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OPINION ON THE PROVISIONS OF THE CRIMINAL CODE OF LITHUANIA ON BIAS-MOTIVATED CRIMES AND OTHER RELATED CRIMINAL OFFENCES

LITHUANIA

Based on an unofficial English translation of the provisions provided by the Ministry of Interior of Lithuania to the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

ODIHR appreciates Lithuania's efforts to tackle bias-motivated crimes and incitement to discrimination, hostility or violence (so-called "hate speech") as prescribed by international instruments, *inter alia*, through means of criminal legislation. Many of the provisions of the Criminal Code of Lithuania contain the main elements prescribed by international human rights standards and are in line with good practice for these types of legislation.

The combination of specific penalty enhancements for a number of crimes coupled with a general penalty enhancement provision explicitly referring to bias motivation provides a robust way to combat bias-motivated crimes and to demonstrate society's condemnation of such offences.

It is, however, crucial that all criminal provisions avoid overly vague terms and are sufficiently accessible, specific and foreseeable.

Certain provisions of the Criminal Code should also be enhanced in certain areas, in order to make the legislation more effective and comprehensive. In particular, the wording of the provisions on bias-motivated crimes should be amended to move away from the hostility model towards the discriminatory selection model, in light of the inherent difficulty of proving the "hate" motive as a constitutive element of the criminal offences.

The scope of the bias-motivated crime provisions should also be expanded to make sure that not only actual membership of a group which exhibits certain characteristics is protected, but also presumed membership and actual or presumed association or affiliation with such a group. Furthermore, it is recommended to introduce a number of changes to the list of protected characteristics and to consider broadening the scope of the base offenses – which are currently limited to murder and serious/minor injury to health, to reflect others that are also frequently motivated by bias in Lithuania.

Finally, to ensure effective implementation of the provisions of the Criminal Code on bias-motivated crimes, it is also essential that criminal procedural provisions specifically address the correct identification, registration, investigation and punishment of such crimes. These could be complemented by introducing/updating police operational instructions, prosecutorial guidelines and by training law enforcement and criminal justice professionals.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the provisions in the Criminal Code of Lithuania under review:

A. to consider broadening the scope of the base offenses that would include specific penalty-enhancing provisions if committed with a bias motivation, depending on what kinds of offences are frequently motivated by bias in Lithuania; [par 28]

B. With respect to bias-motivation:

1. To reflect in the relevant provisions of the Criminal Code by removing the reference to "hatred", thereby moving away from the hostility model, and replace it by a more neutral term such as bias or prejudice motivation; [par 33]
2. 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 or prejudice against the victim due to their actual or perceived protected characteristics; [par 35]
3. To broaden the bias-motivated crimes to also cover offences that are motivated by the real or presumed affiliation or association with such a person or group ; [par 36]

C. With respect to the protected characteristics;

1. To limit characteristics to those that are immutable or fundamental to a person's sense of self and function as markers of group identity, and delete those such as "age", "social status" and "opinions", which are unclear and potentially subject to arbitrary interpretation; [par 45]
2. To consider supplementing Article 60 of the Criminal Code by a reference to bias or prejudice based on other criteria which are fundamental to a person's sense of self and function as markers of group identity are also taken into account; [par 49]

D. With respect to incitement;

1. to delete the reference to "purposes of distribution" so as to expressly only cover the actual dissemination, and to reconsider the words "ridiculing" and "expressing contempt" in Article 170 (1) of the Criminal Code; [par 60]
2. to ensure that Article 170 complies with the principles of legal certainty, foreseeability and specificity of criminal law, as it fails to provide clear guidance with respect to the scope of its application, by considering combining the actions covered in Article 170 of the Criminal Code and adjust the provision to only deal with intentional, direct and immediate incitement to violence containing key elements and limited grounds as foreseen in international standards; [pars 64-65]

E. to take measures to render the wording of Article 170^2 of the Criminal Code more precise, concrete and foreseeable, including by clearly defining and limiting punishable actions to easily identifiable offences; and at a minimum, ensure that the provision focuses on statements rendered in a manner that is likely to directly incite imminent violence; [par 73]

F. to more clearly circumscribe the definition of "association or organised group or organisation with the aim of discriminating against or inciting discrimination against a group of people" in Article 170^1 of the Criminal Code to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity to directly incite imminent violence or commission of serious criminal offences defined in accordance with international human rights standards; [par 78]

G. to review Article 171 of the Criminal Code and define it narrowly and clearly to meet the principle of legal certainty, foreseeability and specificity of criminal law taking, especially reconsidering vague and broad terms such as obscene, indecent, or insolent. In addition, the legal drafters should consider if the 'actions' part of this provision can fall under the scope of general public disturbance provisions, where, if these actions were taken with the intention to target a specific religion, the aggravating circumstance provided under Article 60(1)(12) of the Criminal Code could be applied; [par 85]; and

H. to reconsider the scope of Article 169 of the Criminal Code to only deal with cases of direct and intentional discriminatory acts of the most serious nature while providing a clear definition of what is meant by "discrimination" for the purposes of the Criminal Code and to specify in this definition that temporary special measures aimed at accelerating de facto equality shall not be considered "discrimination". [par 90]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 18 January 2022, the Vice-Minister of Interior of the Republic of Lithuania sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for a legal review of the Criminal Code provisions on bias-motivated crimes. Following discussions between ODIHR and the representatives from the Ministry of Interior, it was specified that the legal analysis should take into account the latest amendments of 28 April 2022.
2. On 6 April 2023, ODIHR responded to this request, confirming ODIHR's readiness to prepare a legal opinion on the compliance of these Criminal Code provisions with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate as established by the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination whereby OSCE participating States committed to "*where appropriate, see the ODIHR's assistance in the drafting and review of [...] legislation [to combat hate crimes]*".[1]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the provisions of the Criminal Code pertaining to bias-motivated crimes, so-called "hate speech" and other related provisions submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire Criminal Code nor of the legal and institutional framework regulating bias-motivated crimes in Lithuania.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the provisions under review. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women[2] (hereinafter "CEDAW") and the 2004 OSCE Action Plan for the Promotion of Gender Equality[3] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspectives.
7. This Opinion is based on an unofficial English translation of the relevant provisions of the Criminal Code provided by the requestor, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.

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1 See *OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination*, taken at the Maastricht Ministerial Council Meeting on 2 December 2003, MC.DEC/4/03, para. 6.

2 *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Lithuania acceded to the CEDAW on 18 January 1994.

3 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Lithuania in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. THE CONCEPT OF "BIAS-MOTIVATED CRIME" OR "HATE CRIME"

9. Based on its commitments and publications, the OSCE considers "hate crimes" to be crimes committed with a bias motive. The *rationale* behind punishing crimes which are at least partly committed with a bias motive more severely than crimes committed without such motivation is based on the recognition that hate crimes affect a far wider circle of people than ordinary crimes by their impact not only on the immediate victim, but also on the community and society as a whole and can raise serious security and public order concerns.[4] By creating or emphasizing existing social tensions, bias-motivated crimes can cause division between the victim group and society at large and exacerbate existing intergroup tensions and play a part in interethnic or social unrest.[5]

10. In this respect, hate crimes are "message crimes" by which the perpetrator sends a message not only to the individual victim but also to other members of the victim's (perceived or actual) community and to society more broadly that members of the victim's community are not welcome and do not belong to society.[6] Even though there are several theories on what distinguishes "hate crimes" from other crimes, it is clear that "hate crimes" do not necessarily require the perpetrator to feel "hate" towards a specific group that a victim belongs to (actually or perceived) or is associated with. While the technically correct and therefore preferred term would be "bias-motivated crime", the term "hate crime" is also often used as an established umbrella term for the kind of crimes addressed in the legislation under review. It has to be emphasized, however, that, technically, the word "hate" is a misnomer, as "hate" as the actual motivation for the commission of the crime is not required.

