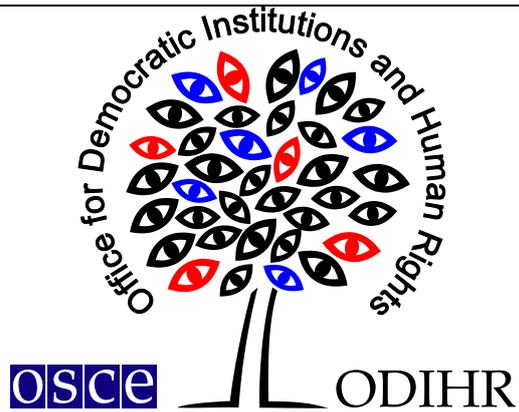


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## **OPINION**

# **ON DRAFT AMENDMENTS TO THE MOLDOVAN CRIMINAL AND CONTRAVENTION CODES RELATING TO BIAS-MOTIVATED OFFENCES**

**based on an unofficial English translation of the draft amendments  
provided by the OSCE Mission to Moldova**

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**Annex: Draft Amendments to the Criminal Code and Contravention Code of the Republic of Moldova**

## **I. INTRODUCTION**

1. *On 3 December 2015, the Deputy Minister of Justice of the Republic of Moldova sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) requesting the OSCE/ODIHR to review draft amendments to a number of provisions of the Criminal Code and Contravention Code of the Republic of Moldova pertaining to certain offences committed with bias motivation (hereinafter “the Draft Amendments”).*
2. *On 8 December 2015, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Amendments with international human rights standards and OSCE commitments.*
3. *On 23 February 2016, the OSCE Mission to Moldova sent to the OSCE/ODIHR an updated version of the Draft Amendments reflecting the latest revisions made by the Ministry of Justice of Moldova.*
4. *OSCE/ODIHR had already issued an Opinion on another set of draft amendments to the Criminal Code of the Republic of Moldova relating to bias-motivated crimes in June 2010 (hereinafter “the 2010 OSCE/ODIHR Opinion”).<sup>1</sup>*
5. *The current Opinion was prepared in response to the above-mentioned request of the Deputy Minister of Justice and reviews the revised Draft Amendments communicated to the OSCE/ODIHR on 23 February 2016. The OSCE/ODIHR conducted this assessment as part of its general mandate of supporting OSCE participating States in legal reform efforts related to the human dimension. In the area of hate crimes-related legislation, this mandate is also explicitly set out in OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination in which OSCE participating States committed to “where appropriate, seek the ODIHR’s assistance in the drafting and review of such legislation [to combat hate crimes]”.<sup>2</sup>*

## **II. SCOPE OF REVIEW**

6. *The scope of this Opinion covers only the Draft Amendments, which are also reviewed in light of other provisions of the Criminal Code, as appropriate and relevant. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework pertaining to the prevention of and protection from bias-motivated crimes and contraventions, and the prosecution of the respective perpetrators in the Republic of Moldova.*
7. *The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on international and regional standards relating to human rights and fundamental freedoms, as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating*

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<sup>1</sup> OSCE/ODIHR Opinion on draft Amendments to the Moldovan Criminal Code Related to Hate Crimes, HCRIM-MOL/156/2010, issued on 7 June 2010, available at <http://www.legislationline.org/documents/id/15840>.

<sup>2</sup> See par 6 of the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination, taken at the Maastricht Ministerial Council Meeting on 2 December 2003, available at <http://www.osce.org/mc/19382>.

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States in this field. Besides, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the Draft Amendments on women and men.<sup>3</sup>

8. This Opinion is based on an unofficial English translation of the Draft Amendments provided by the OSCE Mission to Moldova, which is attached to this document as an Annex. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to this and other related legislation of the Republic of Moldova that the OSCE/ODIHR may make in the future.

### **III. EXECUTIVE SUMMARY**

10. At the outset, the OSCE/ODIHR commends the legal drafters for the initiative to strengthen the legal framework to fight against bias-motivated offences in Moldova. The Draft Amendments broaden the scope of general sentence-enhancing provisions in the Criminal and Contravention Codes, while also providing enhanced penalties under a variety of offences when committed with a bias motivation. This approach is much welcomed and largely corresponds to good practice in this field at the regional and international levels. It is particularly positive that additional protected characteristics have been included beyond the limited “social national, racial or religious” grounds currently mentioned in the Criminal Code. Overall, the current amendments constitute a powerful statement confirming the Moldovan State’s and society’s rejection of and zero tolerance for bias-motivated offences, while recognizing their special nature and particular gravity.
11. At the same time, the wording of certain provisions of the Criminal and Contravention Codes submitted for review appears to be too vague to meet the requirements of legal certainty, foreseeability and specificity for criminal law. The new Article 346 of the Criminal Code, as it stands, has the potential to unduly restrict freedom of expression and should be more narrowly circumscribed in order to prevent potential abuse.
12. In order to further improve compliance of the Draft Amendments with international human rights standards and good practices, the OSCE/ODIHR makes the following key recommendations:
  - A. to amend Article 134<sup>14</sup> of the Criminal Code and Article 46<sup>2</sup> of the Contravention Code as follows:
    - remove the reference to “hatred” and “hostility”; [par 60]
    - supplement both provisions to encompass offences that are motivated by the *real or presumed affiliation or association* with the protected persons or groups, as well as those motivated, *in whole or in part*, by the offender’s bias against the victim due to his or her protected characteristics; [pars 39-40]

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<sup>3</sup> See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

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- remove the open-ended formulation “based on any other criteria, towards persons who can be individualized by any such criteria”, or at a minimum, clarify such wording to ensure that this only covers criteria which are immutable or fundamental to a person’s sense of self and function as a marker of group identity; [pars 43-44]
  - delete the references to “social origin”, “property”, “genetic features”, “opinions of political or any other nature”, “belonging or non-belonging to a national majority, national minority or a group, birth or ancestry”, “health” and “age” as protected characteristics, while providing a broad definition of “disabilities” that would also encompass certain types of diseases, and thus protect persons living with HIV; [pars 46-50]
- B. to consider including a catch-all formulation in Article 77 par 1 (d) to cover not only “motives of prejudice, contempt or hatred” as defined in Article 134<sup>14</sup> but also motives of prejudice, contempt or hatred based on other criteria which are immutable or fundamental to a person’s sense of self and function as a marker of group identity; [pars 54-55]
- C. to clarify in the Draft Amendments the kind of evidence required to establish a bias motive, while specifying that the fact that a victim presents certain protected characteristics, while relevant, should not in itself be sufficient to conclude that a bias-motivated offence was committed; [pars 61-62]
- D. to amend new Article 346 of the Criminal Code as follows:
- include reference to “incitement to violence” while also specifying the violent criminal offences that such public calls for violence refer to; [par 70]
  - remove the words “division” and “territorial” so that incitement to division based on territorial ground is not criminalized; [par 71]
  - delete the formulation “humiliation of national honor and dignity” in order not to criminalize intentional actions and public calls aimed at humiliation of the national honour and dignity that may fall under the protection of the freedom of expression; [pars 66-68]
  - remove the reference to “limitation, direct or indirect, of rights” and to “setting advantages, direct or indirect for persons” and instead provide a clear definition of what is meant by “discrimination” for the purposes of the Criminal Code; [pars 72-73]
  - consider including defences or exceptions, for instance when the statements mentioned in Article 346 were intended as part of a good faith discussion or public debate on an issue of public interest; [par 76]
  - include additional protected characteristics based on which an incitement to hatred, violence and discrimination under this provision may take place, at a minimum “colour”, “sexual orientation or gender identity”, “religion or belief” and “disability”; [pars 78-80] and
  - remove the reference to a minimum sentence of one year and consider introducing a wider range of proposed penalties for this criminal offence, including ones that do not involve imprisonment. [pars 84-86]

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

#### IV. ANALYSIS AND RECOMMENDATIONS

13. Based on OSCE commitments and publications, the OSCE/ODIHR defines bias-motivated crimes (or “hate crimes”) as criminal offences committed with a bias motive.<sup>4</sup> This means that any crime, be it a crime against a person, his/her life, bodily integrity or property, will be a bias-motivated crime if at least one of the motives is the offender’s bias against a group of persons defined by a shared characteristic. The characteristics shared by these groups are often visible, and in any case immutable or fundamental,<sup>5</sup> such as nationality, national or ethnic origin, colour, language, religion or belief, sexual orientation, gender identity, disability or similar markers of a group identity.<sup>6</sup> Such characteristics are generally referred to as “protected characteristics”.<sup>7</sup>
14. “Hate crimes” need to be distinguished from “hate speech” where the underlying action of speaking is not criminal in nature, but is turned into a criminal offence due to its prohibited content.<sup>8</sup> There is no universal definition of “hate speech”, nor is there a clear agreement within the OSCE region on how to deal with this concept. At the same time, “hate speech” is a criminal offence in several OSCE participating States and aims at limiting a person’s freedom of speech in cases where this freedom interferes with the basic rights of others.
15. Bias-motivated crimes are also distinct from general discriminatory behaviour, which is not necessarily criminal in nature (e.g. hiring or failing to hire an employee, issuing an administrative order, etc.) and generally falls within the spheres of civil or administrative law. A bias-motivated crime, on the other hand, only exists if the underlying action is already a criminal act.<sup>9</sup>

##### 1. International and Regional Standards Related to Bias-Motivated Crimes

16. At the international and Council of Europe (hereinafter “CoE”) levels, protection from bias-motivated crimes emanates from general anti-discrimination standards found in the International Covenant on Civil and Political Rights<sup>10</sup> (hereinafter “ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination<sup>11</sup> (hereinafter “CERD”)<sup>12</sup> and the European Convention for the Protection of Human

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<sup>4</sup> See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, Preamble, available at <http://www.osce.org/cio/40695?download=true>. See also OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), available at <http://www.osce.org/odihr/36426?download=true>, page 16. For the purpose of this Opinion, the term “hate crime” is used in brackets to avoid any misunderstandings of the concept, given that “hate” or “hostility” towards the victim would be somewhat limiting; pursuant to standard practice, a “bias motive” would be sufficient to qualify an offence as a bias-motivated crime or “hate crime”.

<sup>5</sup> i.e., an aspect of a person’s identity that is unchangeable or fundamental to a person’s sense of self. See *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>6</sup> *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>7</sup> *ibid.* page 16 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>8</sup> *ibid.* pages 25-26 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>9</sup> *ibid.* page 25 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>10</sup> UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Moldova acceded to the ICCPR on 26 January 1993.

<sup>11</sup> UN International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. The Republic of Moldova acceded to this Convention on 26 January 1993.

