over time and among countries. It may include race, colour, religion, ethnicity and national origin and, more recently, sexual identity, gender identity, gender and disability.

8. Article 4 (a) of the International Convention on the Elimination of Racial Discrimination provides that States parties “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.” ODIHR further explains that hate crimes are “criminal acts motivated by bias or prejudice towards particular groups of people. To be considered a hate crime, the offence must meet two criteria: first, the act must constitute an offence under criminal law; second, the act must have been motivated by bias.”¹

9. Certain cases of gender-based violence and gender-related killing may fall in the category of crime motivated by intolerance or discrimination. Gender-related killing of women is generally understood to refer to the intentional murder of women because they are women, whether the crime is committed in public or in private.² Among the legal definitions in countries that have adopted provisions creating specific offences to deal with gender-related killing of women and girls, only some require a specific mental state on the part of the perpetrator, such as misogyny, hatred or contempt for the victim because of her gender; any other motive related to her gender; or the context of unequal power relations.

10. In her 2012 report, the Special Rapporteur on violence against women, its causes and consequences identified gender-related killing as the extreme manifestation of violence against women, often representing the final event of an ignored continuum of violence. Rooted in gender-based discrimination and the unequal power relations between men and women, gender-related killing is frequently made more likely by the existence of other forms of discrimination. Some groups of women are particularly vulnerable to violence, either because of their nationality, ethnicity, religion or language or because they belong to an indigenous group, are migrants, are stateless, are refugees, live in underdeveloped, rural or remote communities, are homeless, are in institutions or in detention, have disabilities, are elderly, are widowed, or live in conflict, post-conflict or disaster situations.³

11. There is also a degree of overlap between hate crime and terrorist offences, and between hate speech and incitement to and glorification of terrorism. Hate speech can be used to incite violence leading to terrorism, and hate crime, i.e. violence against people based on their race or religion or other discriminatory grounds, can be a form of terrorism under many countries’ laws. In some countries acts of xenophobic violence against immigrants have been prosecuted as terrorism offences.

12. Certain forms of crimes motivated by intolerance, bias or discrimination constitute crimes under international humanitarian law or international criminal law. Genocide is the most striking example. The current guide, however, will focus on ordinary crimes that are motivated by intolerance or discrimination.

¹ <http://hatecrime.osce.org/>.

² UNODC/CCPCJ/EG.8/2014/2, para. 4.

³ Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex, para. 10).

Points for discussion

13. The Commission may wish to consider the following points for further discussion:

(a) Is there a need to provide an international definition of crimes motivated by intolerance or discrimination? What grounds for discrimination should be covered by such a definition?

(b) To what extent is intolerance or discrimination based on sex or gender included in existing international and national definitions of hate crime or other crimes motivated by intolerance or discrimination?

B. Current situation

14. While no global reporting or monitoring currently exists, information collected by international and regional organizations, Member States and civil society organizations indicates worrying trends in crimes motivated by intolerance and discrimination all over the world. Gaps in available data and research persist, especially in Asia and Africa.

15. The Special Rapporteur on minority issues noted that hate speech, xenophobic rhetoric and incitement to hatred against minorities were increasing, coupled with the rise of far-right and extremist political parties worldwide.⁴ She considered obstacles to access to justice faced by members of minority groups who are victims of crime and highlighted that their rights are often not respected or fulfilled. She further noted that “many jurisdictions lack definitions and working protocols for the recording, investigation and prosecution of hate crimes. This leads to the rapid erosion of minorities’ trust in justice. Responding effectively to hate crimes can assist in rebuilding trust.”⁵ The Special Rapporteur also stressed the concerns of international organizations and civil society groups that have drawn attention to the dramatic rise in the persecution of minorities in recent years, with a commensurate number of people from minority backgrounds fleeing their homes, and a dramatic increase in hate crimes against minorities.⁶

16. While UNODC has already reported extensively on violence against women and gender-related killings of women, only limited data are available to estimate what proportion of gender-based violence and gender-related killing constitute crimes motivated by intolerance or discrimination based on sex or gender. ODIHR has reported on sex-based hate crimes since 2013; however, only six States reported to it on sex-based hate crimes in 2016 and 2017.⁷

17. The European FRA has gathered extensive evidence about victims of hate crime. The quantitative data collected by the Agency include both the large-scale, population-based multi-country surveys and administrative and other data collected from published official and civil society sources. FRA has conducted surveys covering the 28 European Union member States on experiences of victims of bias-motivated crime, harassment and discrimination. Many of those surveys have focused on the experiences of specific minority groups, including immigrants and ethnic minorities; lesbian, gay, bisexual, transgender, intersex (LGBTI) and other persons; Muslims; and Jews. The European Union Minorities and Discrimination Survey I was conducted in 2009 and Survey II in 2017. Several dedicated reports have highlighted the situation of particular groups, such as the report *Being Black in the EU*, which showed that 5 per cent of respondents had experienced a racist attack in the five years before the survey and that 64 per cent of victims of racist violence, as well as a 63 per cent of victims of racist physical attacks by police officers, had not

⁴ A/HRC/34/53, para. 58.