11. A bias motive requires that a perpetrator chooses their victims on the basis of a characteristic shared by a group that is fundamental to their sense of self, which, in the context of hate crime legislation, are referred to as "protected characteristics".[7] These characteristics that function as a marker of group identity may include characteristics such as nationality, national or ethnic origin, colour, language, religion or belief, sex, gender, sexual orientation, gender identity, disability or other common feature that is fundamental to their identity.[8] Criminal Codes also generally criminalize certain forms of expression that amount to "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (or so-called "hate speech"[9]), which are explicitly prohibited on the international level for example in

4 ODIHR, Hate Crime Laws: A Practical Guide (2nd ed., 2022) (hereinafter "2022 ODIHR Practical Guide on Hate Crime Laws"), page. 19. See also e.g., European Union Agency for Fundamental Rights (EU FRA), Hate crime in the European Union, page 1, which refers to the necessity to "*counter pervasive prejudice against certain groups and compensate the damage this causes to victims, other members of the same group and society as a whole*".
5 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 22.
6 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, pages 19 and 30.
7 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 47.
8 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 15.
9 There is no internationally agreed definition of "hate speech". However, the term was defined by the Council of Europe Committee of Ministers in a Recommendation adopted in May 2022 (Council of Europe (CoE): Committee of Ministers, Recommendation

Article 20 (2) of the International Covenant on Civil and Political Rights (hereinafter "ICCPR")[10] or Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "ICERD").[11] Unlike "hate speech", the concept of bias-motivated crime requires a base offence, meaning an action which is in and of itself prohibited and sanctioned by means of criminal law.[12] In contrast, "hate speech" is sanctioned in a number of countries because the content of a specific expression amounts to direct and immediate incitement to violence, hostility or discrimination against a certain protected group and the speech itself would not constitute a crime if it did not contain the specific content prohibited in accordance with international standards.[13] If the content of the expression were not prohibited, then the speaker would merely be exercising their right to freedom of expression in line with internationally protected human rights.

12. Finally, it is fundamental to underline that legislation is only one part of the answer to the multi-faceted problem of hate crime and that a comprehensive approach to addressing hate crimes is needed to make hate crime laws effective.[14] This is all the more important in light of the latest Concluding Observations of the Committee on the Elimination of Racial Discrimination, which in particular recommend measures to encourage and facilitate the reporting of "hate speech" and hate crimes, strengthening the capacity of law enforcement officers, prosecutors and judges to investigate and prosecute cases of hate crime and "hate speech" and to collect disaggregated data on these crimes, and enhancing the data-collection system in order to allow the collection of data disaggregated by prohibited grounds in cases of discrimination, "hate speech" and hate crime, among others.[15] The OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes encourages "a comprehensive approach to the tackling of hate crimes".

CM/Rec(2022)16 of the Committee of Ministers on Combating Hate Speech, 20 May 2022, CM/Rec(2022)16) as "*all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as "race", colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation*" but only for the purpose of the Recommendation. The Recommendation then distinguishes between (i) "hate speech" that is prohibited under criminal law; (ii) "hate speech" that is subject to civil or administrative law; and (iii) other offensive or harmful types of expression requiring alternative responses.

10 *UN International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Lithuania acceded to the ICCPR on 20 November 1991.

11 *UN International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. The Republic of Lithuania ratified it on 10 December 1998.

12 The use of the term "race" or "racial" in this Opinion shall not imply endorsement by ODIHR of any theory based on the existence of different "races". While recognizing that the term "race" is a purely social construct that has no basis as a scientific concept, for the purpose of the Opinion, the term "race" or "racial" may be used in reference to international instruments applying such a term to ensure that all discriminatory actions based on a person's (perceived or actual) alleged "race", ancestry, ethnicity, colour or nationality are covered - while generally preferring the use of alternative terms such as "ancestry" or "national or ethnic origin"; the Opinion uses the term to ensure that people who are misperceived as belonging to another "race" are protected against hate crimes. (see e.g., *2022 ODIHR Practical Guide on Hate Crime Laws*, footnote 14 and pages 50-51. Except when part of a citation from a legal instrument or case law, the words "race" or "racial" are thus placed in quotation marks in this Opinion to indicate that underlying theories based on the alleged existence of different "races" are not accepted. See also ECRI, *General Policy Recommendation No. 7 on National Legislation To Combat Racism And Racial Discrimination*, adopted on 13 December 2002 and revised on 7 December 2017, CRI(2003)8, footnote 1.

13 See *2022 ODIHR Practical Guide on Hate Crime Laws*, pages 26-28.

14 See *2022 ODIHR Practical Guide on Hate Crime Laws*, pages 10-11, including but not limited to the training of criminal justice personnel, adopting guidance on effective investigation and prosecution of hate crime, effective mechanisms to record and collect accurate and sex-disaggregated data on crimes committed with a bias motive, including disaggregation of the data by prohibited ground, putting in place victim-friendly mechanisms to report hate crime and ensure effective access to justice, as well as to support victims of hate crime, awareness-raising and outreach to communities, victimization surveys, raising awareness among the public on tolerance and non-discrimination and the nature and impact of hate crime, building the capacity of and supporting civil society organizations to address hate crime, including their work to support victims and form coalitions; and establishing co-ordination mechanisms that ensure coherence of hate crime policies adopted by relevant actors.

15 CERD, *Concluding observations on the combined ninth and tenth periodic reports of Lithuania* (2019), CERD/C/LTU/CO/9-10, para. 14.

2. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

2.1. Anti-Discrimination Standards and "Bias-Motivated Crimes" or "Hate Crimes"

13. At the international and regional levels, protection from bias-motivated crimes emanates from general anti-discrimination standards found in the ICCPR, ICERD and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR").[16] These instruments prohibit discrimination in conjunction with the enjoyment of other protected rights, including the rights to life and to 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*".[17]

14. Under the UN Convention on the Rights of Persons with Disabilities (hereinafter "CRPD"),[18] 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*". Crimes committed with a bias against persons with disabilities remain widely unreported or misunderstood and criminal acts based on such bias thus need to be reflected appropriately in the criminal legislation; this is distinct from introducing aggravating circumstances based on the specific vulnerability of some victims, which pursue a different aim than hate crime laws.[19] However, specifying that disability is among the protected characteristics is generally not enough and should be accompanied by other measures, including the development of proper indicators that can help to identify a bias against persons with disabilities, specific measures to ensure effective access to justice, sex-disaggregated data on disability hate crimes, among others (see also para. 12 above on the need for a comprehensive approach for addressing hate crimes).

15. Across the OSCE region, laws that address gender-based hate crimes differ as to whether the term sex and/or gender is used.[20] The victims of such crimes are often targeted due to their perceived deviation from gender norms, but also due to their association, professional affiliation with or activism on gender issues, such as women's rights groups and civil society organizations working with victims of violence. While some cases of gender-based violence can be treated as gender-based hate crimes, the perpetrator must have demonstrated some forms of gender bias for it to be considered a hate crime.[21]

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16 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. Lithuania ratified the ECHR on 20 November 1995 and is not a signatory to the Protocol No. 12 to the ECHR which extends the prohibition of discrimination in relation to any right set by law.

17 See ECtHR, *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015, para. 67. See also e.g., ECtHR, Šečić v. Croatia, no. 40116/02, 31 May 2007, para. 66.

18 UN Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD"), adopted by General Assembly resolution 61/106 on 13 December 2006. The Republic of Lithuania ratified the CRPD on 18 August 2010.

19 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 54. See also Freedom from exploitation, violence and abuse of persons with disabilities, page 18; and European Union Agency for Fundamental Rights (FRA), *Equal protection for all victims of hate crime: the case of people with disabilities* (2015).

20 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 53.