<sup>12</sup> While recognizing that the term “race” is a purely social construct that has no basis as a scientific concept, for the purpose of the opinion, the term “race” or “racial” may be used in reference to international instruments using such a term to ensure that all discriminatory actions based on a person’s (perceived or actual) alleged “race”, ancestry, ethnicity, colour or nationality are covered - while generally preferring the use of alternative terms such as “ancestry” or “national or ethnic origin” (see e.g., *op. cit.* footnote 4,

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Rights and Fundamental Freedoms (hereinafter “ECHR”).<sup>13</sup> These instruments prohibit discrimination in conjunction with the enjoyment of other protected rights, including the right to life and security of persons. In relation to bias-motivated crimes, the European Court of Human Rights (hereinafter “ECtHR”) has ruled that “[w]hen investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”.<sup>14</sup>

17. Regarding “hate speech”, Article 20 par 2 of the ICCPR states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Moreover, pursuant to Article 4 (a) of the CERD, “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” shall be considered offences punishable by law.
18. Under the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”),<sup>15</sup> Article 16 (5) requires States Parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.
19. The Republic of Moldova is also a State Party to the CoE Convention on Cybercrime,<sup>16</sup> and a signatory to its Protocol<sup>17</sup> which specifically concerns the criminalization of acts of a racist and xenophobic nature committed through computer systems. Moreover, the CoE’s Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”),<sup>18</sup> which the Republic of Moldova is considering ratifying in the future,<sup>19</sup> also requires State Parties to take the necessary legislative and other measures to prevent all forms of violence covered by the scope of the Convention, including gender-based violence against women (i.e., violence

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pages 41-42 (2009 ODIHR Practical Guide on Hate Crime Laws); see also the footnote under the first paragraph of Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”), *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, adopted on 13 December 2002, available at [https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N7/Recommendation\\_7\\_en.asp#P127\\_11468](https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468), where it is stated that “[s]ince all human beings belong to the same species, ECRI rejects theories based on the existence of different ‘races’. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to ‘another race’ are not excluded from the protection provided for by the legislation”. Except when part of a citation from a legal instrument or case law, the word “race” or “racial” is placed in quotation marks in this Opinion to indicate that underlying theories based on the alleged existence of different “races” are not accepted.

<sup>13</sup> The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. Moldova ratified the ECHR on 12 September 1997 and signed, on 4 November 2000, the Protocol No. 12 to the ECHR which extends the prohibition of discrimination in relation to any right set by law but has not yet ratified it.

<sup>14</sup> See the case of *Identoba and Others v. Georgia*, ECtHR judgment of 12 May 2015 (Application no. 73235/12), par 67, available at [http://hudoc.echr.coe.int/eng?i=001-154400#{"itemid":\["001-154400"\]}](http://hudoc.echr.coe.int/eng?i=001-154400#{).

<sup>15</sup> UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by General Assembly resolution 61/106 on 13 December 2006. Moldova ratified the CRPD on 21 September 2010.

<sup>16</sup> The CoE’s Convention on Cybercrime (CETS No. 185) was ratified by Moldova on 12 May 2009 and entered into force in the country on 1 September 2009.

<sup>17</sup> The Protocol to the CoE’s Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No. 189) was signed by Moldova on 25 April 2003, and not yet ratified.

<sup>18</sup> The CoE’s Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210 (hereinafter “the Istanbul Convention”) entered into force on 1 August 2014.

<sup>19</sup> See par 2 of the OSCE/ODIHR Opinion on Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Moldova, GEND-MOL/271/2015, issued on 9 July 2015, available at <http://www.legislationline.org/documents/id/19858>.

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- directed against a woman because she is a woman or that affects women disproportionately).<sup>20</sup>
20. The CoE's Commission on Intolerance and Racism (hereinafter "ECRI") has likewise called upon Member States to ensure that national laws, including criminal laws, specifically counter racism, xenophobia, anti-Semitism and intolerance. CoE Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity also recommends a series of measures to prevent and fight against "hate crimes" and "hate speech" on grounds of sexual orientation or gender identity.<sup>21</sup>
  21. Numerous OSCE commitments also concern OSCE participating States' fight against discrimination and "hate crimes",<sup>22</sup> notably Ministerial Council Decision No. 9/09 on Combating Hate Crimes which calls upon OSCE participating States to "[e]nact, where appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes".<sup>23</sup> The ensuing recommendations will also make reference, as appropriate, to the OSCE/ODIHR Practical Guide on Hate Crime Laws (2009)<sup>24</sup> which, although not binding, may serve as a useful resource in the context of legislative reform pertaining to "hate crimes" and related issues.
  22. And finally, though not formally binding on Moldova, the European Union Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law<sup>25</sup> may be relevant in this context, as may be the 2012 EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime.<sup>26</sup> Notably, the latter Directive recognizes "hate crime victims" as a specific category of victims deserving special treatment.<sup>27</sup>

## **2. General Comments**

23. The Draft Amendments address bias-motivated crimes and contraventions, certain forms of "hate speech" (Article 346 of the Criminal Code and Articles 69 (Insults) and

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<sup>20</sup> See Article 3 (d) of the Istanbul Convention.

<sup>21</sup> CoE's Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2010\)5&Language=lanEnglish&Site=COE&BackColorInternet=](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)5&Language=lanEnglish&Site=COE&BackColorInternet=)

<sup>22</sup> See e.g., OSCE Ministerial Council Decision No. 4/03 of 2 December 2003, par 8; OSCE Permanent Council Decision No. 621 on Tolerance and the Fight against Discrimination, Xenophobia and Discrimination of 29 July 2004, par 1; and Annex to Decision No. 3/03 on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, par 9, available at <http://www.osce.org/odihr/17554?download=true>, which recommends the "[i]mposition of heavier sentences for racially motivated crimes by both private individuals and public officials".

<sup>23</sup> See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, 2 December 2009, par 9, available at <http://www.osce.org/cio/40695?download=true>.

<sup>24</sup> *Op. cit.* footnote 4 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>25</sup> Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913>.

<sup>26</sup> EU Directive 2012/29/EU adopted on 25 October 2012, the provisions of which EU Member States had to incorporate into their national laws by 16 November 2015, Article 22 par 3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>.

<sup>27</sup> The Decision and the Directive are not listed in the Annexes to the Association Agreement between the EU and the Republic Moldova setting out the instruments to be implemented by Moldova within a specific timeframe; however, the Republic of Moldova has generally committed to progressively approximate its legislation in the relevant sectors with that of the EU and to implement it effectively. This would *a fortiori* also include the above Decision and Directive (see the Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, 2014/492/EU, available at [http://eeas.europa.eu/moldova/pdf/eur-md\\_aa-dcfta\\_en.pdf](http://eeas.europa.eu/moldova/pdf/eur-md_aa-dcfta_en.pdf)).

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- 70 (Defamation) of the Contravention Code) as well as some forms of criminal discriminatory behaviour (Article 346 of the Criminal Code).
24. In the current version of the Criminal Code, five articles<sup>28</sup> already include penalty-enhancing provisions when the criminal offence is “committed from motives of social, national, racial, or religious hatred”. Additionally, the current version of Article 77 par 1 (d) of the Criminal Code states that when sentencing perpetrators, the courts shall take into account, among others, “the commission of a crime due to social, national, racial, or religious hatred” as an aggravating circumstance. The Contravention Code, on the other hand, currently does not specifically address bias-motivated offences.
25. The Draft Amendments mainly aim to:
- replace the general sentence-enhancing provision of the Criminal Code currently referring to “social, national, racial or religious hatred” (Article 77 par 1 (d)) with a broader formulation covering more generally “prejudice, contempt or hatred” (as defined in a new Article 134<sup>14</sup> and referring to a wider range of protected characteristics, see Section 3 *infra*), to be considered by a court when deliberating on sentences for the commission of *any* criminal offence;
  - replace, in the five articles of the Criminal Code mentioned in par 24, the existing penalty-enhancing provision referring to “social, national, racial or religious hatred” with the broader wording “prejudice, contempt or hatred”; and
  - add penalty-enhancing provisions based on “prejudice, contempt or hatred” to 26 additional criminal offences.<sup>29</sup>
26. Similarly, the Draft Amendments intend to supplement the general sentence-enhancing provision of the Contravention Code (Article 43 par 1) to also include “motives of prejudice, contempt or hatred”, to be considered by a court when sentencing a perpetrator for *any* contravention. These new terms are then defined under a new Article 46<sup>2</sup> of the Contravention Code in a manner similar to the definition provided in the new Article 134<sup>14</sup> of the Criminal Code. Moreover, the aggravating circumstance of “prejudice, contempt or hatred” leading to the imposition of higher penalties is introduced for six contraventions.<sup>30</sup>
27. Overall, the Draft Amendments thereby broaden the scope of the existing general sentence-enhancing provisions<sup>31</sup> in the Criminal and Contravention Codes, while also

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<sup>28</sup> i.e., the following provisions of the Criminal Code of the Republic of Moldova: Deliberate Murder (Article 145), Intentional Infliction of Severe and Less Severe Bodily Injury or Damage to Health (Articles 151 and 152), Deliberate Destruction or Damage to Goods (Article 197) and Profanation of Graves (Article 222).

<sup>29</sup> i.e., the following provisions of the Criminal Code of the Republic of Moldova: Article 150 (Incitement to Suicide), Article 155 (Threatening Murder or Severe Bodily Injury or Damage to Health), Article 158 (Trafficking of Human Organs, Tissues and Cells), Article 160 (Illegal Performance of Surgical Sterilization), Article 162 (Withholding Help from a Sick Person), Article 163 (Abandonment in Danger), Article 164 (Kidnapping), Article 165 (Trafficking in Human Beings), Article 166 (Illegal Deprivation of Liberty), Article 166<sup>1</sup> (Torture, Inhuman or Degrading Treatment), Article 167 (Slavery and Conditions Similar to Slavery), Article 168 (Forced Labour), Article 171 (Rape), Article 172 (Violent Actions of a Sexual Character), Article 173 (Sexual Harassment), Article 184 (Violation of the Right to Freedom of Assembly), Article 187 (Robbery), Article 188 (Burglary), Article 189 (Blackmail), Article 193 (Trespassing), Article 206 (Trafficking in Children), Article 211 (Infection with a Venereal Disease), Article 212 (Infection with AIDS), Article 217<sup>6</sup> (Deliberate Illegal Introduction into the Body of Another Person, Against His/Her Will, of Narcotic or Psychotropic Substances or Analogous Acts Thereof), Article 282 (Establishment of an Illegal Paramilitary Unit or Participation Therein) and Article 287 (Hooliganism).

<sup>30</sup> i.e., the following provisions of the Contravention Code of the Republic of Moldova: Article 69 (Insult), Article 70 (Defamation), Article 75 (Disclosing Confidential Information about a Medical Examination for Detecting Infection with the Human Immunodeficiency Virus (HIV) that Causes AIDS), Article 78 (Deliberate Slight Bodily Injury), Article 104 (Deliberate Destruction or Damage of Someone else’s Goods) and Article 354 (Disorderly Conduct), the latter being defined in Article 354 as “*accosting an individual in an offensive way in a public place or other similar actions that violate moral norms or that disturb public order or the tranquillity of an individual*”.

<sup>31</sup> New Article 77 par 1 (d) of the Criminal Code read together with new Article 134<sup>14</sup> of the Criminal Code and Article 43 of the Contravention Code read together with Article 46<sup>2</sup> of the Contravention Code.