⁵ A/70/212, para. 68.

⁶ A/HRC/37/66, para. 45.

⁷ <http://hatecrime.osce.org/>.

reported the most recent incident to any organization.⁸ The report on Muslims that resulted from Survey II showed that in the previous 12 months 2 per cent had been physically assaulted and 1 per cent had experienced physical assault by a police officer because of their ethnic or immigrant background (2 per cent had had that experience in the preceding five years). Again, the reporting rate for physical attacks was low. The second online survey on discrimination and hate crime against Jews in the European Union (2018) showed that on average, in all 12 countries covered, 20 per cent of respondents had family members or were close to other people who had been subjected to anti-Semitic verbal or physical attacks, 1 per cent reported witnessing other Jews being physically attacked, and 2 per cent said their family members had been physically attacked.⁹ The 2013 European Union online lesbian, gay, bisexual and transgender survey showed that a quarter of all respondents, and 35 per cent of transgender respondents, had been attacked or threatened with violence in the previous five years.

18. Since 2009 ODIHR has been tasked with collecting yearly data from OSCE member States on hate crime. The latest available data, for 2017, are based on information provided by 39 participating States, 23 of which provided statistics that are disaggregated by categories of bias motivation.

19. There is no regional data-collection system in the Americas for crimes motivated by intolerance or discrimination in general. Several reports, however, have been produced on hate crimes against members of the lesbian, gay, bisexual, transgender and other persons group and on femicides by the Inter-American Commission on Human Rights (IACHR). In 2015 it published a report on violence against lesbian, gay, bisexual, transgender and intersex persons in the Americas, which was based, inter alia, on a registry of violence. It found that during the period from 1 January 2013 to 31 March 2014, at least 594 persons who were or were perceived to be lesbian, gay, bisexual or transgender were killed, and 176 were victims of serious non-lethal attacks apparently related to their sexual orientation, gender identity or form of gender expression. The report focused particularly on the acts of physical violence committed in the Americas against persons with non-normative sexual orientations, identities and forms of gender expression, or whose bodies differ from the conventional standards for female and male bodies. IACHR highlighted that those acts often showed high levels of cruelty that indicated correspondingly high levels of prejudice.

20. Official data on crimes motivated by discrimination and intolerance are scarce on the African continent. According to the Minority Rights Group International annual report of 2014, evidence showed how hate crime and hate speech had, in part, stirred acts of violence and religious or ethnic discrimination across the continent.¹⁰ According to the same report, a worrying trend of vilification and hostility towards minorities and indigenous peoples had spread across Asia. A key aspect of hate crime and hate speech is its invisibility, especially when governments or societies overlook or tolerate entrenched patterns of discrimination against specific communities.

21. The Trans Murder Monitoring project systematically monitors, collects and analyses reports of homicides of transgender and gender-diverse people worldwide. According to its monitoring, between 1 January 2008 and 30 September 2018 a total of 2,982 transgender and gender-diverse people were reported murdered in 72 countries. “Victims whose occupations are known are mostly sex workers (62 per cent). In the United States, the majority of the trans people reported murdered are trans women of colour and/or Native American trans women (85 per cent), and in France, Italy, Portugal and Spain, which are the countries to which most trans and gender-diverse people from Africa and Central and South America migrate,

⁸ European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey: Being Black in the EU* (Vienna, 2018).

⁹ European Union Agency for Fundamental Rights, *Experiences and Perceptions of Antisemitism: Second Survey on Discrimination and Hate Crime against Jews in the EU* (Vienna, 2018).

¹⁰ Minority Rights Group International, “Annual survey warns of serious consequences of ignoring hate crime towards minorities and indigenous peoples in Africa”, press release of 3 July 2014. Available at <https://minorityrights.org/>.

65 per cent of the reported murder victims were migrants.”¹¹ This highlights a key concern in this area: the importance of adopting an intersectional approach in analysing the situation of persons at risk and victims of crime motivated by discrimination and intolerance to address the multiple, intersecting and aggravated forms of violence and discrimination.¹²

Points for discussion

22. The Commission may wish to consider the following points for further discussion:

(a) What are the trends relating to crime motivated by intolerance and discrimination?

(b) Do specific grounds for discrimination and intolerance or specific categories of crime require urgent priority action?