21 See e.g., ODIHR, *Gender-Based Hate Crime* (10 March 2021), page 2.

16. 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.[22]

17. Lithuania is also a State Party to the CoE Convention on Cybercrime,[23] and has ratified its Protocol,[24] 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"),[25] which the Republic of Lithuania has signed but is yet to ratify, also requires States 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 directed against a woman because she is a woman or that affects women disproportionately).[26]

18. As an EU Member State, the EU 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[27] is relevant in this context, as is the 2012 EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime.[28] Notably, the latter Directive recognizes "*hate crime victims*" as a specific category of victims deserving special treatment.[29]

19. Numerous OSCE commitments also concern OSCE participating States' fight against discrimination and "hate crimes",[30] 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*".[31] The ensuing recommendations will also make reference, as appropriate, to the OSCE/ODIHR Hate Crime Laws: A Practical Guide (2022)[32] which, although not binding, may serve as a useful resource in the context of legislative reform pertaining to "hate crimes" and related issues.

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22 CoE, *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.

23 The CoE's Convention on Cybercrime (CETS No. 185) was ratified by Lithuania on 18 March 2004.

24 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 ratified by Lithuania on 12 October 2006.

25 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. The Republic of Lithuania signed the Istanbul Convention on 7 June 2013.

26 See Article 3 (d) of the Istanbul Convention.

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

28 *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 (3).

29 *Ibid.* Article 22 (3) of the EU Directive 2012/29/EU.

30 See e.g., *OSCE Ministerial Council Decision No. 4/03* of 2 December 2003, para. 8; *OSCE Permanent Council Decision No. 621 on Tolerance and the Fight against Discrimination, Xenophobia and Discrimination* of 29 July 2004, para. 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, para. 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*".

31 See *OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes*, 2 December 2009, para. 9.

32 ODIHR, *Hate Crime Laws: A Practical Guide*, 2nd edition, 2022.

2.2. Right to Freedom of Expression and Incitement to Discrimination, Hostility or violence

20. The right to freedom of expression becomes relevant in the context of so-called "hate speech". The right to freedom of expression and to receive and impart information is enshrined in Article 19 of the ICCPR and Article 10 of the ECHR.[33] The scope of Article 19 of the ICCPR embraces even expression that "*may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20*".[34] The ECtHR has similarly underlined that Article 10 of the ECHR also protects expressions that "offend, shock or disturb" the State or any part of the population[35]

21. The right to freedom of expression is not absolute and it can be limited under specific circumstances. Restrictions on the right to freedom of expression must be compatible with the requirements set out in Article 19(3) of the ICCPR and Article 10(2) of the ECHR, that is, they must be provided by law (test of legality), pursue one of the legitimate aims listed exhaustively in the text of international instruments[36] (test of legitimacy), be necessary and proportionate, and constitute the least intrusive measure among those effective enough to reach the designated objective (test of necessity and proportionality). In addition, they must be non-discriminatory. The requirement of legality of restrictions to freedom of expression means that the law concerned must be precise, certain and foreseeable, and must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[37]

22. Regarding so-called "hate speech", Article 20 (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 ICERD, "*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. The prohibitions provided by Articles 20 (2) of the ICCPR and 4 (a) of the ICERD are also subject to the strict conditions of Article 19 (3) of the ICCPR on restrictions to freedom of expression[38] as underlined above.

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33 See the UN International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the Convention on 7 October 1994.

34 See the UN Human Rights Committee, General Comment No. 34 on Article 19 of the ICCPR, CCPR/C/GC/34, paras. 11 and 38.

35 See e.g., ECtHR, Handyside v. United Kingdom, no. 5493/72, 7 December 1976, para. 49, where the ECtHR held that Article 10 of the ECHR protects "*not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*". See also e.g., ECtHR, *Bodrožić v. Serbia*, no. 32550/05, 23 June 2009, paras. 46 and 56.

36 Article 19 (3) of the ICCPR refers to *"(a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals*"; while Article 10 (2) of the ECHR mentions "*national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary*" as potential legitimate aims.

37 See the UN Human Rights Committee, General Comment No. 34 on Article 19 of the ICCPR, CCPR/C/GC/34, para. 25, which states: "*a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.*" See also ECtHR, *The Sunday Times v. the United Kingdom (No. 1),* no. 6538/74, where the Court ruled that "*the law must be formulated with sufficient precision to enable the citizen to regulate his conduct, by being able to foresee what is reasonable and what type of consequences an action may cause*." See also, e.g., Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, para. 58.

38 See UN Human Rights Committee, General Comment No. 34 on Article 19 of the ICCPR, CCPR/C/GC/34, 12 September 2011, para. 11; and Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35 on combating racist hate speech (2013), paras. 19-20.

23. In particular, the prosecution of direct and immediate incitement to violence is permissible[39] provided the material and mental elements of the offence are clearly defined and limited in law, and any interference is necessary and proportionate. Such incitement would only be prohibited and punishable by law if they constitute direct and immediate incitement meaning when: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence; a number of factors should be taken into account to determine whether the expression is serious enough to warrant restrictive legal measures including the context, speaker (including the individual's or organization's standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence).[40] Similarly, factors considered by the ECtHR when assessing whether an interference with the exercise of the freedom of expression in the form of criminal conviction is necessary in a democratic society 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; the manner in which the statements were made; their capacity – direct or indirect – to lead to harmful consequences; and the proportionality of sanctions.[41]

24. Building on the case-law of the ECtHR, the Council of Europe *Recommendation CM/Rec(2022)16 on Combating Hate Speech* distinguishes between (1) "hate speech" that is prohibited under criminal law; (2) "hate speech" that does not attain the level of severity required for criminal liability, but is nevertheless subject to civil or administrative law; and (3) offensive or harmful types of expression which are not sufficiently severe to be legitimately restricted under the ECHR, but nevertheless call for alternative (non-legislative) responses.[42] To assess the severity of an expression and which type of liability should be incurred, the Recommendation refers to the following factors: the content of the expression; the political and social context at the time of the expression; the intent of the speaker; the speaker's role and status in society; how the expression is disseminated or amplified; the capacity of the expression to lead to harmful consequences, including the imminence of such consequences; the nature and size of the audience, and the characteristics of the targeted group.[43]

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39 See e.g., ECtHR, *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998, para. 54, which states that "*it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks*"; ECtHR, *Sürek and Özdemir v. Turkey* (No. 2), nos. 23927/94 24277/94, 8 July 1999, para. 34, indicating that States enjoy a wider margin of appreciation for curtailing freedom of expression when remarks incite to violence; *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010, para. 116, finding that unless a publication incites violence on ethnic hatred, the government should not bring criminal law proceedings again the media; *Müdür Duman v. Turkey*, no. 15450/03, 6 October 2015, para. 33, finding an invalid interference as the relevant materials which the applicant was convicted for possessing did not advocate violence.

40 See e.g., CERD, *General recommendation No. 35* (2013), paras. 13-16; see also the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 29; and UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter "International Mandate-Holders on Freedom of Expression"), *Joint Declaration on Freedom of Expression and Countering Violent Extremism* (2016), para. 2(d).

41 See ECtHR, *Ibragim Ibragimov and Others v. Russia*, nos. 1413/08 and 28621/11, 28 August 2018, especially paras. 98-99 and 115-124; and regarding so-called "extremist" statements, ECtHR, *Stomakhin v. Russia,* no. 52273/07, 9 May 2018.

42 CoE Committee of Ministers, *Recommendation CM/Rec(2022)16 on Combating Hate Speech*, 20 May 2022, CM/Rec(2022)16), para. 3.

43 *Ibid.* *Recommendation CM/Rec(2022)16 on Combating Hate Speech*, para. 4; see also paragraph 11, which elaborates the types of expressions of hate speech that are subject to criminal liability.

3. General Comments on Bias-Motivated Crimes

25. The current Criminal Code of Lithuania has several provisions specifically dealing with bias-motivated crimes, namely Article 129 (13) (Murder), Article 135 (2) (13) (Serious Injury to Health), Article 138 (2) (13) (Minor Injury to Health), as amended in 2022, and Article 312 (2) (Desecration of a Grave or Another Place of Public Respect). These provisions allow for a heightened penalty when the said criminal offence was committed with the intent to express hatred towards a group of persons or a person belonging thereto on grounds of "*age, sex, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, belief or opinions*".