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adding penalty-enhancing provisions to various offences where these are committed with a bias motivation. This step is much welcome, and largely corresponds to what is considered as a good practice in this field at the regional and international levels.<sup>32</sup> In particular, this approach recognizes the special nature and particular gravity of bias-motivated crimes.<sup>33</sup> It likewise takes into account the ensuing need to treat such offences differently from ordinary crimes given their greater harm towards victims, the impact on and message that they send to individual communities and the society as a whole, and the potentially serious security and public order problems that they may cause.<sup>34</sup> Such crimes also have the potential to exacerbate existing tensions between societal groups, and may play a part in interethnic or social unrest.<sup>35</sup> For this reason, it is essential to address them in a way that demonstrates society's rejection of and zero tolerance for such offences. Additionally, this approach may help create a framework within which cases can be more effectively identified and data collected.<sup>36</sup>

28. A number of the 37 offences to which the Draft Amendments add penalty-enhancing aggravated circumstances correspond to the most serious or frequent forms of crimes habitually committed against certain persons or groups by reason of their protected characteristic(s). These generally include e.g., homicide, physical assaults, rape and sexual assault, serious and less serious bodily harm, threats to commit such acts, harassment or stalking, arson, robbery/theft/burglary, damage to or destruction of goods, property and places of worship, vandalism and the desecration of graves.<sup>37</sup> Including penalty-enhancing provisions for these types of offences which are the most common forms of "hate crimes" is a recognized good practice.
29. Such crimes typically send a message to the victims that they are not welcome; they further have the effect of denying the victims their rights to full participation in

<sup>32</sup> See e.g., pars 28-31 of the OSCE/ODIHR Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland, HCRIM- POL/277/2015, issued on 3 December 2015, available at <http://www.legislationline.org/documents/id/19893>. See also UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, 19 August 2004, par 22, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en); and *General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, 2005, par 4(a), available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7503&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7503&Lang=en). See also UN High Commissioner for Human Rights, *2015 Update of Report A/HRC/19/41 (on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity)*, A/HRC/29/23, 4 May 2015, par 78 (a), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>; ECRI, *General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance*, adopted by ECRI on 4 October 1996, Section A on "Law, Law Enforcement and Judicial remedies", available at [https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N1/Recommendation\\_1\\_en.asp](https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N1/Recommendation_1_en.asp); European Union Agency for Fundamental Rights (FRA), *Report on Making hate crime visible in the European Union: acknowledging victims' rights*, 2012 (hereinafter "2012 EU FRA Report on Making Hate Crime Visible"), page 11, available at [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf); and *EU FRA Paper on Equal protection for all victims of hate crime - The case of people with disabilities* (March 2015), page 14, available at [http://fra.europa.eu/sites/default/files/fra-2015-focus-03-hate-crime-disability\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/fra-2015-focus-03-hate-crime-disability_en_0.pdf). See also the cases of *O'Keefe v. Ireland*, ECtHR judgment of 28 January 2014 [GC] (Application no. 35810/09), par 148, available at [http://hudoc.echr.coe.int/eng?i=001-140235#{"itemid":\["001-140235"\]}](http://hudoc.echr.coe.int/eng?i=001-140235#{); *T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014 (Application No 26608/11), pars 38-39, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{"itemid":\["001-140240"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{), where the ECtHR referred to the obligation "to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals"; and *Angelova and Iliev v. Bulgaria*, ECtHR judgment of 26 July 2007 (Application no. 55523/00), par 104, available at [http://hudoc.echr.coe.int/eng?i=001-81906#{"itemid":\["001-81906"\]}](http://hudoc.echr.coe.int/eng?i=001-81906#{), where the ECtHR specifically mentioned several possible means to "attain the desired result of punishing perpetrators who have racist motives", such as the separate criminalization of "racially" motivated murders or serious bodily injuries, explicit penalty-enhancing provisions relating to such offences, as well as the possibility in domestic legislation to impose a more severe sentence depending on, *inter alia*, the motive of the offender.

<sup>33</sup> *Op. cit.* footnote 4, pages 21-23 and 33-37 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>34</sup> *Op. cit.* footnote 32, par 117 (2007 ECtHR judgment in the case of *Angelova and Iliev v. Bulgaria*), where the ECtHR found that Bulgaria had failed to "make the required distinction from other, non-racially motivated offences, which constitutes unjustified treatment irreconcilable with [the anti-discrimination principles inherent in] Article 14 of the Convention". See also, *op. cit.* footnote 4, pages 19-21 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>35</sup> *ibid.* pages 17 and 19-23 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>36</sup> *ibid.* pages 22 and 35-36 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>37</sup> See e.g., *op. cit.* footnote 32, par 31 (2015 OSCE/ODIHR Opinion on Bias-Motivated Crimes in Poland).

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- society.<sup>38</sup> As such, it is therefore positive that these offences are specifically addressed in the Draft Amendments. Certain other offences, such as forced sterilization (Article 160 of the Criminal Code), specifically affect certain persons or groups such as women with disabilities, women in rural areas and Roma women in Moldova,<sup>39</sup> and thus also deserve special mention in the Moldovan criminal legislation.
30. At the same time, adding enhanced penalties to such a large number of different criminal offences/contraventions for cases where the commission of offences is motivated by “prejudice, contempt or hatred” (37 in total) may undermine the very concept of “bias-motivated crime” as a message crime and water down society’s condemnation of these offences.<sup>40</sup> For this reason, it may be preferable to include penalty-enhancing provisions only for the most frequent forms of “hate crimes”, and to address other offences motivated by bias using the general sentence-enhancing provision.
  31. To gain a proper oversight over the most frequent bias-motivated offences in Moldova, the legal drafters are encouraged to research what kinds of offences have been or are regularly motivated by bias in the Moldovan context, if they have not done so already. The results of such research may already help limit the number of offences for which penalty-enhancement is provided in case they are committed with a bias motive.
  32. Certain of these offences (e.g., incitement to suicide, trafficking in human beings, slavery, forced labour, blackmail, infection with a venereal disease or with HIV, deliberate intoxication with narcotics or other similar substances) will *prima facie* less frequently be committed with a bias motive. In that respect, it must be noted that “crimes of opportunity” (i.e., where the perpetrator selects certain victims based on the belief that they are easy or convenient targets that would offer a high profit with little effort and/or limited risks of being caught or convicted), would not necessarily mean that an offence is “bias-motivated” (see comments in Section 4 *infra* regarding the definition of ‘bias motive’ and evidence).<sup>41</sup> Moreover, and perhaps for these reasons, such offences are not commonly found as possible bias-motivated offences in criminal legislation of OSCE participating States.
  33. Regarding specifically the crimes of trafficking in human beings (Article 165) and in children (Article 206), it is worth noting that the “vulnerability” of the victim already constitutes one of the possible constitutive elements of the offence. Consequently, if these particular “crimes of opportunity” are considered to be bias-motivated crimes due to the perpetrators’ perception of the victim’s alleged vulnerabilities, then this would mean that the bias motive (vulnerability of the victims) would potentially be both a constitutive element of the criminal offence as well as an aggravating circumstance, which goes against international standards.<sup>42</sup>

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<sup>38</sup> See *op. cit.* footnote 4, page 17 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>39</sup> See e.g., Concluding Observations of the UN Committee on the Elimination of Discrimination against Women on the Republic of Moldova (29 October 2013), pars 31-32, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MDA/CO/4-5&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MDA/CO/4-5&Lang=En). See also par 25 of the Report of the Special Rapporteur on extreme poverty and human rights, Mission to the Republic of Moldova (8 to 14 September 2013), A/HRC/26/28/Add.2, 22 May 2014, available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A\\_HRC\\_26\\_28\\_Add\\_2\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_28_Add_2_ENG.doc).

<sup>40</sup> *ibid.* page 37 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>41</sup> See *op. cit.* footnote 32, page 19 (2012 EU FRA Report on Making Hate Crime Visible). On the dichotomy between “crimes of opportunity” and bias-motivated crimes, see also e.g., Alex Ginsberg, *Hate Is Enough: How New York’s Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 Brook. L. Rev. (2011), available at: <http://brooklynworks.brooklaw.edu/blr/vol76/iss4/7>.

<sup>42</sup> See e.g., the International Criminal Tribunal for the Former Yugoslavia (ICTY) judgment *Prosecutor v. Radislav Krstic*, case no. IT-98-33-T, 02 August 2001, par 707, available at <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>. See also Article 46 of the Istanbul Convention.

34. Additionally, having too many potential bias-motivated offences may also pose a challenge in terms of implementation, including data collection by the police, prosecution services and the judiciary. In this context, it is noted that the latest OSCE/ODIHR Hate Crime Report (2014) on Moldova<sup>43</sup> mentions that only one “hate crime” was recorded by the police and then prosecuted in 2014. While this could be an indicator for a possible lack of effective investigation and prosecution of bias-motivated crimes in Moldova, it could also mean that data collection in this field poses a particular challenge. Having a broader list of potential bias-motivated offences as contemplated in the Draft Amendments could well exacerbate this situation.
35. In light of the above, and bearing in mind that such a broad coverage is not *per se* contrary to international human rights standards, **the legal drafters should nevertheless assess whether the inclusion of penalty-enhancing provisions is really necessary and justified for all of the above-mentioned offences.**
36. Finally, it is assumed that Article 197 of the Criminal Code pertaining to the “Deliberate Destruction or Damaging of Goods” applies not only to “goods” understood as moveable property, but also to *immoveable* property, including for instances houses, apartments or places of worships. **If not the case, the scope of Article 197 should be broadened to cover bias-motivated damages or destruction to such properties as well.**

### **3. Protected Persons or Groups**

37. The current version of the Moldovan Criminal Code refers to a limited number of protected characteristics (social, national, racial, or religious grounds). The proposed new Article 134<sup>14</sup> of the Criminal Code (and Article 46<sup>2</sup> of the Contravention Code) would introduce a number of new protected characteristics (particularly colour, ethnic or national origin, citizenship, gender, language, belief, disability, health, sexual orientation or gender identity). These changes are a positive development and welcome response to recent recommendations to Moldova by international and regional human rights monitoring bodies.<sup>44</sup>
38. In particular, the new provisions distinguish between ‘ethnic origin’, ‘national origin’ and ‘citizenship’ (i.e., the legal bond between a person which does not necessarily indicate the person’s ethnic origin) and are thus in line with the recommendations made by OSCE/ODIHR in 2010.<sup>45</sup> The Draft Amendments also cover offences committed due to “real or perceived” protected characteristics of the victim. This is a commendable addition that was also addressed in the 2010 OSCE/ODIHR Opinion and is in line with good practices.<sup>46</sup>

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<sup>43</sup> Available at <http://hatecrime.osce.org/moldova>.

<sup>44</sup> See e.g. ECRI, *Report on the Republic of Moldova (4th monitoring cycle)*, adopted on 20 June 2013, pars 31-32, available at <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Moldova/MDA-CbC-IV-2013-038-ENG.pdf>; Concluding Observations of the UN Committee on the Elimination of Racial Discrimination on the Republic of Moldova (6 April 2011), par 14, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/MDA/CO/8-9&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/MDA/CO/8-9&Lang=En); and Concluding Observations of the UN Committee against Torture on the Republic of Moldova (29 March 2010), par 27, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/MDA/CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/MDA/CO/2&Lang=En). See also in particular Recommendations 73.26, 75.32 and 75.33 of the Report of the Working Group on the Universal Periodic Review (UPR) for the Republic of Moldova, A/HRC/19/18, 14 December 2011, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/173/94/PDF/G1117394.pdf?OpenElement>.

<sup>45</sup> See *op. cit.* footnote 1, par 47 (2010 OSCE/ODIHR Opinion). See also Article 2 (a) of the Council of Europe’s European Convention on Nationality, ETS No. 166, signed in Strasbourg on 6 November 2007, ratified by the Republic of Moldova on 30 November 1999.