III. International and regional standards, and national legislation

A. International obligations, standards and commitments

23. In the Doha Declaration, adopted by the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Member States committed:

(a) To implement effective measures to eliminate violence against all migrants, migrant workers and their families, and to take all necessary legal and administrative steps to prevent and counter crimes involving violence against those groups;

(b) To conduct further research and gather data on crime victimization motivated by discrimination of any kind and to exchange experiences in and information on effective laws and policies that can prevent such crimes, bring perpetrators to justice and provide support to victims;

(c) To consider providing specialized training to criminal justice professionals to enhance capacities for recognizing, understanding, suppressing and investigating hate crimes motivated by discrimination of any kind, to help engage effectively with victim communities and to build public confidence and cooperation with criminal justice agencies;

(d) To intensify national and international efforts to eliminate all forms of discrimination, including racism, religious intolerance, xenophobia and gender-related discrimination by, inter alia, raising awareness, developing educational materials and programmes, and considering, where appropriate, drafting and enforcing legislation against discrimination.

24. The General Assembly, in its resolutions on extrajudicial, summary or arbitrary executions, has also highlighted the need for States to effectively protect the right to life of all persons, and to carry out prompt, exhaustive and impartial investigations into all killings, including those targeted at specific groups of persons.¹³

1. Racial discrimination

25. A key legally binding international instrument is the International Convention on the Elimination of all Forms of Racial Discrimination (see para. 8 above). The Committee on the Elimination of Racial Discrimination, in its general

¹¹ <https://transrespect.org/en/research/trans-murder-monitoring>.

¹² See A/HRC/38/43.

¹³ See, for example, General Assembly resolution 71/198.

recommendation No. 15 on article 4 of the Convention, states that States are required to penalize four categories of misconduct:

- (a) Dissemination of ideas based upon racial superiority or hatred;
- (b) Incitement to racial hatred;
- (c) Acts of violence against any race or group of persons of another colour or ethnic origin;
- (d) Incitement to such acts.

26. The Committee also emphasized that “the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced”.

27. Furthermore, in paragraph 12 of its general recommendation No. 35 on combating racist hate speech, the Committee recommended that “the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.”

28. Further Committee general recommendations relate to the training of law enforcement officials (No. 13), including reference to the 1979 Code of Conduct for Law Enforcement Officials; to the prevention of racial discrimination in the administration and functioning of the criminal justice system (No. 31), including steps to be taken to prevent racial discrimination with regard to victims of racism and to accused persons who are subject to judicial proceedings; and to racial discrimination against people of African descent (No. 34), including a section on the administration of justice.

29. The responsibility of criminal justice systems in preventing and countering crime motivated by intolerance or discrimination has been addressed by both the Committee on the Elimination of Racial Discrimination and the Human Rights Committee in the concluding observations and recommendations issued in response to regular reports from States. In its opinion concerning the case *Mahali Dawas and Yousef Shava v. Denmark*, the Committee held that, when investigating and prosecuting crimes with a potential bias motivation, the prosecution had a duty to ensure that racist motivation was fully investigated through the criminal proceedings.¹⁴

30. With the adoption of the Durban Declaration and Programme of Action at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, the international community affirmed its commitment to eradicate racism and racial discrimination. The Durban Declaration and Programme of Action constituted the first comprehensive, victim-centred and action-oriented document in this area, and it outlines concrete measures to address these issues, including measures directly relevant to the criminal justice system. The outcome document of the Durban Review Conference, held in 2009, assessed the implementation of the Durban Declaration and Programme of Action and highlighted future requirements for action. Those two documents underline the importance of the criminal justice system in combating racism, racial discrimination, xenophobia and related intolerance.¹⁵

31. The Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, at its fifteenth session, discussed training and awareness-raising for law enforcement officials and the judiciary, and the monitoring and investigation of hate speech and hate crimes.

¹⁴ CERD/C/80/D/46/2009.

¹⁵ See A/CONF.189/12 and Corr.1, chap. I and A/CONF.211/8, chap. I.

32. The Working Group of Experts on People of African Descent has placed significant focus on addressing racism, racial discrimination, xenophobia, Afrophobia and related intolerance in the administration of justice, as well as institutional racial bias in the criminal justice system and the accountability of law enforcement. It has also addressed the issue of violent manifestations of racism and intolerance through extremist nationalist and populist ideologies, hate speech and incitement to hatred.