26. In addition, Article 60 (1) of the Criminal Code, as amended in 2022, covers aggravating circumstances for all crimes, except when such circumstance is a constitutive element of the criminal offence (Article 60 (2)). Article 60 (1) (12) includes among others a general penalty enhancement provision when the criminal act has been committed with the intention of expressing hatred towards a group of persons or a person belonging thereto on grounds of "*age, sex, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, beliefs or opinions*". Pursuant to Article 54 of the Criminal Code, when sentencing, the court shall take into account various elements, including mitigating and aggravating circumstances. Article 60 of the Criminal Code thereby serves as a supplementary umbrella provision obliging judges to consider bias-motivation, within the established maximum penalty, for all crimes, except those where bias is a constitutive element. It is noted that there may be discrepancies in the English translation of the words 'lyties', 'tikėjimo', 'įsitikinimų' and 'pažiūrų'in Article 60. For the purpose of this Opinion it is assumed that these words accurately translate to 'sex', 'religion', 'beliefs' and 'opinions' respectively.

27. In light of the foregoing, the criminal legislation of Lithuania combines specific aggravating circumstance of bias motivation for three serious criminal offences against the person (murder, serious and minor injury to health) as well as a general penalty-enhancing provision applicable to other crimes. Such a combination of approaches is generally acknowledged as a good practice to combat hate crime effectively.[44]

28. At the same time, the current legal framework in place does not provide specific penalty enhancements for some of the most common base offences for bias-motivated crimes. These are, in particular, property crimes like, for example, theft, robbery, burglary and arson. Specific penalty enhancements could also be foreseen in provisions targeting sexual violence and sexual harassment, other forms of harassment, threatening of persons as well as unlawful deprivation of liberty. **The legal drafters could consider broadening the scope of the base offenses that would include specific penalty-enhancing provisions if committed with a bias motivation**, depending on what kinds of offences are frequently motivated by bias in Lithuania.[45] Further, the impact of the specific crimes committed with a bias motive on a particular society should also be a factor to consider in this respect.

29. It is important to note however that general penalty enhancement provisions, such as Article 60 of the Criminal Code can be outweighed by mitigating circumstances. Hence, it is generally good practice to adopt mandatory statutory instructions or sentencing guidelines that require an automatic penalty enhancement when an offence

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44 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 45.
45 See *2022 ODIHR Practical Guide on Hate Crime Laws*, pages 45-46.

is motivated by bias to prevent the relevant aggravating circumstances from being outweighed.[46] Moreover, it is also good practice to require courts to put on record the reasons for applying or not applying sentence-enhancing provisions in cases of bias-motivated crime.[47] This increases the visibility of bias-motivated crimes, also within the judiciary and makes a history of bias-motivated crimes known to investigative authorities.[48] It furthermore can serve as a way to demonstrate to the victim that a bias motivation has been taken into account and to the public that courts follow a zero tolerance policy for bias-motivated crimes in society. Finally, an acknowledgement of a bias motivation on public record is also crucial in terms of data collection, which plays a part in the prevention and identification of "hate crimes". It is therefore essential that applicable criminal procedural provisions require judges to put on record the reasons for applying or not applying aggravating circumstances or penalty-enhancing provisions in cases which involve potential bias motives on the part of the perpetrator. At the same time, if the bias motivation is disregarded during the early stages of investigation, and therefore no evidence collected, the bias motivation will also be ignored at the sentencing stage. Therefore, it is essential that criminal justice authorities establish effective systems to record bias motivation, train relevant officials and develop police and prosecutorial guidance to thoroughly investigate and record the potential bias motivation from the outset of the investigation, regardless of the legal qualification of an act.[49] **It is therefore essential that criminal procedural provisions specifically address and emphasize the importance of correct identification, registration, investigation and punishment of such crimes.**

RECOMMENDATION A.

To consider broadening the scope of the base offenses that would include specific penalty-enhancing provisions if committed with a bias motivation, depending on what kinds of offences are frequently motivated by bias in Lithuania.

3.1. Motives, Mixed Motives, Affiliation and Association

30. Currently, the wording concerning the bias motivation in the above-mentioned provisions of the Criminal Code is solely linked to the intention to express 'hatred'. While certain laws of OSCE participating States do refer to "hate" and adopt a so-called "hostility model", 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 criminal offences will often be challenging and sets a very high standard which may often lead to the non-application of provisions on bias-motivated crimes.[50]

31. Furthermore, from a victim's point of view, the fact of being selected due to a fundamental group characteristic and for who they are psychologically does the most damage, not necessarily the fact that the crime was committed due to an emotional reaction such as "hate". The offensive message conveyed by the perpetrator who

46 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 44.
47 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 44.
48 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 45.
49 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 44.
50 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, pages 58-59.

believes that certain people deserve less or no protection, as opposed to others, due to their protected characteristics, justifies harsher punishment.

32. Some other OSCE participating States adopt a so-called "discriminatory selection model", whereby the perpetrator deliberately targets the victim because of a protected characteristic, but no actual hatred or hostility is necessary to prove the offence. At the same time, the mere fact that a victim presents one or several protected characteristics is not sufficient and there should be some evidence of specifically targeting the victim on the basis of one or several protected characteristics demonstrating some forms of bias.

33. In the context of Lithuania, the 2020 methodological guidelines of the Prosecutor General,[51] confirm that hate crimes have their own specificities.[52] Hate crime is defined as all criminal acts motivated by hate, bias and/or prejudice against a group of persons distinguished according to the characteristics. These methodological guidelines pertain to the regulation of arrangements of pre-trial investigations of these crimes. The guidelines acknowledge that *"[h]ate crimes and hate speech differ from other criminal acts by their impact and consequences (both tangible and intangible) on the victims and certain groups of persons or their individual members because they not only traumatise but also intimidate. The social harm of hate crimes stands out not so much by its physical or material damage; it is distinctive because of its severe moral harm for the victim. Such criminal acts target the personal qualities, which form the core of the person's identity.*" Hence, it appears that the approach adopted does not necessarily require evidence of "hatred" but is broader and would more generally consider bias or prejudice. **It is therefore recommended that the wording in the relevant provisions of the Criminal Code reflects this broader approach by removing the reference to "hatred", thereby moving away from the hostility model, and replace it by more neutral term such as bias or prejudice motivation**.

34. Whatever model is chosen by the legislator, the law should be accompanied by interpretative guidance and training for law enforcement, prosecutors and courts as to what evidence is necessary and sufficient to prove the bias motivation. In developing such guidance, emphasis should be placed on the external expressions of hate rather than proving the emotional or mental state of the perpetrator.

35. It is 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. Crimes in general, including bias-motivated crimes, could also be committed out of a variety of reasons (mixed motives). Crimes committed against a person based on their *presumed* belonging to a protected group should also be covered. 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 or prejudice against the victim due to their actual or perceived protected characteristics**.

36. Further, some bias-motivated crimes are motivated in part or in whole due to a person's association or affiliation with a person or a group of persons with protected

51 *Methodological recommendations No 17.9-4265 of 30 March 2020*, approved by the Order of the Prosecutor General of the Republic of Lithuania on the peculiarities of conducting, organising and managing a pre-trial investigation into hate crimes and hate speech. Available online: <https://www.prokuraturos.lt/data/public/uploads/2020/04/neapykantos_nusikaltimu_tyrimo_metodines_rekomendacijos.pdf>.