<sup>46</sup> See *op. cit.* footnote 4, pages 49-51 (2009 ODIHR Practical Guide on Hate Crime Laws). See e.g., Articles 132-76 and 132-77 of the French Penal Code which refer to victim’s *actual* or *supposed* membership or non-membership of a given protected group; and Section

### *3.1. Association, Affiliation and Mixed Motives*

39. The new Article 134<sup>14</sup> of the Criminal Code (and Article 46<sup>2</sup> of the Contravention Code) also refers to “persons [...] who offer support” to a protected person or group. While this is generally positive, this fails to encompass **offences that are motivated by the real or presumed affiliation or association with such a person or group (e.g., personal relationship, friendship or marriage).**<sup>47</sup> **It is recommended to also cover such cases in the above provisions.**
40. Overall, it is likewise important to note that in order for a crime to become a “hate crime”, the bias motivation does not need to be the only motive for the criminal offence.<sup>48</sup> Crimes in general, including bias-motivated crimes, are often committed out of a variety of reasons (mixed motives). In order to give full effect to “hate crimes” legislation and taking into account the complexity of criminal motives, **it is recommended to clarify that the enhanced penalty (or enhanced sentence) will apply when the said offence is motivated, in whole or in part, by the offender’s bias against the victim due to his or her protected characteristics.**

### *3.2. List of Protected Characteristics*

41. The list of protected characteristics proposed by the Draft Amendments for inclusion in both articles is quite extensive, and at times very general. This may make it difficult to effectively implement the law.<sup>49</sup> Moreover, a list that is too long or too vague can undermine the concept of bias-motivated crime as a message crime, water down society’s condemnation of these offences and provide opportunities for abuse or misuse.<sup>50</sup>
42. First, the new Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code refer to motives “based on any other criteria, towards persons who can be individualized by any such criteria”. Unless this is an issue of translation, the reference to the individualization of the victim runs counter to the very concept of bias-motivated crime, which involves prejudice towards a group which the victim represents or is associated with, irrespective of the individual identity of the victim.
43. Such wording also creates a potentially open-ended list of protected characteristics. In this regard, the ECtHR has recognized that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague” and that “progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States”. The ECtHR has also stated that “one of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists”.<sup>51</sup> At the same time, the proposed formulation could pose problems with respect to the principles enshrined in Article 7 of the ECHR, in particular that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine*

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216 of the Criminal Code of Hungary which addresses violence against members of certain protected groups, whether they are part of such groups “in fact or under presumption”; see also several criminal provisions of the Criminal Code of the Czech Republic including penalty-enhancing provisions for bias motivation based on “real or perceived” protected characteristics (see <http://www.legislationline.org/documents/action/popup/id/15725>).

<sup>47</sup> *ibid.* footnote 4, pages 49-50 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>48</sup> See *op. cit.* footnote 4, pages 55-56 (2009 ODIHR Practical Guide on Hate Crime Laws). See also the case of *Balázs v. Hungary*, ECtHR judgment of 20 October 2015 (Application no. 15529/12), par 70, available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-158033\"\]}](http://hudoc.echr.coe.int/eng#{\).

<sup>49</sup> *ibid.* footnote 4, pages 39-40 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>50</sup> *ibid.* footnote 4, page 45 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>51</sup> See e.g., the cases of *Del Rio Prada v. Spain*, ECtHR judgment of 21 October 2013 [GC] (Application no. 42750/09), pars 91-93, available at [http://hudoc.echr.coe.int/eng?i=001-127697#{\"itemid\":\[\"001-127697\"\]}](http://hudoc.echr.coe.int/eng?i=001-127697#{\); and *Perinçek v. Switzerland*, ECtHR judgment of 15 October 2015 [GC] (Application no. 27510/08), par 134, available at <http://hudoc.echr.coe.int/eng?i=001-158235>.

- lege*).<sup>52</sup> This principle implies that criminal offences and the relevant penalties must be clearly defined by law, meaning that an individual, either by himself/herself or with the assistance of a legal counsel, should know from the wording of the relevant provision which acts and omissions will make him/her criminally liable and what penalty he or she will face as a consequence.<sup>53</sup>
44. While certain countries do include open-ended lists of protected characteristics in their penalty-enhancing provisions,<sup>54</sup> this runs the risk of imposing criminal sanctions which may, in serious cases, extend to imprisonment based on quite vague legal provisions. This may be permissible in anti-discrimination legislation, which often includes open-ended lists of grounds, but such legislation is usually of a private/civil or administrative nature, and will not lead to criminal liability and sanctions. The wording of Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code would thus appear to be too vague to meet the requirements of legal certainty, foreseeability and specificity of criminal law<sup>55</sup> and may lead to a variety of interpretations by state authorities. **It is thus recommended to delete the open-ended formulation “based on any other criteria, towards persons who can be individualized by any such criteria” from Article 134<sup>14</sup> of the Criminal Code (and Article 46<sup>2</sup> of the Contravention Code). If not, at a minimum, the drafters should clarify such wording to limit the above criteria to those which are immutable or fundamental to a person’s sense of self and function as markers of group identity (see par 13 *supra*).**
45. Moreover, the new wording of Article 134<sup>14</sup> of the Criminal Code (and of Article 46<sup>2</sup> of the Contravention Code) contains numerous characteristics that are mentioned in international and European anti-discrimination instruments, such as “genetic features”, “social origin”, “property”, “political or other opinions”, “birth or ancestry” and “age”.<sup>56</sup> As stated in the previous paragraph, such a broad approach may be justifiable in anti-discrimination legislation leading to possible administrative or civil liability. At the same time, it is doubtful whether these terms are specific for criminal legislation, which given the potentially severe nature of criminal penalties needs to be as precise and specific as possible.
46. Therefore, the OSCE/ODIHR would first like to take this opportunity to reiterate the recommendation made in its 2010 OSCE/ODIHR Opinion, which proposed deleting the protected characteristic referring to social status for being unclear and potentially subject to arbitrary interpretation.<sup>57</sup>
47. Second, “opinions of political or any other nature” are generally not considered to be immutable or core characteristics. They may change over time and do not necessarily represent strong markers of group identity or may not be so fundamental to a person’s sense of self compared to other potentially mutable characteristics, such as religion.<sup>58</sup> While there are arguments for including “political opinion” as a protected

<sup>52</sup> See e.g., the case of *Kokkinakis v. Greece*, ECtHR judgment of 25 May 1993 (Application no. 14307/88), par 52, available at [http://hudoc.echr.coe.int/eng?i=001-57827#{"itemid":\["001-57827"\]}](http://hudoc.echr.coe.int/eng?i=001-57827#{).

<sup>53</sup> See e.g., the case of *Rohlena v. the Czech Republic*, ECtHR judgment of 27 January 2015 [GC] (Application no. 59552), pars 78-79, available at [http://hudoc.echr.coe.int/eng?i=001-119066#{"itemid":\["001-119066"\]}](http://hudoc.echr.coe.int/eng?i=001-119066#{).

<sup>54</sup> See e.g., Article 144(4) and 319 of the Criminal Code of the former Yugoslav Republic of Macedonia; Section 216 of the Criminal Code of Hungary which refers to “a certain group of population – especially due to a disability, sexual identity or sexual orientation”; and Article 116 of the Criminal Code of Slovenia referring to murder “because of violation of equality”.

<sup>55</sup> See e.g., *op. cit.* footnote 4, page 46 (2009 ODIHR Practical Guide on Hate Crime Laws). See also *op. cit.* footnote 1, par 24 (2010 OSCE/ODIHR Opinion).

<sup>56</sup> Such as Article 26 of the ICCPR, Article 14 of the ECHR and Article 21 of the Charter of Fundamental Rights of the European Union.

<sup>57</sup> See *op. cit.* footnote 1, Recommendation B and par 46 (2010 OSCE/ODIHR Opinion).

<sup>58</sup> See e.g., *op. cit.* footnote 32, par 44 (2015 OSCE/ODIHR Opinion on Bias-Motivated Crimes in Poland).

characteristic,<sup>59</sup> a bias motive based on this ground may be extremely difficult to prove in practice. Moreover, a “person’s political or other opinion” may not be evident unless the victim is somehow known to the perpetrator. It is doubtful whether the said group in general is typically be perceived as an oppressed group in the current or historical Moldovan context. Additionally, the term itself is not very precise, and may be subjected to various interpretations. Consequently, **it is recommended to remove the reference to “opinions of political or any other nature” as being too vague.** However, the investigating authorities should still investigate into possible political motives if they have plausible information which was sufficient to alert them about a possible bias motive;<sup>60</sup> this could then still potentially lead to the imposition of an enhanced sentence (see par 54 *infra*).

48. Similar comments would apply to the term “**health**”, which is generally not immutable. However, if a disease is incurable or provokes certain physical, mental or psychological impairments, this could be considered to fall under “disability” if impairments suffered as a consequence, combined with attitudinal and environmental barriers, would hinder a person’s full and effective participation in society on an equal basis with others.<sup>61</sup> As regards specifically persons living with HIV (asymptomatic or symptomatic), it is worth mentioning that State parties to the CRPD are required to ensure that national legislation complies with an understanding of disability that would protect persons living with HIV against stigma and discrimination.<sup>62</sup> Certain countries have specifically referred to people living with HIV or AIDS in the definition of disability in their “hate crime” legislation.<sup>63</sup> It is unclear what definition of “disability” is being used for the purpose of the Criminal and Contravention Codes; in any case, **the legal drafters should ensure that it is broad enough to encompass the above-mentioned situations.**
49. Regarding “**age**”, it is noted that some countries do include such a protected characteristic in their criminal legislation.<sup>64</sup> That being said, it is still questionable whether age really constitutes a strong marker of group identity and an aspect of a person’s identity that is fundamental to a person’s sense of self (see par 13 *supra*).<sup>65</sup> Similar comments would apply to protected characteristics such as “**genetic features**” or “**property**”. Moreover, some of these latter characteristics are not necessarily visible to others, which may in practice again raise the question of whether the respective perpetrator was even aware of the protected characteristic.<sup>66</sup> This remark could likewise

<sup>59</sup> For instance, the ECtHR has considered that there exists a duty for state authorities “to take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a *dissenting political opinion* may have played a role in [violent incidents]” while recognizing that “proving political motivation will often be extremely difficult in practice” and that the “State’s obligation to investigate possible political overtones to a violent act is an obligation to use best endeavours and not absolute” (see the case of *Virabyan v. Armenia*, ECtHR judgment of 2 October 2012 (Application no. 40094/05), pars 218-219, available at <http://hudoc.echr.coe.int/eng?i=001-113302>).

<sup>60</sup> *ibid.* pars 223-224 (2012 ECtHR judgment in the case of *Virabyan v. Armenia*).

<sup>61</sup> See the Preamble of the CRPD which recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. See also United Nations Enable, official website of the Secretariat for the Convention on the Rights of Persons with Disabilities (SCRPD) in the Division for Social Policy and Development (DSPD) of the Department of Economic and Social Affairs (DESA) at the United Nations Secretariat regarding the meaning of the terms “disability” and “persons with disabilities” as defined in the CRPD, available at <http://www.un.org/disabilities/default.asp?id=151>. See also, for reference, pars 41-42 of the Judgment of the Court of Justice of the European Union in the joined cases *HK Danmark v. Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark v. Dansk Arbejdsgiverforening* (C-337/11), 11 April 2013, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d59dbffed4f8ce4972baf9a54d13176b05.e34KaxiLc3eQc40LaXqMbn4OcheSe0?text=&docid=136161&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=327223>.