2. Discrimination based on sex, gender, sexual orientation or gender identity

33. Several international and regional treaties contain binding obligations on States parties to prevent and investigate gender-based violence against women, to prosecute and punish the perpetrators and to protect and provide redress to the victims.¹⁶ Those treaties are complemented by internationally agreed instruments and resolutions on violence against women and gender-related killing of women and girls.¹⁷

34. In its resolution 32/2, the Human Rights Council strongly deplored acts of violence and discrimination committed against individuals because of their sexual orientation or gender identity and decided to appoint, an independent expert on protection against violence and discrimination based on sexual orientation or gender identity. The Council described a sequence of actions required from States to eradicate violence and discrimination based on sexual orientation and gender identity, covering legislation and public policy, executive and administrative action, and access to justice, access to an effective remedy and redress. The Independent Expert wrote in his report to the Human Rights Council: “Underreporting, negligent investigations and prosecution, and almost non-existent convictions lead to a situation of systematic impunity. No element in the chain of justice is unaffected by such factors. Trans women and gender-non-conforming persons are often targeted by justice sector officers, as negative prejudices and stereotypes about trans and *travesti* persons often associate them with the idea of criminality. This has direct consequences for their access to justice; their gender identity functions tacitly as an aggravating circumstance when they are denounced and as reasons for disrepute when they denounce someone else.”¹⁸

3. Crimes motivated by intolerance based on religion or belief

35. The General Assembly, in its resolution 67/178, “Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief”, called on all States to adopt “measures to criminalize incitement to imminent violence based on religion or belief”. In October 2012, experts convened by the Office of the United Nations High Commissioner for Human Rights adopted the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Rabat Plan of Action includes several recommendations related to hate crime.

4. Prevention of violent extremism

36. Security Council resolution 1624 (2005) calls upon States to adopt measures to prohibit by law incitement to commit terrorist acts. Incitement to terrorism, ethnic, national and religious discrimination and dehumanization of victims of terrorism in all its forms and manifestations are recognized as conditions conducive to terrorism.

¹⁶ Convention on the Elimination of All Forms of Discrimination against Women; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

¹⁷ Declaration on the Elimination of Violence against Women; Beijing Declaration and Platform for Action; updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice; General Assembly resolutions 68/191 and 70/176 on taking action against gender-related killing of women and girls.

¹⁸ A/HRC/38/43.

Furthermore, the Secretary-General's Plan of Action to Prevent Violent Extremism has a strong focus on strengthening good governance, human rights and the rule of law. It recommends that Member States implement Security Council resolution 1624 (2005), promoting a comprehensive approach to incitement and violent extremism, and the Rabat Plan of Action.

B. Regional standards

37. In 2014 the African Commission on Human and Peoples' Rights adopted resolution 275, on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity, urging States "to end all acts of violence and abuse, whether committed by State or non-State actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence, including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims."

38. In the European Union, a legal framework has been developed over the years to address discrimination, racism, hate speech and hate crime. Member States are obliged to penalize public incitement to violence or hatred against persons by reference to race, colour, religion, descent or national or ethnic origin. Furthermore, for any other criminal offences, member States must ensure that racist or xenophobic motivation is considered an aggravating circumstance, or alternatively allow for such motivation to be considered in the determination of penalties. National law enforcement and judicial authorities are responsible for investigating and prosecuting ex officio any such instance, and for ensuring that effective and dissuasive penalties are applied to perpetrators, including legal persons.¹⁹

39. That legislation is complemented by European Union legislation to protect victims of crime,²⁰ which obliges member States to ensure fair and non-discriminatory treatment of victims of crime, recognizing victims of hate crime as one of the particularly vulnerable categories of the crime victims entitled to special protection measures.

40. The European Court of Human Rights has provided additional guidance when addressing cases of violations of the European Convention on Human Rights, particularly article 14, prohibiting discrimination. In *Šečić v. Croatia* the court states that to treat racially (or religiously, homophobically, etc.) induced violence on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. In the *Nachova* case, the Court derived from article 14 of the European Convention, on the prohibition of discrimination, a positive duty for State authorities to investigate and unmask the bias motivation of an offence, if there are indications of its existence; jurisprudence has further developed in this area.

41. Other regional human rights instruments also afford protection against discrimination, such as the American Declaration of the Rights and Duties of Man and the African Charter on Human and Peoples' Rights. The Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, which entered into force in 2017, obliges States to prevent, eliminate, prohibit and punish all acts and manifestations of discrimination and intolerance, including hate crimes.

¹⁹ Council framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (*Official Journal of the European Union*, L 328, 6 December 2008).

²⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

C. National legislation

42. Most countries have included general anti-discrimination provisions in their Constitution or their legislation. Some countries have also established specific legal provisions on hate crime or defined aggravating circumstances for crimes motivated by intolerance or discrimination to varying degrees. In the OSCE region, technical assistance is being provided by ODIHR, which issues opinions on recommended changes or improvements to national hate crime laws based on international standards.²¹

43. Some countries are in the process of reforming their substantive and procedural criminal law to address crimes motivated by intolerance or discrimination. In European Union member States, challenges and gaps remain in relation to the racist and xenophobic motivations of crimes, the liability of legal persons and jurisdiction.²²

44. There have been legal developments in recent years regarding crimes committed against members of communities of lesbian, gay, bisexual, transgender, intersex and other persons. The repeal of discriminatory legislation is essential to enable victims to have access to justice without risking prosecution for engaging in same-sex relations. As an example, between 2011 and 2014, 14 States had adopted or strengthened anti-discrimination and hate crime laws, extending protection on grounds of sexual orientation and/or gender identity and, in two cases, also introducing legal protections for intersex persons.²³

45. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association, in May 2017, 63 States had provisions that were either comprehensive or specific non-discrimination laws and 43 States had enacted laws under which a motivation of discrimination was considered an aggravating circumstance (including against lesbian, gay, bisexual, transgender, intersex and other persons).