52 New methodological recommendation for hate crime and hate speech prosecution were developed by the prosecutor general's office. The text was finalized in May 2023 with support from ODIHR.

characteristics**.** Crimes committed against a person because of a presumed association or affiliation with this group should also be included. **It is recommended to broaden the scope of the above-mentioned criminal provisions to also cover 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, member of associations or activism to promote or protect the rights of the persons/communities presenting the protected characteristics, etc.).[53] This would be in line with the ECtHR's decision in *Škorjanec v. Croatia*, where the Court held that the obligation of State authorities in cases of suspected racist violence, to take all reasonable action to ascertain whether a bias motivation underlies a specific crime "*concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic*".[54]

37. To ensure that these provisions are effectively applied by the police, prosecutors and judges, it is key to specify in the Criminal Code, or in prosecuting or investigating guidelines, what kind of evidence could be used to establish the bias motive, as in other countries. While the protected characteristic(s) of the victim should not in itself be a sufficient element to conclude that a bias-motivated offence was committed, this will be a relevant factor that should trigger an investigation to determine whether a "bias motivation" exists. The existence of bias indicators does not automatically prove that the criminal act was a hate crime, although this should prompt investigators to ask the necessary follow-up questions, and investigate potential bias motivation further.[55] It is welcome that the 2020 methodological guidelines of the Prosecutor General elaborate the kinds of bias indicators that could be used to identify "hate crimes". This should be accompanied by adequate training and could help clarify how the terms mentioned in the provisions of the Criminal Code under review should be interpreted in practice.

RECOMMENDATION B.1

To reflect in the relevant provisions of the Criminal Code by removing the reference to "hatred", thereby moving away from the hostility model, and replace it by a more neutral term such as bias or prejudice motivation.

RECOMMENDATION B.2

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 or prejudice against the victim due to their actual or perceived protected characteristics

RECOMMENDATION B.3

53 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 62.

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

55 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 16; see also ODIHR, *Using Bias Indicators: A Practical Tool for Police* (2019), page 4. See also, ECtHR, *Balázs v. Hungary*, no. 15529/12, 20 October 2015, para. 75.

To broaden the bias-motivated crimes to also cover offences that are motivated by the real or presumed affiliation or association with such a person or group.

3.2. Protected Characteristics

38. Characteristics protected by "hate crime" legislation are usually said to fulfil three criteria: one, the characteristics are noticeable from the outside, either from a person's appearance or from contextual circumstances; two, they are fundamental to a person's identity; and three, they are markers of group identity, embedding an individual into a broader group context with a common group identity.[56] The most common protected characteristics in national legislation within the OSCE area are "race", national origin, ethnicity and religion.[57] In addition, other characteristics such as colour, language, belief, sex, sexual orientation, gender identity, or disability also deserve enhanced protection from bias-motivated crimes. In order to ensure that the provisions are applied in practice, it is of utmost importance that the characteristics protected in the provisions are consistent and the logic underlying them is congruent. At the same time, the list of protected characteristics should not be overly broad as it may otherwise undermine the concept of hate crime and provide opportunities for abuse or misuse.[58]

39. The general penalty enhancing provision (Article 60 (1) (12)) and the three specific penalty enhancing provisions in Articles 129 (Murder), 135 (Serious Injury to Health) and 138 (Minor Injury to Health) refer to the following specific characteristics, namely "*age, sex, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, belief or opinions*". and Article 312 (Desecration of a Grave or Another Place of Public Respect) to vandalizing for "racial, national or religious reasons"

40. The provisions of the Criminal Code under review mention the protected characteristics most frequently covered by hate crime laws across the OSCE region, such as "race", nationality, ethnic origin as well as religion and belief, which is welcome.[59] The adopted amendments of April 2022 expanded the existing list of protected characteristics with 'colour' and 'ethnic origin' in all the above-mentioned provisions, which is welcome and in line with good practice.[60] Indeed, the prior existing grounds of "race", nationality or descent were not necessarily sufficient to ensure broad applicability and the new wording better reflects the scope of the ICERD where the use of "racial" explicitly incorporates "race", colour, descent and national or ethnic origin. The mention of language, which is a visible characteristic intrinsically linked to the national, ethnic and/or cultural origin, is also positive.

41. It is also welcome that protected characteristics such as gender, sexual orientation and disability are explicitly mentioned in these provisions. Other terms included in the list (such as age and social status) may lack precision or include characteristics that may not necessarily be essential to a person's sense of self nor shared by people who as a group have experienced discrimination, exclusion or oppression. This may make it

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56 See [2022 ODIHR Practical Guide on Hate Crime Laws](), page 47.
57 *Ibid.* page 40.
58 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 56.
59 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, pages 49-52.
60 *Ibid.* 2022 ODIHR Practical Guide on Hate Crime Laws, page 71.

difficult to effectively implement the law with respect to these characteristics. The proposed formulation of some of the protected characteristics could also 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 lege*). 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. A criminal law provision that provides for increased penalties but is unclear about the circumstances in which those increased penalties will be applied is likely to fail this fundamental test.[61]

42. The characteristic of "social status" would appear to be too vague to meet the requirements of legal certainty, foreseeability and specificity of criminal law and may lead to a variety of interpretations by state authorities. In this respect it is noted that the Law on Equal Treatment defines social status as education, qualification acquired by a natural person or his/her studies at higher education and research institutions, his/her property, income, need for state support provided for in legal acts and/or other factors related to the financial/economic situation of the person.[62] It is doubtful whether these terms are sufficiently clear for criminal legislation, which given the potentially severe nature of criminal penalties needs to be as precise and specific as possible. Moreover, it may not necessarily constitute a marker of group identity or a characteristic that is fundamental to a person's sense of self.[63]

43. Similarly, "opinions" (in general) as referred to in the Criminal Code provisions under review is generally not considered to be immutable or a core characteristic. 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. A bias motive based on this ground may be extremely difficult to prove in practice. Moreover, a person's "opinions" may not be evident unless the victim is somehow known to the perpetrator. 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" as being too vague**.

44. Regarding "age", it is noted that some countries do include such a protected characteristic in their criminal legislation. 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. Including this characteristic might also pose particular difficulties when distinguishing between a mere opportunistic crime and a "hate crime".

45. In light of the foregoing, **it is thus recommended reconsider the inclusion of the above-mentioned characteristics, with a view to limit them to those that are immutable or fundamental to a person's sense of self and function as markers of group identity, and delete those which are unclear and potentially subject to arbitrary interpretation such as "age", "social status" and "opinions"**.

46. As regards "sex", this falls among the frequently protected characteristics in "hate crime" legislation of OSCE participating States.[64] Including sex and sexual orientation

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61 *Ibid.* [2022 ODIHR Practical Guide on Hate Crime Laws](), page 57.
62 Law on Equal Treatment of the Republic of Lithuania, 8 November 2016, No XII-2768.
63 See [2022 ODIHR Practical Guide on Hate Crime Laws](), pages 56-57.
64 See [2022 ODIHR Practical Guide on Hate Crime Laws](), page 53

as protected characteristics demonstrates Lithuania's willingness to punish offences motivated by gender bias more severely. This is overall in line with the Istanbul Convention, to which Lithuania is a signatory, 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" puts the focus on the offender's "hate" motivation and at the same rejects a culture of victim-blame, particularly in sexual violence cases.[65] At the same time, "gender identity" - understood as a person's internal, deeply felt sense of being male or female or other, which may or may not correspond to the sex assigned at birth, is not mentioned and it is recommended to supplement the list accordingly. This would ensure that perpetrators targeting victims due to their perceived deviation from gender norms based on their gender identity, are covered. Further references can be made to gender expression, sex characteristics or any other fundamental characteristic, or a combination of such characteristics.

47. Article 312 of the Criminal Code penalizes the vandalizing of a cemetery or other place of public worship or desecrating a grave or other place of public worship for "racial, national or religious reasons". Hate crimes include acts of vandalism and other attacks against property, of individuals or communities sharing certain protected characteristics. The protective ground "national" is unclear and should be addressed, unless this a result of a translation error or is a term understood within the specific country context.