<sup>62</sup> See e.g., the UN OHCHR, World Health Organization and UNAIDS Policy Brief on Disability and HIV (April 2009), page 1, available at [http://www.who.int/disabilities/jc1632\\_policy\\_brief\\_disability\\_en.pdf](http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf).

<sup>63</sup> See e.g., the U.K. Guidance on Prosecuting Cases of Disability Hate Crime of the Crown Prosecution Service, available at [http://www.cps.gov.uk/legal/d\\_to\\_g/disability\\_hate\\_crime/#a09](http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/#a09).

<sup>64</sup> See e.g., *op. cit.* footnote 4, pages 43-44 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>65</sup> *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>66</sup> *ibid.* pages 39 and 56 (2009 ODIHR Practical Guide on Hate Crime Laws).

be made regarding **“birth or ancestry”** as a protected characteristic. Further, it is not clear whether these groups are perceived as an oppressed group in the current or historical Moldovan context, and would hence require special mention in the Criminal Code.<sup>67</sup> Some of these grounds, such as “property”, “group” or “birth”, are also worded in a vague manner. Consequently, **the drafters should reconsider including these protected characteristics in Article 134<sup>14</sup> of the Criminal Code (and Article 46<sup>2</sup> of the Contravention Code).**

50. Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code also refer to the fact of **“belonging or non-belonging to a national majority [or a] national minority”**. While “hate crimes” may occur against majority communities as well as against members of minority communities,<sup>68</sup> both cases would already appear to fall under other, broader terms, such as e.g. “ethnic origin”. Hence, **such wording would not appear to be necessary; the drafters should thus consider deleting it.**
51. As regards “gender”, this falls among the frequently protected characteristics in “hate crime” legislation of OSCE participating States.<sup>69</sup> Including gender as a protected characteristic demonstrates Moldova’s willingness to punish offences motivated by gender bias more severely. This is overall in line with the Istanbul Convention which aims at preventing and combating all acts of violence directed against a woman because she is a woman or that affects women disproportionately. Moreover, it is generally acknowledged that recognizing gender-motivated crimes as a type of “hate crime” re-orientates the focus on the offender’s “hate” motivation while rejecting a culture of victim-blame, particularly in sexual violence cases.<sup>70</sup>
52. Although beyond the scope of this Opinion, it is also worth mentioning in this context that in addition to addressing offenses motivated by the gender of the victims, the Moldovan legal framework should also include legislation that effectively combats and prevents domestic violence. In that respect, the OSCE/ODIHR refers to its 2015 Opinion on Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Moldova, in particular the recommendations on the definition of “rape”<sup>71</sup> and the need to provide harsher penalties for domestic violence cases than for similar crimes in a non-domestic context.<sup>72</sup>
53. Finally, it must be underlined that even if “hate crime” provisions do not cover all potential cases and scenarios, this does not mean that certain cases are not perhaps already covered by other criminal provisions. For instance, various criminal offences committed against certain categories of persons such as juveniles, pregnant women, or persons with disabilities, who are considered to deserve special protection due to their

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<sup>67</sup> *ibid.* pages 38-39 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>68</sup> *ibid.* pages 23 and 32 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>69</sup> See e.g., in Albania, Croatia, former Yugoslav Republic of Macedonia, Georgia, Luxembourg, Malta, the Netherlands, Romania, Serbia, Slovakia, Slovenia, Spain and the U.S.A. In 2012, 17 OSCE participating States reported in the ODIHR Annual Hate Crime Report that they collect data on hate crimes motivated by gender-based bias (see *Hate Crimes in the OSCE Region: Incidents and Response – Annual Report for 2012* (Warsaw: ODIHR, 2013), p. 79 <http://tandis.odihhr.pl/hcr2012>). See also *ibid.* footnote 4, page 43 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>70</sup> See Walters, Mark and Tumath, Jessica, “*Gender ‘Hostility’, Rape, and the Hate Crime Paradigm*” (July 2014), *The Modern Law Review*, Vol. 77, Issue 4, page 596, available at SSRN: <http://ssrn.com/abstract=2462301>.

<sup>71</sup> Available at <http://www.legislationline.org/documents/id/19858>, particularly par 59.

<sup>72</sup> See Section 3.11.1. of the 2012 UN Women Handbook for Legislation on Violence against Women, available at [http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW\\_Legislation-Handbook%20pdf.pdf](http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf); see also Recommendation No. 9 from the UN Women Virtual Knowledge Centre to End Violence Against Women and Girls, available at <http://www.endvawnow.org/en/articles/445-criminal-sanctions-and-sentencing-provisions-.html>, which states that “[l]egislation should specify that penalties for crimes involving domestic violence should be more severe than similar non-domestic violence-related crimes. This sends the important message that the state will treat a domestic violence crime as seriously, if not more seriously, than a crime against a stranger”.

situation or the challenges they face, are subject to enhanced penalties, but do not constitute “hate crimes”.

54. Also, while specific penalty-enhancing provisions listing bias motives and various protected characteristics should be clearly and narrowly defined to fulfil the requirements of legal certainty, foreseeability and specificity of criminal law, the wording of general sentence-enhancing provisions (e.g. Articles 77 par 1 (d)) may be framed more broadly. In the area of sentencing, the margin of appreciation of the judge is in any case limited by the maximum penalty set out in the respective criminal provisions (see Article 75 par 1 of the Criminal Code), which is another way of ensuring sufficient legal certainty. Consequently, a catch-all formulation included in the general sentence-enhancing provision would mean that crimes committed against certain persons based on their specific characteristics (even if not expressly mentioned in existing penalty-enhancing provisions) could still be adequately assessed by a judge at the sentencing stage and lead to aggravated sanctions. This would for instance allow a judge to consider as an aggravating circumstance the fact that an offence was motivated by bias against the victim’s homelessness or against certain political or other opinions expressed publicly, even if the protected characteristic is not expressly mentioned in Article 134<sup>14</sup> of the Criminal Code.
55. Consequently, **the drafters could consider supplementing the new Article 77 par 1 (d) to specify that, next to “motives of prejudice, contempt or hatred” as defined in Article 134<sup>14</sup> of the Criminal Code, motives of prejudice, contempt or hatred based on other criteria which are immutable or fundamental to a person’s sense of self and function as markers of group identity are also taken into account. A similar approach could be followed regarding the general sentence-enhancing provision contained in Article 43 of the Contravention Code.**
56. Finally, to facilitate the collection of “hate crimes” data, **a provision could be introduced obliging the competent court to expressly mention in its sentencing judgment the specific circumstances, including bias motivation, that were taken into account when determining the sentence, as done in certain countries.**<sup>73</sup>

#### **4. Defining Motive and Evidence**

57. The new draft Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code define the “motives of prejudice, contempt or hatred” as “judgments of the offender, determined by the offender’s hostile or discriminatory attitude” based on the above-mentioned protected characteristics.
58. It is particularly welcome that the wording has moved from “hatred” as the sole defining motive for bias-motivated crimes to include references to the perpetrator’s possibly prejudicial, or contemptuous motivation. Indeed, as mentioned in the 2010 OSCE/ODIHR Opinion, while certain laws of OSCE participating States do refer to “hate”, the concept of hate is often difficult to define in practice, since it is very subjective and may require an assessment of the perpetrator’s mental state of mind while committing the crime; thus, proving “hate” as a constitutive element of the

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<sup>73</sup> See e.g., Article 50 of the Swiss Criminal Code of 21 December 1937 (as last amended in 1 July 2014) which states that “[w]here a judgment must be justified, the court shall also specify the circumstances taken into account in determining the sentence and their weighting”.

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- criminal offences will often be challenging and sets very high standard which will often lead to the non-application of this provision.<sup>74</sup>
59. The broader wording proposed by the Draft Amendments would appear to remove these potential difficulties, and thereby also responds to one of the 2010 OSCE/ODIHR Opinion's recommendations.<sup>75</sup> Furthermore, from a victim's point of view, the fact of being selected due to a special, often immutable group characteristic psychologically does the most damage, not necessarily the fact that the crime was committed due to an emotional reaction such as "hate".<sup>76</sup> The offensive message conveyed by the perpetrator who believes that certain people deserve less or no protection, as opposed to others, due to their protected characteristics, justifies harsher punishment.<sup>77</sup>
60. At the same time, the three terms "prejudice", "contempt" and "hatred" somewhat overlap since "contempt" or "hatred" would not exist without "prejudice" in this context. Moreover, from a formalistic point of view, the definition provided in Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code appears to be somewhat circular since the "motives of prejudice, contempt or hatred" are defined as judgments of the offender determined by the offender's hostile or discriminatory attitude based on a variety of "motives". Further, pursuant to such a definition, the "hostility model" (requiring some form of hatred, hostility or enmity) and the "discriminatory selection model" (the selection of a victim because of a protected characteristic) appear on equal footing, although the latter is broader and already encompasses the former. This definition contained in the Draft Amendments thus appears overly complex and redundant. In order to prevent diverging interpretation and to avoid that in practice, the criminal justice actors continue to require proof of some forms of "hate"/"hatred", **it would be advisable to delete the references to "hatred" and "hostility" altogether from Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code.**
61. Moreover, the defining motive should imply more than causation. Indeed, as mentioned in par 32 *supra*, bias-motivated offences should be distinguished from mere "crimes of opportunity", which are not always necessarily bias-motivated offences. Such crimes involve, for instance, cases where a perpetrator targets certain persons that he or she perceived as being vulnerable such as older persons, persons with disabilities or women when committing a theft or robbery based on the assumption that they are less likely to resist. Other examples involve cases where a perpetrator selects wealthy neighbourhoods to commit burglaries, or where he/she chooses specific victims from minority groups based on the belief that they are less likely to report an incident, or that the police would not take their complaints seriously.<sup>78</sup> At the same time, "crimes of opportunity" against certain persons or groups presenting protected characteristics should always be investigated to determine whether a "bias motivation" exists.
62. To avoid that such crimes are automatically considered as bias-motivated crimes and to ensure that these provisions are not discretionarily applied by the police, prosecutors and judges, it is key **to specify in the Draft Amendments, or in other laws what kind of evidence could be used to establish the bias motive**, as in other countries.<sup>79</sup> **While**

<sup>74</sup> See e.g., *op. cit.* footnote 4, pages 46-49 (2009 ODIHR Practical Guide on Hate Crime Laws). See also *op. cit.* footnote 1, pars 52-53 (2010 OSCE/ODIHR Opinion).

<sup>75</sup> See *ibid.* par 53 (2010 OSCE/ODIHR Opinion).

<sup>76</sup> See *op. cit.* footnote 1, par 53 (2010 OSCE/ODIHR Opinion).

<sup>77</sup> See *op. cit.* footnote 32, page 19 (2012 EU FRA Report on Making Hate Crime Visible).

<sup>78</sup> *ibid.* page 19 (2012 EU FRA Report on Making Hate Crime Visible).