46. Today, most countries have laws to address violence against women and some have criminalized gender-related killing of women. However, in many other countries, existing legal provisions are gender-neutral and hence do not allow for specific responses in cases of crimes motivated by intolerance or discrimination based on sex or gender. Moreover, not all forms of violence against women are criminalized or prohibited in many countries and some legal systems still retain procedural provisions that discriminate against women or have a discriminatory impact on women, which allows perpetrators to escape criminal responsibility. Some countries have established the crime of femicide or feminicide in their criminal codes, although the subjective and objective elements of the crime vary. Other countries have included gender-related aggravating factors for homicide offences or for offences in general.

47. It has been highlighted that including gender in domestic hate crime legislation, so that violent crimes against women are considered acts of prejudice to oppress, subordinate and control women, could help to prevent victim-blaming and promote offender accountability.²⁴

²¹ See Legislationline, ODIHR legal reviews, assessments and guidelines, available at www.legislationline.org; and Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (Warsaw, 2009).

²² European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, document COM (2014) 27 final.

²³ See [A/HRC/29/2](http://www.unhcr.org/refugees/2014/02/15/A/HRC/29/2).

²⁴ See Aisha K. Gill and Hannah Mason-Bish, "Addressing violence against women as a form of hate crime: limitations and possibilities", *Feminist Review*, No. 105 (2013).

Points for discussion

48. The Commission may wish to consider the following points for further discussion:

- (a) Are additional standards necessary at the global or regional level?
- (b) How should the national implementation of existing international and regional standards and commitments be promoted?
- (c) What are the benefits and challenges of mainstreaming a focus on crimes motivated by intolerance or discrimination in the implementation of relevant international and regional instruments?
- (d) Is there sufficient guidance available for Member States to review and adapt their national legislation on crimes motivated by intolerance and discrimination and on the repeal of discriminatory legislation?
- (e) What are the lessons learned from jurisdictions that have specific substantive and procedural criminal law provisions, for example on hate crime, gender-related killing, violence against women or violence against children?
- (f) Can the inclusion of gender in hate crime legislation help enhance offender accountability while ensuring the safety and empowerment of victims of gender-based violence?

IV. Data collection

Current challenges

49. While some data are available on different types of crimes motivated by intolerance and discrimination, several challenges persist relating to the collection of such data. First, such crimes are among the most underreported categories of crime, for a variety of reasons. As highlighted by FRA, “inadequate recording of hate crime incidents, ... coupled with victims’ hesitance to report incidents to the authorities, contributes to the gross underreporting of the extent, nature and characteristics of ... incidents. It also limits the ability of policymakers and other relevant stakeholders at national and international levels to take measures and implement courses of action to combat hate crimes effectively and decisively, and to assess the effectiveness of existing policies.”²⁵ FRA studies have consistently found that victims encounter difficulties in reporting hate crime, and, in many cases, police, public prosecutors and criminal court judges are reluctant to record and acknowledge hate crime. Even when crimes are reported they may not be recorded as hate crimes by the authorities of first contact.²⁶ The Working Group of Experts on People of African descent has expressed its concern “that some States do not collect disaggregated data that reflects the magnitude of racism, racial discrimination, hate speech and hate crimes perpetrated against people of African descent. States that do not collect and analyse disaggregated data lack the information necessary to address racism and intolerance effectively, including measures to counter extremist ideologies and hate speech.”²⁷ To respond to these data gaps, the Working Group is currently gathering all available data and analysis to conduct a mapping exercise and prepare a baseline report on the human rights situation of people of African descent, which will include data on racially motivated acts of violence and hate crimes.

50. The lack of data may also be due to the lack of recognition of a particular minority by authorities, or the fact that a victim does not feel able to report a characteristic as a possible motive for the crime. This is particularly the case with

²⁵ European Union Agency for Fundamental Rights, *Antisemitism: Overview of Data available in the European Union 2005–2015* (Luxembourg, Publications Office, 2016).

²⁶ See European Union Agency for Fundamental Rights, *Hate Crime Recording and Data Collection Practice across the EU* (Luxembourg, Publications Office, 2018).