48. As indicated above, at the stage of sentencing, a court takes into account a number of elements, including mitigating and aggravating circumstances to determine the sentence, limited by the maximum penalty set out in the Special Part of the Criminal Code. Article 60 of the Criminal Code provides a closed list of 'aggravating circumstances' and includes a list of specific protected characteristics as noted above. 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 a general penalty-enhancing provision such as Article 60 could potentially be framed more broadly.[66] 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, which is another way of ensuring sufficient legal certainty. Consequently, a catch-all formulation included in the general sentence-enhancing provision could 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 within the maximum limit, even if the protected characteristic is not expressly mentioned.

49. Consequently, **the drafters could consider supplementing Article 60 of the Criminal Code by a reference to bias or prejudice based on other criteria which are fundamental to a person's sense of self and function as markers of group identity are also taken into account**.

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[65] 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

[66] See e.g., ODIHR, *Opinion on Draft Amendments to the Moldovan Criminal and Contravention Codes relating to Bias-motivated Offences* (2016), para. 54.

50. The Criminal Code contains provisions on incitement to discrimination, hatred or violence, such as in Articles 170 (Incitement against Any National, Racial, Ethnic, Religious or Other Group of Persons), and 170[2] (Public Condonation of International Crimes, Crimes Committed by the USSR or Nazi Germany, Denial or Gross Trivialisation of the Crimes), as well as other related crimes, including Articles 170[1] (Creation and Activities of the Groups and Organisations Aiming at Discriminating a Group of Persons or Inciting against it), and 171 (Disturbance of Religious Ceremonies or Religious Celebrations), and 312 (1) (Desecration of a Grave or Another Place of Public Respect). These will be addressed in the next sections, though the concerns expressed regarding the protected grounds extend to these provisions in so far they cover the aforementioned grounds.

RECOMMENDATION C.1

To limit characteristics to those that are immutable or fundamental to a person's sense of self and function as markers of group identity, and delete those such as "age", "social status" and "opinions", which are unclear and potentially subject to arbitrary interpretation.

RECOMMENDATION C.2

To consider supplementing Article 60 of the Criminal Code by a reference to bias or prejudice based on other criteria which are fundamental to a person's sense of self and function as markers of group identity are also taken into account.

4. Incitement to Discrimination, Hostility or Violence and Other Prohibited Expressions

51. Currently, the prohibition of acts related to incitement to hatred is directly derived from the Constitution, the Criminal Code and the international commitments of Lithuania. There is no separate article of the Criminal Code devoted to so-called "hate speech" in Lithuanian law, but it is generally considered to be covered by incitement to hatred (Article 170). Article 25 of the Constitution of the Republic of Lithuania states that a person shall have the right to hold and freely express his or her own convictions, and shall not be hindered in seeking, receiving and disseminating information and idea. According to this Article, freedom to express opinions and disseminate information is incompatible with criminal acts such as incitement to national, racial, religious or social hatred, violence and discrimination, defamation and disinformation. Acts related to incitement to hatred as a criminal offence are regulated in Chapter XXV of the Criminal Code.[67]

67 Namely, Article 169 (Discrimination on Grounds of Nationality, Race, Sex, Descent, Religion or Belonging to Other Groups), 170 (Incitement against Any National, Racial, Ethnic, Religious or Other Group of Persons), Article 170[1] (Creation and Activities of the Groups and Organisations Aiming at Discriminating a Group of Persons or Inciting against It), Article 170[2] (Public Condonation of International Crimes, Crimes Committed by the USSR or Nazi Germany, Denial or Gross Trivialisation of the Crimes), 171 (Disturbance of Religious Ceremonies or Religious Celebrations), and 312 (Desecration of a Grave or Another Place of Public Respect).

52. The 2020 methodological guidelines of the Prosecutor General provide that "hate speech" "*is considered to be the public dissemination (oral, written or otherwise) of information (ideas, opinions, known false facts) that ridicules, despises or incites hatred, inciting discrimination, violence, physical violence against a group of people or a person belonging to such a group on the grounds of age, gender, sexual orientation, disability, race, nationality, language, origin, social status, religion, belief, or opinion*."[68] The methodological guidelines note that in the case of "hate speech", the perpetrator's prejudice and/or bias is a crucial element in the application of criminal liability, since in the absence of this motive, the speech does not constitute a criminal offence in itself.

53. 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.[69] 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.[70] As it stands, even if absolute precision may not be possible, these factors may help amend the provisions mentioned below in such a way to allow individuals to distinguish between permissible statements or ideas and public expression that would render them criminally liable.

4.1. Incitement-related Offences

54. Article 170 of the Criminal Code distinguishes three different incitement offences. Paragraph 1 concerns a situation where a person *"...for the purposes of distribution, produces, acquires, sends, transports or stores items mocking, ridiculing, expressing contempt for, urging hatred of or inciting discrimination ... or inciting violence, a physical violent treatment of ... a group of persons or the person belonging thereto or distributes [the items] ...*". Paragraph 2 covers a person who "*… publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of persons or a person belonging thereto…*", and paragraph 3 a person who "*…publicly incites violence or a physical violent treatment of a group of persons or a person belonging thereto on grounds of […] or who has financed or otherwise materially supported such activities…*".

55. Article 170 (1) categorizes several actions that are carried out for the purposes of distribution or to actually distribute items that ridicule, express contempt for and incite hatred or discrimination or violence against a group or a person belonging thereto on

68 Methodological recommendations No 17.9-4265 of 30 March 2020, approved by the Order of the Prosecutor General of the Republic of Lithuania on the peculiarities of conducting, organising and managing a pre-trial investigation into hate crimes and hate speech. Available online: <https://www.prokuraturos.lt/data/public/uploads/2020/04/neapykantos_nusikaltimu_tyrimo_metodines_rekomendacijos.pdf>.

69 ECtHR, *Perinçek v. Switzerland [GC]*, no. 27510/08, 15 October 2015, para. 133.

70 ibid. Paras. 204-208 (2015 ECtHR judgment in the case of Perinçek v. Switzerland).

the grounds of the above-mentioned protected characteristics. These actions engage the right to freedom of expression, in particular media freedom.

56. 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".[71] Similarly, the UN Human Rights Committee has considered that Article 19 of the ICCPR also protects "deeply offensive" speech.[72] As such, public expression that is said to mock or ridicule or express contempt for groups of persons or a person belonging to groups protected on the grounds provided in Article 170 (1), may thus nevertheless be protected by the right to freedom of expression.[73]

57. The wording of this Article in its English translation appears vague and would require substantial revision in order to comply with the principles of legal certainty, foreseeability and specificity of criminal law, as it fails to provide clear guidance with respect to the scope of its application. The limitations to the exercise of the right to freedom of expression, through criminalizing actions for distribution or with an intention to distribute items that ridicule and express contempt, without any qualifying factors, or without outlining the circumstances in which these are propagated, make the used terms overly broad and vague. This means they could apply to a vast number of situations and statements, which creates problems in terms of accessibility, legal certainty and foreseeability. As mentioned above, criminal offences and the relevant penalties must be clearly and precisely 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.[74] The overly broad terms in Article 170 (1) will make it hard for a person to understand, even when seeking expert advice, which statements are allowed and which are sanctioned by means of criminal law and to align their behaviour accordingly.

58. The CoE Committee of Minister's *Recommendation CM/Rec(2022)161 on Combating Hate Speech*, notes that "*Member States should specify and clearly define in their national criminal law which expressions of hate speech are subject to criminal liability, such as …intentional dissemination of material that contains […] expressions of hate speech…*" in the form of public incitement to commit genocide, crimes against humanity or war crimes, or public denial, trivialisation and condoning therefore, public incitement to hatred, violence or discrimination, racist, xenophobic, sexist and LGBTI-phobic threats, and racist, xenophobic, sexist and LGBTI-phobic public insults.[75]

59. Thus, while the dissemination of expressions such as incitement to hatred, violence and discrimination through materials can indeed be subject to criminal liability, Article 170 (1) seems to go further and criminalizes a person who "*produces, acquires, sends, transports or stores*" any item that ridicules, expresses contempt for certain groups or persons with the intention to dissemination or actually disseminates. The protection grounds raise similar concerns as noted above, especially for characteristics such as age, social status, and opinion. In addition, the actions are not qualified as deliberate or intentional, therefore bringing those who unknowingly engage in the identified

71 See ECtHR, *Bodrožić v. Serbia*, no. 32550/05, 23 June 2009, paras. 46 and 56.

72 See UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, 12 September 2011, para. 11.

73 *Ibid.* para. 38 (UN HRC General Comment No. 34).