<sup>79</sup> For instance, Articles 132-76 and 132-77 of the French Penal Code provides that aggravating circumstances are established when "the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honor or the reputation of the victim, or a group of persons to which the victim belongs" (see

**the protected characteristic(s) of the victim will be a relevant factor to be considered by the criminal justice actors, this should not in itself be a sufficient element to conclude that a bias-motivated offence was committed.**

63. Moreover, the above amendments will only truly achieve their intended goal if there is a clear understanding among criminal justice actors as to what evidence is necessary and sufficient to prove a bias motive. Guidelines or other tools for investigators, prosecutors and/or judges could further elaborate the kinds of bias indicators that could be used to identify “hate crimes”<sup>80</sup>, and should be accompanied by adequate training.<sup>81</sup> This could help clarify how the terms mentioned in Articles 134<sup>14</sup> of the Criminal Code and 46<sup>2</sup> of the Contravention Code should be interpreted in practice.
64. On a practical note, it is also essential that the Criminal Code or Criminal Procedure Code specifies that the identified bias motive for a committed crime shall become part of the public record. This is necessary both to facilitate data collection of bias-motivated crimes,<sup>82</sup> but also to make sure that in cases of recidivism, prior “hate crimes” may be taken into account when debating on the criminal sentence.<sup>83</sup> It is thus recommended **to amend relevant legislation to ensure that existing bias motivation leading to an aggravated penalty/sentence is included in perpetrators’ criminal records.**

## **5. Draft Amendments to Article 346 of the Criminal Code**

65. The proposed amendments to Article 346 of the Criminal Code aim to remove reference to intentional actions and public calls “inciting national, racial or religious hostility or discord”. The new wording would be broader and would encompass incitement to “hatred, discrimination or division based on national, territorial, ethnic, racial or religious nature”. The new Article 346 would also broaden the scope of the provision, which currently covers “direct or indirect limitations of rights, or that offer direct or indirect advantages to citizens based on their national, racial, or religious affiliations”, to also include similar acts based on an open-ended list of other protected characteristics. The penalty would further be increased from a maximum of three years of imprisonment to one to five years’ imprisonment.

### **5.1. Constitutive Elements of the Criminal Offence**

66. At the outset, it is worth highlighting that in its 2010 Opinion, the OSCE/ODIHR welcomed the proposed removal of the terms “humiliation of national honor and dignity”, “direct or indirect limitation of rights” and “direct or indirect advantages for citizens”.<sup>84</sup> In the end, these terms were not deleted from Article 346 of the Criminal Code and also remain part of the new provision.

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[https://www.legifrance.gouv.fr/affichCode.do;jsessionid=CE16FDC342D12130E8809296937CFD44.tpdila16v\\_2?idSectionTA=LEGISCTA000006165269&cidTexte=LEGITEXT000006070719&dateTexte=20160306](https://www.legifrance.gouv.fr/affichCode.do;jsessionid=CE16FDC342D12130E8809296937CFD44.tpdila16v_2?idSectionTA=LEGISCTA000006165269&cidTexte=LEGITEXT000006070719&dateTexte=20160306).

<sup>80</sup> See also e.g., OSCE/ODIHR, *Prosecuting Hate Crimes: A Practical Guide* (2014), page 46, available at <http://www.osce.org/odihr/prosecutorsguide?download=true>, which refers to the use of bias indicators by prosecutors and provides the example of the leaflet on hate crimes for police officers provided by the Polish Ministry of Interior (pages 47-48). See also pages 12-14 of the Hate Crime Data Collection Guidelines and Training Manual of the Federal Bureau of Investigation (27 February 2015), available at <https://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf>, which list a number of elements that may be considered to establish whether a crime was motivated by bias.

<sup>81</sup> See *op. cit.* footnote 4, pages 48-49 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>82</sup> See OSCE/ODIHR Practical Guide on Hate Crime Data Collection and Monitoring (2014), available at <http://www.osce.org/odihr/datacollectionguide>.

<sup>83</sup> *Op. cit.* footnote 4, pages 36-37 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>84</sup> *Op. cit.* footnote 1, par 30 (2010 OSCE/ODIHR Opinion).

67. Removing the above wording from Article 346 would, however, still be advisable, since the criminalization of such forms of speech, which are quite vaguely worded, may go too far. More specifically, Article 346 would appear to go beyond the permissible limitations to the right to freedom of expression set out in Article 19 of the ICCPR and Article 10 of the ECHR. Both international provisions stress the importance of freedom of expression and list specific exceptional situations where this right may be curtailed. Such exceptions must be narrowly interpreted and the necessity for restrictions must be convincingly established.<sup>85</sup> The ECtHR has considered that states have the positive obligation to create a favourable environment for participation in public debate, allowing people to express their opinions without fear.<sup>86</sup> Furthermore, as recommended by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “[t]o prevent any abusive use of hate speech laws, [...] only serious and extreme instances of incitement to hatred [should] be prohibited as criminal offences”; other cases should be addressed under civil legislation.<sup>87</sup>
68. According to the case law of the ECtHR, the notion of freedom of expression is also applicable to information or ideas that “offend, shock or disturb”.<sup>88</sup> Similarly, the UN Human Rights Committee has considered that Article 19 of the ICCPR also protects “deeply offensive” speech.<sup>89</sup> As such, public expression that is said to humiliate “national honor and dignity” may thus nevertheless be protected by the right to freedom of expression.<sup>90</sup> **It is recommended to delete the reference to “humiliation of national honor and dignity” from the new Article 346 of the Criminal Code.**
69. In this context, it should be noted that the ECtHR has acknowledged the “impossibility of attaining absolute precision in the framing of laws” even in cases where a criminal penalty interferes with individuals’ right to freedom of expression, since in this field, the situation may change according to the prevailing views of society.<sup>91</sup> At the same time, the ECtHR has taken into account a number of factors to be considered when assessing whether a conviction for calls to violence and “hate speech” constitutes an interference with the respective person’s exercise of the right to freedom of expression, which could provide valuable guidance for law drafters. These include the following: whether the statements were made against a tense political or social background; whether such statements, being fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance; the manner in which the statements were made; their capacity – direct or indirect – to lead to harmful consequences; and the proportionality of sanctions.<sup>92</sup> As it stands, even if absolute precision may not be possible, these factors may help amend the new Article 346 in such a way to allow individuals to distinguish

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<sup>85</sup> See e.g., the case of *Vogt v. Germany* ECtHR judgment of 26 September 1995 (Application no. 17851/91), par 52, available at <http://hudoc.echr.coe.int/eng?i=001-57949>. See also par 18 of the 2012 *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, available at [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

<sup>86</sup> See the case of *Dink v. Turkey*, ECtHR judgment of 14 September 2010 (Application nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), par 137, available at <http://hudoc.echr.coe.int/eng?i=001-100383>.

<sup>87</sup> See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2012 *Report*, A/67/357, 7 September 2012, pars 79-80, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement>.

<sup>88</sup> See the case of *Bodrožić v. Serbia*, ECtHR judgment of 23 June 2009 (Application no. 32550/05), pars 46 and 56, available at <http://hudoc.echr.coe.int/eng?i=001-93159>.

<sup>89</sup> See UN Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 11, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>90</sup> *ibid.* par 38 (UN HRC General Comment No. 34).

<sup>91</sup> *Op. cit.* footnote 51, par 133 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland* [GC]).

<sup>92</sup> *ibid.* pars 204-208 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland*).

- between permissible statements or ideas and public expression that would render them criminally liable.
70. Moreover, it is noted that the new Article 346 of the Criminal Code does not explicitly criminalize “incitement to violence”, whereas Article 20 par 2 of the ICCPR and Article 4 (a) of the CERD expressly call for such prohibition. More generally, the domestic legal framework on incitement should be guided by Article 20 of the ICCPR (i.e., “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”) and should include robust definitions of key terms such as “hatred”, “discrimination”, “violence” and/or “hostility”.<sup>93</sup> Hence, **it is recommended to include reference to “incitement to violence”, while also specifying the criminal offences that such public calls for violence refer to, as recommended in the 2010 OSCE/ODIHR Opinion.**<sup>94</sup>
71. Additionally, the new Article 346 mentions incitement to “hatred, discrimination or *division* based on national, *territorial*, ethnic, racial or religious nature”. The meaning of incitement to “division” is unclear and is not mentioned in international human rights instruments addressing certain forms of “hate speech”. Moreover, read together with the reference to “territorial” grounds for such division, this could potentially imply that persons calling for autonomy or even secession of part of the country’s territory may be subject to prosecution, even if they do so via peaceful means. In that respect, the ECtHR has held that “[d]emanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security” and recognized that “political ideas which challenge the existing order and whose realisation is advocated by peaceful means” are protected under the ECHR.<sup>95</sup> **The reference to “division” based on “territorial” grounds should thus be deleted from Article 346 of the Criminal Code, or at a minimum, this provision should specify that the prohibition concerns public calls for division using non-peaceful means only.**
72. Moreover, it is doubtful whether expressions such as the “limitation, direct or indirect, of rights” or “setting advantages, direct or indirect for persons” are sufficiently clear and foreseeable to be in line with Article 7 of the ECHR (see par 43 *supra* regarding Article 7 of the ECHR).<sup>96</sup> As it stands, the mere mention of the limitation of rights or provision of advantages, without specifying what kind of acts this would entail and which rights or advantages are being referred to, would appear to be too vague to satisfy such conditions.
73. It is noted that a number of OSCE countries have introduced legal provisions criminalizing discriminatory acts committed by private persons and/or by public officials.<sup>97</sup> The related criminal offences are, however, often depicted in very broad and

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<sup>93</sup> See *op. cit.* footnote 85, par 19 (2012 Rabat Plan of Action). See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (10 December 2008), page 3, available at <http://www.osce.org/fom/99558?download=true>, which states that “[r]estrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. See also the criteria considered by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to determine whether an expression constitutes incitement to hatred (i.e., severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context), *op. cit.* footnote 87, pars 46 and 79 (UNSR 2012 Report).

<sup>94</sup> *Op. cit.* footnote 1, par 37 (2010 OSCE/ODIHR Opinion).

<sup>95</sup> See the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, ECtHR judgment of 2 October 2001 (Application nos. 29221/95 and 29225/95), par 97, available at <http://hudoc.echr.coe.int/eng/?i=001-59689>.

<sup>96</sup> See e.g., *op. cit.* footnote 53, pars 78-79 (2015 ECtHR judgment in the case of *Rohlena v. the Czech Republic [GC]*).

<sup>97</sup> See e.g., Albania, Bosnia and Herzegovina, Croatia, Estonia, France, Latvia, Lithuania, Luxembourg, Moldova, Montenegro, Serbia, Slovenia, etc.

vague terms, which are unlikely to comply with the need for specificity of criminal law (see par 43 *supra*). Additionally, such wording somewhat overlaps with the “incitement to discrimination” also mentioned in the new Article 346. Therefore, **the drafters should consider removing the reference to “limitation, direct or indirect, of rights” and to “setting advantages, direct or indirect for persons” from Article 346 of the Criminal Code, and instead provide a clear definition of what is meant by “discrimination” for the purposes of the Code.** Such a definition could then specify what kind of “limitation” and/or “advantages” are addressed and which rights are being referred to.<sup>98</sup>

74. Further, the new Article 346 of the Criminal Code envisions the criminalization of *indirect* discrimination (i.e., acts that, although *prima facie* not discriminatory, result in unequal treatment when put into practice). This may contradict the reference to “intentional actions” contained in the same provision. It may also be disproportionate to impose criminal sanctions for indirect discriminatory acts where these are involuntary. Voluntary cases of indirect discrimination may, at the same time, be difficult to prove in practice. For instance, this could lead to criminalizing public calls to adopt a certain law which although apparently neutral on its face, could after further analysis or when applied in practice, lead to discriminatory treatment.
75. In order to ensure that such a criminal offence is narrowly defined, **it is recommended to not criminalize indirect discrimination, but rather to exclusively address such cases of discrimination in administrative or private/civil legislation;** if the drafters chose to provide a definition of “discrimination” as mentioned in pars 70 and 73 *supra*, such a definition should then exclude “indirect discrimination” from its scope for the purpose of the Criminal Code. In accordance with Article 4 par 1 of the CEDAW, **it would also be advisable to specify in this definition that temporary special measures aimed at accelerating *de facto* equality shall not be considered “discrimination”.**
76. Finally, to ensure that the criminal offence under the new Article 346 is narrowly defined and does not lead to abuse or to discretionary interpretation, the **legal drafters could also consider including in this new provision defences or exceptions, for instance when the statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics or some other issue of public interest,**<sup>99</sup> including in the context of peaceful protests.<sup>100</sup>

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<sup>98</sup> See, for instance, Articles 225-1 to 225-4 of the French Penal Code which address the criminal offence of discrimination (on a number of listed protected grounds) defined as any distinction made between individuals or legal persons by reason of their (real or presumed) protected grounds “where it consists of: (1) a refusal to supply goods or services; (2) an obstruction to the normal exercise of any economic activity; (3) a refusal to hire, or a sanction or a dismissal; (4) making the supply of goods or services subject to fulfilling a condition based on one of the [protected grounds]; (5) making an offer of employment, internship or job training period subject to fulfilling a condition based on one of the [protected grounds]”, making it punishable by up to three years of imprisonment and a fine of € 45,000.