²⁷ [A/HRC/39/69](#), para. 53.

members of groups of lesbian, gay, bisexual, transgender, intersex and other persons, where a data gap is correlated with negation, which is to say, the assumption that violence and discrimination based on sexual orientation or gender identity do not exist or that, in a given social context, there are no lesbian, gay, bisexual, transgender or gender non-conforming persons. Inevitably, any data gathered in such a context will be unreliable, unsystematic and biased.²⁸

51. With regard to challenges in relation to crimes motivated by intolerance and discrimination on the basis of sex or gender, the different manifestations, causes and consequences of gender-related killing of women and girls and the motivation of perpetrators are still not well understood. Administrative records of homicides often do not capture information on gender-related killing. In many cases, they are not disaggregated by sex and do not include data on the motivation, context or circumstances of the crime, on the relationship between victim and perpetrator, the modus operandi or the connection between the killing of women and their prior experiences of violence. Misclassifications of the murders of women under categories such as “crime of passion”, “accidental death” or “suicide” can lead to underreporting.²⁹

Possible responses

52. Existing United Nations initiatives can support countries in gathering data and information on crimes motivated by intolerance or discrimination. To improve the comparability of criminal justice data on different offences, the International Classification of Crime for Statistical Purposes, which was developed in 2015 under the auspices of the Statistical Commission and the Commission on Crime Prevention and Criminal Justice, contains variables that allow for disaggregation of motives that are gender-based or that are related to hate crime.³⁰

53. The *Manual on Victimization Surveys* produced by UNODC and the Economic Commission for Europe also contains some guidance on how to reflect hate crime in victimization surveys, which are a recognized methodology for measuring the reality of crime in all contexts.

54. Within the European Union and OSCE, efforts have been made to improve reporting of data, such as the establishment of key principles to improve the recording of hate crime by law enforcement authorities by ensuring that law enforcement officials have the skills necessary to identify the potential bias motivation of an offence.³¹

Points for discussion

55. The Commission may wish to consider the following points for further discussion:

(a) How can the collection of comparable and reliable data and knowledge about the current situation of crimes motivated by discrimination and intolerance be promoted at the global, regional and national level?

(b) How can underrecording and underreporting of these offences be addressed?

(c) Do countries require further guidance on methodologies to collect data in this area? How can Member States make more effective use of the International Classification of Crime for Statistical Purposes and the *Manual on Victimization*

²⁸ A/HRC/38/43, para. 62.

²⁹ UNODC/CCPCJ/EG.8/2014/2, para. 24.

³⁰ United Nations Office on Drugs and Crime (UNODC), *International Classification of Crime for Statistical Purposes*, version 1.0 (March 2015), p. 99.

³¹ European Commission, “Guidance note on the practical application of Council framework decision 2008/913/JHA” (November 2018), p. 12.

Surveys to collect and analyse statistics on crime motivated by intolerance or discrimination of any kind?

V. Strengthening responses by the criminal justice system

56. The Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation, calls on Member States to integrate rule of law issues into all levels of education. Ministries of justice and interior, and other institutions within the crime prevention and criminal justice system, may also strengthen their preventive actions on crime motivated by intolerance or discrimination of any kind by working together with the formal, non-formal and informal education sectors to create social environments conducive to dialogue, respect and tolerance. UNODC launched the Education for Justice initiative, which seeks to develop in children values such as tolerance, empathy and ethical behaviour.

57. The police and other criminal justice institutions have a key role to play in preventing hate crime through outreach activities and community policing and measures to ensure diversity in policing,³² as well as by providing support to organizations and initiatives on ending discrimination and violence and promoting women's equality, through efforts to raise awareness and promote the unacceptability of discrimination and violence against women, and by stopping violence and encouraging women to report violence.³³ Recommendations for more effectively preventing gender-related killing of women and girls include enhancing safety and early detection of lethal violence, addressing the risk of firearms and promoting rehabilitation of perpetrators.³⁴

58. The establishment and strengthening of effective, fair, humane and accountable criminal justice systems are prerequisites for addressing crimes motivated by discrimination. Criminal justice systems that are themselves discriminatory will not be efficient in addressing such crimes, as victims will not turn to the system for redress. States also have a duty to address discriminatory practices within the police and prevent ethnic profiling.³⁵

Current challenges

59. At the policy level, in 2018 only 15 European Union member States had dedicated action plans and strategies in place to combat racism and ethnic discrimination.

60. IACHR, in its report cited in paragraph 19 above, emphasized the lack of an efficient response from States, as evidenced by the lack of adoption of effective measures to prevent, investigate, sanction and provide reparations for acts of violence committed against lesbian, gay, bisexual, transgender, intersex and other persons.

61. Several challenges stand in the way of effectively preventing, investigating, prosecuting and punishing gender-based violence and gender-related killing, including crimes motivated by intolerance or discrimination based on sex or gender. Studies from around the globe show that a majority of perpetrators of gender-based

³² See the joint UNODC-Office of the United Nations High Commissioner for Human Rights (OHCHR) *Resource Book on Use of Force and Firearms in Law Enforcement*, which provides guidance on measures to improve diversity and representativity in the police force.