74 See e.g., ECtHR, *Rohlena v. the Czech Republic* [GC], no. 59552, 27 January 2015, paras. 78-79. See also UN Human Rights Committee, *General Comment No. 29 on States of Emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), para. 7.

75 Council of Europe Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted by the Committee of Ministers on 20 May 2022, Appendix, para. 11.

actions within the scope of criminal liability. This may result in criminal sanctions for merely disseminating information, which, for instance, could be considered discriminatory. Without any further definition or clarification what "discrimination" means in this context, this could constitute and unjustified interference in fundamental rights and freedoms.

60. The lack of certainty and foreseeability of this provision is not strictly circumscribed to the situations laid out before. As it stands, even if absolute precision may not be possible, these factors may help amend Article 170 (1) in such a way as to allow individuals to distinguish between permissible items or material or those that would render them criminally liable. **It is recommended to delete the reference to "purposes of distribution" so as to expressly only cover the actual dissemination, and to reconsider the words "ridiculing" and "expressing contempt" in Article 170 (1) of the Criminal Code.** Further, while this may stem from the English translation, it is unclear if the provision refers to urging hatred or the 'incitement' of hatred. The latter wording is preferred.

61. As for Article 170 (2) of the Criminal Code similar observations can be made with respect to the overbroad and vague wording. This provision penalizes a person who "*publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of persons or a person belonging thereto*" on grounds of "*age, gender, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, belief or opinion*".

62. Article 20 of the ICCPR prohibits *"[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*" and, as such, is more concrete than Article 170 (2) of the Criminal Code. Additionally, according to the recommendations of the Rabat Plan of Action, "*States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant,… and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others.*"[76]

63. The third paragraph of Article 170 covers incitement to violence. Here too the protected grounds are extensive. As noted, it may be justified to impose criminal sanctions in cases of incitement-related offences, but these should be proportionate and only applied in the most serious expressions of incitement to violence. Also, as the explanatory memorandum to the CoE Recommendation notes, *"[t]he [ECtHR] has indeed acknowledged that criminal sanctions, including those against individuals responsible for the most serious expressions of hatred or inciting others to violence, could be invoked only as an ultima ratio measure. At the same time it also held that where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor. The [ECtHR] has likewise accepted that criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes.*"[77]

64. At the same time, the mentioned incitement is unclear as to the type of actions of support this covers and the context in which this should take place. This could

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76 See the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 21.

77 Council of Europe Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted by the Committee of Ministers on 20 May 2022, Explanatory Memorandum, para. 56.

potentially cover a wide range of activities and even holding an opinion in support of the incitement. This does not appear to comply with legal certainty, foreseeability and specificity required of criminal law and should be addressed. Moreover, as mentioned above, such forms of expression would only be prohibited and punishable by law if they constitute *direct and immediate* incitement to violence (see paragraph 23 above).[78]

65. The legal drafters could consider combining the actions covered in Article 170 of the Criminal Code and adjust the provision to only deal with intentional, direct and immediate incitement to violence containing key elements and limited grounds as foreseen in international standards. The provisions do not contain exceptions or defences for good faith discussions or public debate on issues of public interest, be it of a religious, educational, scientific, political or other nature. It is recommended to add such exceptions.

RECOMMENDATION D.1

To delete the reference to "purposes of distribution" so as to expressly only cover the actual dissemination, and to reconsider the words "ridiculing" and "expressing contempt" in Article 170 (1) of the Criminal Code.

RECOMMENDATION D.2

To ensure that Article 170 complies with the principles of legal certainty, foreseeability and specificity of criminal law, as it fails to provide clear guidance with respect to the scope of its application, by considering combining the actions covered in Article 170 of the Criminal Code and adjust the provision to only deal with intentional, direct and immediate incitement to violence containing key elements and limited grounds as foreseen in international standards.

4.2. Propaganda of Genocide or Crimes against Humanity

66. Article 170[2] of the Criminal Code covers public support, denial or grossly disparaging of genocide or other crimes against humanity or war crimes that are recognized by the legislation of Lithuania, EU or by the final judgments of Lithuania or of international tribunals, if this was done in a threatening, abusive or insulting manner, or if it resulted in a disturbance of public order or could have resulted in a disturbance of public order. It further penalizes whoever publicly supported aggression against Lithuania committed by the USSR or Nazi Germany, genocide or other crimes against humanity

78 See e.g., CERD, *General recommendation No. 35* (2013), paras. 13-16; see also the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 29; and UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur and the African Commission Special Rapporteur on Freedom of Expression and Access to Information (hereinafter "International Mandate-Holders on Freedom of Expression"), *Joint Declaration on Freedom of Expression and Countering Violent Extremism* (2016), para. 2(d).

or war crimes committed by the USSR or Nazi Germany, or other very serious or serious crimes against Lithuania or its population of committed in 1990-1991 by persons who perpetrated or participated in the aggression against the Republic of Lithuania, or denied or grossly disparaged them, if it was done in a threatening, abusive or insulting manner, or if it resulted in a disturbance of public order, or was liable to result in such a disturbance.

67. Article 170^2 is problematic for several reasons. First, it is too vague to adhere to the principles of legal certainty, foreseeability and specificity of criminal law. The reference to terms such as publicly supported, deny or grossly disparage "genocide or other crimes against humanity or war crimes", "*done in a threatening, abusive or insulting manner*", or if it resulted or could have resulted in a disturbance of public order can encompass a multitude of different actions, which are difficult to foresee or follow. Existence of such an open-ended and unclear provision in the criminal legislation creates risk of its overbroad application and abuse. There seems to be no robust definition of what the law means by "support" and "grossly disparage" and whether or not it requires an element of publicly disseminating the information (or whether, e.g., the sharing of information within a private group of persons would also fall under this provision).

68. Similar concerns arise with respect to the second part of the provision that more concretely aims to penalize whoever publicly supported aggression, genocide or other crimes against humanity or war crimes committed by the USSR or Nazi Germany or other very serious or serious crimes committed in 1990-1991 on the territory of or against the population of Lithuania, or denied or grossly disparaged these events, *"…if it was done in a threatening, abusive or insulting manner, or if it resulted in a disturbance of public order, or was liable to result in such a disturbance…*".

69. As underlined above, to comply with the principle of foreseeability, an individual must know from the wording of the relevant provision and, if need be, after asking for legal advice and with the assistance of the courts' interpretation, what acts are punishable by means of criminal law and what penalty will be imposed for these acts.

70. Additionally, whilst the provision does contain the caveat that the actions in question must be committed in a manner likely to or able to disturb peace, the use of 'or' shows that this is not necessarily linked to the behaviours mentioned in the provision, namely the public support, denial and grossly disparaging could also be penalized if this is done 'in a threatening, abusive or insulting manner' only.