<sup>99</sup> See e.g., OSCE Representative on Freedom of the Media, *Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression* (May 2015), pages 9-10, available at <http://www.osce.org/fom/156261?download=true>.

<sup>100</sup> See e.g., the case of *Christian Democratic People's Party v. Moldova*, ECtHR judgment of 14 February 2006 (Application no. 28793/02), pas 62-70, available at <http://hudoc.echr.coe.int/eng/?i=001-72346>.

## **5.2. Protected Characteristics**

### *5.2.1. Protected Characteristics in Cases of Incitement to Hatred, Discrimination or Division*

77. The new Article 346 of the Criminal Code refers to incitement to “hatred, discrimination or division” based on a narrow list of grounds, i.e., “national, territorial, ethnic, racial or religious”. The listed grounds may be somewhat limited, bearing in mind that international and regional standards, as well as recommendations made by international human rights monitoring bodies, propose the inclusion of additional grounds.
78. First, Article 4 (a) of the CERD expressly mentions “colour” as a protected characteristic. Second, UN human rights monitoring mechanisms have called upon States “to take legislative and other measures to prohibit, investigate and prosecute all acts of targeted, hate-motivated violence and incitement to violence directed at LGBT and intersex persons”.<sup>101</sup> Similarly, CoE Recommendation CM/Rec(2010)5 recommends that Member States take “appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons”.<sup>102</sup>
79. Third, in its resolution 16/18, the UN Human Rights Council addresses the fight against incitement to violence against persons based on “religion *or belief*” [emphasis added].<sup>103</sup> Fourth, there is a growing trend in national criminal codes from the European Union and beyond towards including disability as a protected characteristic, including in “hate speech” provisions.<sup>104</sup> In that context, according to the Allport scale of prejudice,<sup>105</sup> so-called “antilocution” which includes “hate speech” is the first stage of the intolerance pattern creating an environment conducive to the flourishing of extreme forms of intolerance and violence. As such, “hate speech” and “hate crimes” are intrinsically linked.
80. Hence, in light of the above, and also to ensure consistency between the different provisions of the Moldovan Criminal Code, **the protected characteristics included in the revised Article 346 as they relate to incitement to hatred, violence and discrimination should be identical to the protected characteristics included in other bias-motivated offences. At the same time, recommendations made in par 44 supra regarding the deletion of the open-ended formulation and of certain protected characteristics should be borne in mind. Alternatively, at a minimum, the legal drafters should add, with reference to incitement to violence, hatred or discrimination, the following grounds: “colour”, “sexual orientation or gender identity”, “religion *or belief*” and “disability”.**

<sup>101</sup> *Op. cit.* footnote 32, par 11 (2015 UN High Commissioner for Human Rights Report A/HRC/29/23).

<sup>102</sup> *Op. cit.* footnote 21, par 6 (CoE Recommendation CM/Rec(2010)5).

<sup>103</sup> UN human Rights Council resolution 16/18, 12 April 2011, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf).

<sup>104</sup> See e.g., *op. cit.* footnote 32, pages 4-5 (2015 EU FRA Paper “Equal protection for all victims of hate crime - The case of people with disabilities”).

<sup>105</sup> See G. Allport, *The Nature of Prejudice* (1954). Allport scale of prejudice distinguishes five stages of the manifestation of prejudice in a society: (i) Antilocution (including hate speech), (ii) Avoidance (manifestations range from social exclusion to segregation), (iii) Discrimination, (iv) Physical attack, and (v) Extermination (deliberate physical destruction of the entire excluded group).

5.2.2. *Protected Characteristics in Cases of Intentional Actions, Public Calls Aimed at Other Discriminatory Practices*

81. As mentioned in par 65 *supra*, the new Article 346 would also cover “intentional actions, public calls” aimed at “direct or indirect limitations of rights, or that offer direct or indirect advantages to citizens” based on an open-ended list of protected characteristics, similar to the one mentioned under Article 134<sup>14</sup>.
82. In relation to the open-ended list of protected characteristics, **the same recommendations as mentioned in par 44 *supra* should apply.** Indeed, such general wording in a criminal provision could potentially lead to arbitrary criminal investigations against certain persons merely for criticizing a certain political opinion or party, or for criticizing social inequality or individuals more powerful or wealthier than themselves.<sup>106</sup>

5.3. *Penalties*

83. The above-mentioned recommendations aiming at setting out more clearly the definition of the criminal offence are all the more important given that the new Article 346 of the Criminal Code foresees a heavy sanction ranging from one to five years of imprisonment. Criminal sanctions involving imprisonment are serious interferences with the right to freedom of expression; the ECtHR even noted in similar cases that “what matters is not so much the severity of the [...] sentence but the very fact that [the applicant] was criminally convicted”.<sup>107</sup>
84. Moreover, the practice of providing for a minimum penalty, such as, in this case, one year of imprisonment has generally been criticized at the international level.<sup>108</sup> First, a mandatory minimum penalty binding a court may sometimes lead to instances of arbitrary imprisonment. In such cases, higher sentences are arbitrarily imposed because the respective judges have no discretion to pronounce lower penalties; this is prohibited under Article 9 of the ICCPR on liberty and security of person. Second, as noted by the UN Special Rapporteur on the Independence of the Judiciary, “[m]inimum sentencing legislation may offend the fair trial provisions of article 14 of the [ICCPR] and principle 3 of the United Nations Basic Principles on the Independence of the Judiciary” since they impinge upon international standards on judicial independence.<sup>109</sup>
85. At the same time, if the Criminal Code does not foresee lower sanctions for children, such a high mandatory minimum sanction would also potentially contravene Article 37 (b) of the UN Convention on the Rights of the Child.<sup>110</sup> This provision stipulates that children or juveniles should only be imprisoned as a measure of last resort and for the shortest appropriate period of time. The UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) specify that “[d]eprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious

<sup>106</sup> *Op. cit.* footnote 1, pars 35-36 (2010 OSCE/ODIHR Opinion Crimes).

<sup>107</sup> *Op. cit.* footnote 51, par 133 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland* [GC]).

<sup>108</sup> See e.g., the Law Council of Australia Mandatory Sentencing Discussion Paper (May 2014), available at [https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS\\_Discussion\\_Paper\\_Final\\_web.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf).

<sup>109</sup> UN Special Rapporteur on the independence of judges and lawyers, Mission to South Africa: Report of the Special Rapporteur on the independence of judges and lawyers (25 January 2001), E/CN.4/2001/65/Add.2, page 4, available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=2380](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=2380).

<sup>110</sup> UN Convention on the Rights of the Child (hereinafter “CRC”), adopted by General Assembly resolution 44/25 on 20 November 1989. The Republic of Moldova acceded to this Convention on 28 February 2006.

offences and unless there is no other appropriate response”.<sup>111</sup> In light of the above, **it is recommended to remove the reference to a minimum sentence of one year in Article 346 of the Criminal Code, and instead to refer only to a maximum sentence.**

86. More generally, **the drafters should consider introducing a wider range of proposed penalties for this criminal offence, including ones that do not involve imprisonment. This should help ensure that any sanction applied by a court is proportionate to the gravity of the offence,** in line with ECtHR case law.<sup>112</sup> For instance, in the absence of incitement to violence or hatred, the imposition of a sentence of imprisonment would fail to meet the requirement of proportionality.<sup>113</sup>

## 6. Final Comments

87. While a number of the above-mentioned amendments to criminal law provisions are welcome, it is doubtful whether they will achieve results in practice if they are not supported by political will, and accompanied by other measures to ensure a comprehensive approach to preventing and combatting bias-motivated crimes in Moldova. Thus, any criminal law reform in this field should go hand in hand with other measures, such as educating the public (especially young people) on tolerance and non-discrimination and adequate training of all the actors of the criminal justice chain both on the concept of bias-motivated offences and on data collection. Moreover, guidance tools for investigators and/or prosecutors should be adopted, and adequate mechanisms for data collection should be in place. Legislation should provide victims with access to effective remedies. Finally, public country-wide awareness-raising campaigns should ensure that the population is aware of the concept of hate crimes, and should also be conducted in minority languages. More generally, other measures addressing discrimination in all spheres of life, including public and political, economic, health, social and cultural life would be needed.<sup>114</sup>
88. Moreover, various recommendations at the international and regional levels note that a criminal justice system and its actors need to be representative of the community as a whole, including in terms of gender balance and diversity,<sup>115</sup> to enhance the confidence of the entire population in the system. Good practices have also shown that specialized

<sup>111</sup> See par 17.1 (c) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, 29 November 1985, available at <http://www.un.org/documents/ga/res/40/a40r033.htm>.

<sup>112</sup> See e.g., the cases of *Skalka v. Poland*, ECtHR judgment of 27 May 2003 (Application no. 43425/98), par 38, available at <http://hudoc.echr.coe.int/eng?i=001-61105>; and of *Gündüz v. Turkey*, ECtHR judgment of 13 November 2003 (Application no. 43425/98), par 1, available at <http://hudoc.echr.coe.int/eng?i=001-23973>.

<sup>113</sup> See e.g., in the area of political speech, the case of *Otegi Mondragon v. Spain*, ECtHR judgment of 15 March 2011 (Application no. 2034/07), available at <http://hudoc.echr.coe.int/eng?i=001-103951>. See also Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, CDL-AD(2016)002, 15 March 2016, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e), which states that “in the absence of incitement to violence, the imposition of an imprisonment sentence fails to meet the requirement of necessity in a democratic society”.

<sup>114</sup> See e.g., *op. cit.* footnote 4, page 12 (2009 ODIHR Practical Guide on Hate Crime Laws).

<sup>115</sup> See e.g., UN Special Rapporteur on the Independence of Judges and Lawyers, *2011 Annual Report*, par 81 on the “Adequate Representation of Women in the Judiciary”, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/15/PDF/G1113015.pdf?OpenElement>; OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), par 24, available at <http://www.osce.org/odihr/KyivRec?download=true>, which states that “[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole”; see also OSCE, *Guidebook on Democratic Policing* (May 2008), par 124, available at <http://www.osce.org/spmu/23804?download=true>; and Preamble Paragraph, 8(a) of the *UN Code of Conduct for Law Enforcement Officials*, adopted by the UN General Assembly in its resolution 34/169 of 17 December 1979, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>. See also pars 1-2 of the OSCE Ministerial Council Decision MC DEC/7/09 on Women’s Participation in Political and Public Life, 2 December 2009; and Document of the Seventeenth OSCE Ministerial Council, Athens, 1-2 December 2009, available at <http://www.osce.org/mc/40710?download=true>.