³³ United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), United Nations Population Fund (UNFPA), United Nations Development Programme (UNDP), UNODC, World Health Organization, "Module 3: justice and policing", in *Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines* (2014), pp. 14–15.

³⁴ See [A/70/93](#).

³⁵ See *Preventing Unlawful Profiling Today and in the Future: A Guide*, for police and border management, published by the European Union Agency for Fundamental Rights in 2018.

violence against women face no legal consequences.³⁶ Only a minority of cases of violence against women are ever reported to the police; an even smaller percentage of reported cases result in charges against a perpetrator, and in only a small fraction of those cases is there a conviction.³⁷ Victims and survivors are not provided with assistance, protection or redress.

Possible responses

62. In some countries particular measures have been taken to address crimes against lesbian, gay, bisexual, transgender, intersex and other persons, including specialized investigation teams, trained police liaison officers, multi-stakeholder task teams involving civil society organizations and the adoption of internal policies on diversity in the police. In Mexico, UNODC, in coordination with the civil society group Yaaj, is developing a protocol to understand, prevent and counteract discriminatory violence online against the community of lesbian, gay, bisexual, transgender, queer and other persons.

63. In the European Union, practical guidance tools have been developed by the High-Level Group on combating racism, xenophobia and other forms of intolerance, which has also highlighted the need to explore and discuss the specificities of particular forms of intolerance, such as anti-Gypsyism and Afrophobia. Work on ensuring the effective implementation of the code of conduct on countering illegal hate speech online has shown very positive results.

64. In 2015 UNODC, together with the International Federation of Red Cross and Red Crescent Societies, published *Combating Violence against Migrants: Criminal Justice Measures to Prevent, Investigate, Prosecute and Punish Violence against Migrants, Migrant Workers and Their Families and to Protect Victims*, which includes strategies and good practices in addressing hate crimes against migrants.

65. It has been recommended that respect for the cultural identity, ethnicity, social origin and language of victims of gender-related killing of women be made an integral part of the legal framework and institutional policies and practices.³⁸

66. The Office of the United Nations High Commissioner for Human Rights provides technical assistance to Member States for the development and implementation of national action plans against racial discrimination.

67. Several promising practices can be identified with regard to the criminal justice responses to violence against women that are in line with international standards and norms. In many countries, violence in the family or against a partner is considered a public offence that does not require the complaint of the victim or private prosecution. Some countries have designated forms of violence against women as a priority for the police and prosecution, and established special units within the police and prosecution or specialized courts, some of them focusing on gender-related killings of women.

68. According to FRA, law enforcement in European Union member States should strengthen outreach and cooperation activities with ethnic minority communities, local authorities and non-governmental organizations to more effectively tackle hate crime. Initiatives are under way to improve training of law enforcement and justice

³⁶ See Holly Johnson, Natalia Ollus and Sami Nevala, *Violence against Women: An International Perspective* (New York, Springer, 2008), p. 146; and Emma Fulu and others, *Why Do Some Men Use Violence against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific* (Bangkok, UNDP, UNFPA, UN-Women and United Nations Volunteers, 2013).

³⁷ Johnson, Ollus and Nevala, *Violence Against Women*, p. 146.

³⁸ A/70/93, para. 41(mm).

professionals.³⁹ The guidance note on the implementation of the relevant European Union framework decision contains recommendations in this regard.

69. The Office of the United Nations High Commissioner for Human Rights is currently developing a handbook for the judiciary on combating racism, racial discrimination, xenophobia and related intolerance, and OSCE has developed a guide for prosecutors.

70. Restorative justice can provide an important alternative to address crimes motivated by discrimination.⁴⁰

71. The Inter-American Development Bank reported that it had supported its member countries with technical and financial resources on issues of criminal justice, focusing, inter alia, on preventing violence among at-risk populations, modernizing police forces, strengthening the effectiveness of criminal investigation and adjudication and promoting rehabilitation approaches within penitentiary systems.

72. UNODC has developed a training module entitled *Human Rights and Criminal Justice Responses to Terrorism* and has provided training to criminal justice officials on measures to suppress and prosecute hate speech and incitement to terrorism. In cooperation with the Counter-Terrorism Committee Executive Directorate and the International Association of Prosecutors, UNODC has developed several technical tools to address incitement to terrorism over the Internet.

73. The Commonwealth Secretariat reported that its Countering Violent Extremism Unit had established a successful programme of technical assistance to Commonwealth member countries to assist them in confronting the challenge of violent extremism.

Points for discussion

74. The Commission may wish to consider the following points for further discussion:

(a) How can criminal justice and educational institutions work together to prevent crime motivated by intolerance or discrimination of any kind?