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services provided by the police, prosecution service and courts, and additional and continuous training, tend to increase reporting, trust and engagement of crime victims with the criminal justice system and the overall efficiency and effectiveness of such system.<sup>116</sup> Consequently, the reform of “hate crime”-related legislation should be complemented by other reforms that address the composition and organization of all actors of the criminal justice system as a whole.

89. Finally, recommendations at the international level highlight the need for direct and meaningful participation of all criminal justice agencies, civil society, in particular marginalized and minority groups, and other stakeholders throughout the process of amending legislation on preventing and combating bias-motivated crimes.<sup>117</sup> Consequently, policy and law makers in Moldova should ensure that all stakeholders and interested parties are, and continue to be, fully consulted and informed, and that they are able to submit their views throughout the amendment process. Public discussion and an open and inclusive debate will increase an overall understanding of the various factors involved, enhance confidence in and ownership of the adopted legislation, and ultimately improve implementation.

[END OF TEXT]

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<sup>116</sup> See also, for instance, in cases of domestic violence the draft of the *European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases*, December 2012, page 10, available at <http://www.eucpn.org/download/?file=EUHndbookAttritionDomViol.pdf&type=3>. Regarding juvenile justice, see also *op. cit.* footnote 111, Section 12 on “Specialization within the Police” (1985 UN Beijing Rules).

<sup>117</sup> See *op. cit.* footnote 4, pages 13-14 (2009 ODIHR Practical Guide on Hate Crime Laws).

**ANNEX:**

*Draft (as of February 2016)*

**Law**

**On Amendments and Supplements to Certain Legal Acts**

The Parliament adopts the present organic law.

**Article I** – The Criminal Code of the Republic of Moldova No. 985-XV of 18 April 2002 (reissued in the Official Monitor of the Republic of Moldova, 2009, No. 72-74, Article 195), with further amendments and supplements, is amended and supplemented as follows:

1. In Article 77 paragraph (1) point d), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.

2. Is completed with Article 134<sup>14</sup> of the following content:

**“Article 134<sup>14</sup>.** Motives of prejudice, contempt or hatred

The motives of prejudice, contempt or hatred are defined as judgments of the offender, determined by the offender’s hostile or discriminatory attitude based on the motives, whether real or perceived as real, of race, color, ethnic, national or social origin, citizenship, gender, property, genetic features, language, religion or beliefs, opinions of political or any other nature, belonging or non-belonging to a national majority, national minority or a group, birth or ancestry, disability, health, age, sexual orientation, gender identity, or based on any other criteria, towards persons who can be individualized by any of such criteria or who offer support to these persons”.

3. In Article 135<sup>1</sup> paragraph (1) point e), the wording “form of sexual violence” is substituted with the wording “violent action of sexual nature”.

4. In Article 145 paragraph (2) point 1), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.

5. Article 150 paragraph (2) is completed with point d<sup>1</sup>) of the following content: “d<sup>1</sup>) on the motives of prejudice, contempt or hatred.”.

6. In Article 151 paragraph (2) point i), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.

7. In Article 152 paragraph (2) point j), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.

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8. In Article 155, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) The same action committed on the motives of prejudice, contempt or hatred shall be punished with imprisonment from 2 to 4 years.”.

9. Article 158 paragraph (3) is completed with point g) of the following content: “g) on the motives of prejudice, contempt or hatred.”.

10. Article 160 paragraph (3) is completed with point d) of the following content: “d) were committed on the motives of prejudice, contempt or hatred,”.

11. In Article 162:

Is completed with paragraph (1<sup>1</sup>) of the following content:

“(1<sup>1</sup>) The same action committed on the motives of prejudice, contempt or hatred shall be sanctioned with a fine of 500-700 conventional units, or with unpaid community service for 150-240 hours.”;

12. In Article 163:

Is completed with paragraph (1<sup>1</sup>) of the following content:

“(1<sup>1</sup>) The same action committed on the motives of prejudice, contempt or hatred shall be punished with imprisonment from 1 to 3 years.”;

13. Article 164 paragraph (2) is completed with point h) of the following content: “h) on the motives of prejudice, contempt or hatred.”.

14. Article 165 paragraph (2) is completed with point h) of the following content: “h) on the motives of prejudice, contempt or hatred,”.

15. Article 166 paragraph (2) is completed with point d<sup>1</sup>) of the following content: “d<sup>1</sup>) on the motives of prejudice, contempt or hatred;”.

16. In Article 166<sup>1</sup>, paragraphs (2) and (4) are completed with point h) of the following content:

“h) on the motives of prejudice, contempt or hatred;”.

17. In Article 167, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) The same action committed on the motives of prejudice, contempt or hatred shall be punished with imprisonment from 6 to 10 years with (or without) deprivation of the right to occupy certain posts or to perform certain activities for a term up to 5 years.”.

18. Article 168 paragraph (2) is completed with point e) of the following content: “e) on the motives of prejudice, contempt or hatred,”.

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19. Article 171 paragraph (2) is completed with point g), of the following content: “g) committed on the motives of prejudice, contempt or hatred;”.
20. Article 172 paragraph (2) is completed with point h), of the following content: “h) committed on the motives of prejudice, contempt or hatred;”.
21. In Article 173, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:  
“(2) The same action committed on the motives of prejudice, contempt or hatred shall be sanctioned with a fine of 500-700 conventional units, or with unpaid community service for 200-240 hours, or with imprisonment for up to 4 years. “. .
22. Article 184 paragraph (2) is completed with point b<sup>1</sup>) of the following content: “b<sup>1</sup>) committed on the motives of prejudice, contempt or hatred;”.
23. Article 187 paragraph (2) is completed with point g), of the following content: “g) on the motives of prejudice, contempt or hatred;”.
24. Article 188 paragraph (2) is completed with point g) of the following content: “g) on the motives of prejudice, contempt or hatred;”.
25. Article 189 paragraph (3) is completed with point g), of the following content: “g) committed on the motives of prejudice, contempt or hatred;”.
26. Article 193 the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:  
“(2) The same action committed on the motives of prejudice, contempt or hatred shall be punished with imprisonment for 1-3 years.”.
27. In Article 197, paragraph (2) point b), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.
28. Article 206 paragraph (2) is completed with point g) of the following content: “g) on the motives of prejudice, contempt or hatred”.
29. Article 211 paragraph (2) is completed with point d) of the following content: “d) on the motives of prejudice, contempt or hatred.”.
30. Article 212, paragraph (3) is completed with point c) of the following content: “c) on the motives of prejudice, contempt or hatred.”.
31. Article 217<sup>6</sup> paragraph (2) is completed with point f) of the following content: “f) on the motives of prejudice, contempt or hatred;”.

32. In Article 222, paragraph (2) point b), the wording “social, national, racial or religious hatred” is substituted with the wording “prejudice, contempt or hatred”.

33. Article 282 is completed with paragraph (1<sup>1</sup>) of the following content: “(1<sup>1</sup>) The same action committed on the motives of prejudice, contempt or hatred shall be punished with imprisonment for 6-9 years.”.

34. Article 287 paragraph (2) is completed with point c) of the following content: “c) on the motives of prejudice, contempt or hatred;”.

35. Article 346 shall have the following content:

**“Article 346.** Intentional actions aimed at incitement of hatred, discrimination or division

Intentional actions, public calls, including through mass media, printed and electronic, aimed at incitement of hatred, discrimination or division based on national, territorial, ethnic, racial or religious nature, at humiliation of the national honor and dignity, as well as at limitation, direct or indirect, of rights or at setting advantages, direct or indirect, for persons based on race, color, ethnic, national or social origin, gender, genetic features, language, religion or beliefs, opinions of political or any other nature, belonging to the national majority, belonging to a national minority, belonging to a group, birth or ancestry, disability, health, age, sexual orientation, gender identity, or any other criteria,

shall be punished with a fine of up to 250 conventional units, or with unpaid community service for 180-240 hours, or with imprisonment for 1-5 years.”.

**Article II.** - Contravention Code of the Republic of Moldova No. 218-XVI of 24 October 2008 (Official Monitor of the Republic of Moldova, 2009, No. 3-6, Article 15), with further amendments and supplements, is amended and supplemented as follows:

1. Article 43 paragraph (1) is completed with point h) of the following content: “h) contravention committed on the motives of prejudice, contempt or hatred.”.

2. Is completed with Chapter V<sup>1</sup> of the following content:

#### **“Chapter V<sup>1</sup>**

##### **MEANING OF SOME TERMS OR PHRASES IN THIS CODE**

#### **Article 46<sup>1</sup>.** General Provisions

Whenever a term or expression defined in this chapter is used in the contravention code, the meaning thereof shall be as provided herein below.

#### **Article 46<sup>2</sup>.** Motives of prejudice, contempt or hatred

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The motives of prejudice, contempt or hatred are defined as judgments of the offender, determined by the offender's hostile or discriminatory attitude based on the motives, whether real or perceived as real, of race, color, ethnic, national or social origin, citizenship, gender, property, genetic features, language, religion or beliefs, opinions of political or any other nature, belonging or non-belonging to a national majority, national minority or a group, birth or ancestry, disability, health, age, sexual orientation, gender identity, or based on any other criteria, towards persons who can be individualized by any of such criteria or who offer support to these persons”.

3. Article 69 is completed with paragraph (3) of the following content:

“(3) Actions referred to in paragraph (1) or (2) committed on the motives of prejudice, contempt or hatred,  
shall be sanctioned with a fine of 100-150 conventional units, or with unpaid community service for up to 60 hours.”.

4. In Article 70, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) Action referred to in paragraph (1) committed on the motives of prejudice, contempt or hatred,  
shall be sanctioned with a fine of 120-150 conventional units imposed on an individual, or with unpaid community service for up to 60 hours, or with administrative arrest for up to 15 days, with a fine of 300-400 conventional units imposed on a public official, with deprivation of the right to occupy certain posts or to perform certain activities for a term from 6 months to 1 year.”.

5. In Article 75, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) Action referred to in paragraph (1) committed on the motives of prejudice, contempt or hatred,  
shall be sanctioned with a fine of 90-130 conventional units.”.

6. Article 78 is completed with paragraph (4) of the following content:

“(4) Actions referred to in paragraph (2) or (3) committed on the motives of prejudice, contempt or hatred,  
shall be sanctioned with a fine of 100 to 150 conventional units, or with unpaid community service for up to 60 hours, or with administrative arrest for up to 15 days.”.

7. In Article 104, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) Action referred to in paragraph (1) committed on the motives of prejudice, contempt or hatred,  
shall be sanctioned with a fine of 80 to 120 conventional units, or with unpaid community service for up to 60 hours.”.

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8. In Article 354, the only paragraph becomes paragraph (1) and is completed with paragraph (2) of the following content:

“(2) Action referred to in paragraph (1) committed on the motives of prejudice, contempt or hatred,

shall be sanctioned with a fine of 80 to 120 de conventional units, or with unpaid community service for 20 to 60 hours.”.

**Speaker of Parliament**