(b) What measures are necessary for police forces and justice systems to play a stronger role in preventing crimes motivated by different forms of discrimination and intolerance?

(c) What strategies are in place to address crimes motivated by intolerance or discrimination against particular groups, particularly those facing intersectional discrimination based on multiple factors? How effective are such strategies in practice? What best practices can be shared?

(d) What can criminal justice professionals do to more effectively investigate, prosecute and punish crimes motivated by intolerance or discrimination?

(e) How can existing measures to address gender-based violence and gender-related killing be aligned and integrated with measures to address hate crime so as to enhance responses to crimes motivated by intolerance or discrimination based on sex or gender?

(f) How can training and other responses improve the response by criminal justice systems to crimes motivated by discrimination and intolerance?

³⁹ OSCE Training against Hate Crimes for Law Enforcement programme for the police; OSCE Prosecutors and Hate Crimes Training programme; standardized training and other capacity development for civil society organizations; a Human Rights Education for Legal Professionals/OSCE Office for Democratic Institutions and Human Rights online training has been developed on hate crimes; a Council of Europe training programme to address transphobic and homophobic crimes.

⁴⁰ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 3rd ed. (Scottsdale, Pennsylvania, Herald Press, 2005).

(g) What are good practices in monitoring incidents of incitement to commit terrorist acts and their glorification over the Internet and other communications technologies, while ensuring that relevant measures comply with human rights obligations?

VI. Supporting, protecting and assisting victims of crimes motivated by intolerance and discrimination

Current challenges

75. Victims of crimes motivated by discrimination or intolerance often do not trust the criminal justice system to address their concerns and experience the justice system as itself discriminatory.

76. Victims of bias-motivated offences are often particularly vulnerable, and therefore reluctant to initiate legal proceedings.⁴¹ Evidence shows that, compared to victims of other types of crime, they often face higher levels of protracted suffering and of negative health outcomes, including post-traumatic stress disorder.⁴² Court mechanisms and procedures are often not accessible or sensitive to the needs of groups facing discrimination or do not ensure the fair and timely processing of cases. Access to justice is often limited, owing to a lack of access to free legal aid or court support and interpretation services, or to potential beneficiaries being unaware of the availability of such services. Obstacles faced by victims in claiming their rights and participating in criminal proceedings often result from a combination of inequalities and biases at legal, institutional, structural, socioeconomic and cultural levels.

77. Victims of violence against women need services that go beyond immediate protection. A key challenge is therefore to effectively coordinate the response of different parts of the public sector, including justice, law enforcement, education, health and social services, as well as informal support systems that are often involved before criminal justice actors. In some countries, the police undertake preventive initiatives. However, failures in the adequate protection of women victims of violence often start with the initial inadequate response by police to an emergency call.⁴³

78. At the other end of the criminal justice process, reparations for gender-related violence and killing of women are often deficient. The imposition of a prison sentence on the perpetrator, sometimes coupled with the payment of damages, is often considered a sufficient remedy, while broader measures to address gender hierarchies, systematic marginalization and structural inequalities are neglected.⁴⁴

Possible responses

79. Promising practices to improve the treatment of victims of crime motivated by intolerance and discrimination and increase their trust in the authorities include measures such as the establishment of toll-free helplines to obtain rapid police assistance, improving the enforcement of protection orders, providing access to shelters, providing free psychosocial and legal assistance, conducting awareness-raising campaigns, and developing user-friendly reporting tools and structures.

80. An adequate legal basis is also crucial for ensuring that victims have access to justice and can obtain assistance, protection and compensation. The possibility for third parties, such as civil society organizations, to initiate proceedings on behalf of

⁴¹ European Commission, “Ensuring justice, protection and support for victims of hate crime and hate speech: 10 key guiding principles” (December 2017), pp. 8–9. See also the report, *Ensuring Justice for Hate Crime Victims: Professional Perspectives*.

⁴² See Stephan-Jakob Kees and others, *Hate Crime Victim Support in Europe: A Practical Guide* (Dresden, Germany, 2016).

⁴³ A/HRC/23/49, para. 50.

⁴⁴ A/HRC/14/22, para. 31.

victims should be explored.⁴⁵ It is important to include victim organizations and representation from marginalized communities when designing responses and programmes.

Points for discussion

81. The Commission may wish to consider the following points for further discussion:

- (a) Are policy and practical measures in place to ensure that victims of crimes motivated by intolerance and discrimination receive support, protection and assistance?
 - (b) What good practices exist for involving victim organizations and community organizations in the development and delivery of victim services?
 - (c) Are there needs for technical assistance to support States in their provision of victim support and protection services?
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⁴⁵ “Ensuring justice, protection and support for victims of hate crime and hate speech”, pp. 8–9. See also the *Ensuring Justice for Hate Crime Victims*, p. 27.