71. The ECtHR and the European Commission of Human Rights have dealt in a number of cases with national laws on Holocaust denial and other statement relating to crimes committed by Nazi Germany. It either dismissed the complaints as incompatible *ratione materiae* pursuant to Article 17 ECHR, according to which activities which are incompatible with the values of the Convention are excluded from its protection or argued that the interference with an applicant's right to freedom of expression was necessary in a democratic society and hence held that no undue interference in a person's human rights or fundamental freedoms had occurred.[79]

72. In other cases, the ECtHR has ruled that the penalization of statements denying certain historic events was an undue restriction of Article 10 of the ECHR. The Court has listed factors which should be considered when determining if interferences with

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79 See e.g., ECtHR, *Garaudy v. France*, no. 65831/01, 24 June 2003; ; *Witzsch v. Germany (no. 2)*, no. 7485/03, 13 December 2005; see also ODIHR-Venice Commission, *Joint Interim Opinion on the Law of Ukraine "On the condemnation of the communist and national socialist (Nazi) regimes, and prohibition of propaganda of their symbols"* (21 December 2015), para. 92; for ECtHR jurisprudence on "hate speech" and Article 17 of the ECHR, see further *M'Bala v. France*, no. 25239/13, 20 October 2015.

Article 10 ECHR were necessary in a democratic society: the manner in which the impugned statements were phrased and the way in which they could be construed, the specific interest or right affected by the statements, the possible impact of the statements made, and the time that has elapsed since the relevant historical events have taken place.[80]

73. It is recommended to take measures to render the wording of Article 170^2 of the Criminal Code more precise, concrete and foreseeable, including by clearly defining and limiting punishable actions to easily identifiable offences and taking into account the above-outlined guidance. At a minimum, the provision should focus on statements rendered in a manner that is likely to directly incite imminent violence.

RECOMMENDATION E.

To take measures to render the wording of Article 170^2 of the Criminal Code more precise, concrete and foreseeable, including by clearly defining and limiting punishable actions to easily identifiable offences; and at a minimum, the provision should focus on statements rendered in a manner that is likely to directly incite imminent violence.

5. Other Related Crimes

5.1. Creation of Groups or Organizations Aimed at Discriminating

74. Article 170^1 of the Criminal Code penalizes the creation of groups or organizations whose aim is discriminating or inciting discrimination against a group of people on certain protected grounds. It also penalizes the participation in the activities of such a group or organization and the financing or otherwise materially supporting such a group or organization.

75. All persons are free to establish an association and determine its objectives and activities free from discrimination and state interference.[81] Limitations to the right to freedom of association need to adhere to the criteria set by international instruments, should be narrowly construed and are permissible only based on one or several legitimate aims as listed in Article 22 (2) of the ICCPR and Article 11 (2) of the ECHR.[82] The ability to associate together and form collective entities in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.[83] At the same time, this right to determine freely its objectives or activities is not unlimited, especially when they are incompatible with international human rights standards. Article 4 (b) ICERD contains a binding obligation to declare organizations that promote and incite racial discrimination illegal and prohibit them, as well as recognize "participation in such organizations or activities as an offence punishable by law".

80 E.g., ECtHR, *Perinçek v. Switzerland [GC]*, no. 27510/08, 15 October 2015, paras. 215 et seq..

81 See Principles 2, 4 and 5 of the ODIHR and Venice Commission, *Guidelines on Freedom of Association* (2015) (hereinafter "2015 Guidelines on Freedom of Association").

82 The legitimate aims mentioned in Article 22 (2) the ICCPR and Article 11 (2) of the ECHR include national security, public safety, public order (ordre public) for Article 22 (2) of the ICCPR or the prevention of disorder or crime for Article 11 (2) of the ECHR, the protection of public health or morals, and the protection of the rights and freedoms of others.

83 See also Principle 1 and 2, ODIHR-Venice Commission *Guidelines on Freedom of Association* (2015).

Hence, participation in such organizations can be recognized as a criminal offence.[84] As underlined in the ODIHR-Venice Commission Joint Guidelines on Freedom of Association, this includes "*cases where an association's objectives and activities promote propaganda for war, the incitement of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as well as the achievement of goals that are inconsistent with democracy or that are prohibited by laws that are not themselves contrary to those standards*".[85] The Joint Guidelines further emphasize that *"[g]iven that the advancement of equality has become a major goal at the national and international levels, as underlined by these provisions, legislation that prohibits associations from discriminating against potential members on the basis of their gender, sexual orientation or gender identity would be a legitimate restriction to the right to freedom of association.*"[86]

76. In this connection, reference should also be made to case-law of the ECtHR under Article 11 of the ECHR which acknowledges that a State is entitled to take preventive measures to protect democracy vis-à-vis associations or movements. This can be done if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. One such value is the coexistence of members of society free from racial segregation, without which a democratic society is inconceivable.[87] The ECtHR's case-law also provides that associations that engage in activities contrary to the values of the ECHR cannot benefit from the protection of Article 11 by reason of Article 17 which prohibits the use of the Convention in order to destroy or excessively limit the rights guaranteed by it.[88]

77. At the same time, as mentioned above, criminal provisions need to comply with the principle of legal certainty, foreseeability and specificity of criminal law. The ambiguity and possible susceptibility of arbitrary application of Article 170[1] of the Criminal Code may raise concerns as to its compatibility with rule of law principles, and international human rights law requiring that interference with rights be clearly prescribed by law. The provision may also negatively impact the exercise of the right to freedom of association. In particular, it should not be interpreted as prohibiting associations that advocates for or promote minority rights, or for instance would promote quotas for certain persons or groups. Whilst a state may legitimately respond to a threat coming from certain associations' actions, it is important that relevant legislation is drafted in precise terms and in a manner avoiding unintended and problematic consequences.

78. Consequently, the definition of "association or organised group or organisation with the aim of discriminating against or inciting discrimination against a group of people" should be more clearly circumscribed to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity to directly incite imminent violence or commission of serious criminal offences defined in accordance with international human rights standards. This would not prevent other non-criminal legal measures prohibiting an association's objectives and activities that are not compliant with international human rights standards as underlined above.

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84 See also the similar recommendation in the ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, para. 18g, 2002 (amended in 2017) 16808b5aae (coe.int).

85 *Ibid.* ODIHR-Venice Commission *Guidelines on Freedom of Association* (2015), para. 179.

86 *Ibid.* ODIHR-Venice Commission *Guidelines on Freedom of Association* (2015), para. 138.

87 See Council of Europe, Combating Hate Speech, 2022, para. 63 at 1680a70b37 (coe.int) with a reference to ECtHR, *Vona v. Hungary*, no. 35943/10, 9 July 2013, para. 57.

88 See Council of Europe, Combating Hate Speech, 2022, para. 63 at 1680a70b37 (coe.int).

79. The breadth of the reference to the provision of "material support" raises rule of law concerns owing to its lack of clarity and certainty. For example, a variety of acts could fall under material support and it could be questioned whether this would meet the proportionality threshold of criminal legislation and whether this could be qualified as serious enough to trigger criminal sanctioning. It is of further importance to highlight that a person had knowingly supported or financed the organisation's discriminatory actions.

RECOMMENDATION F.

To more clearly circumscribe the definition of "association or organised group or organisation with the aim of discriminating against or inciting discrimination against a group of people" in Article 170[1] of the Criminal Code to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity to directly incite imminent violence or commission of serious criminal offences defined in accordance with international human rights standards.

5.2. Disrupting Religious Ceremonies and Rites

80. Article 171 of the Criminal Code provides that "*[w]hoever, by means of obscene words, insolent acts, threats, bullying or other indecent acts, disrupts the worship or other rites or ceremonies of a state-recognised religious community or society, commits a criminal offence and shall be punishable by community service or a fine, or by restriction of liberty or arrest*." The provision aims to protect the exercise of religious freedom.

81. Freedom of religion or belief in its *forum internum* (the right to have a religion) and *forum externum* ("*communication of spiritual subject matter to the world at large and defence of a conviction in public*"[89]) is a human right of every person ("everyone" as stated in Article 18 (1) of the ICCPR and Article 9 of the ECHR). Article 18 of the ICCPR and Article 9 of the ECHR do not only guarantee the freedom of religion, but also the "freedom of belief",[90] as do OSCE human dimension commitments.[91] Moreover, the UN Human Rights Committee has expressly stated that the "freedom of thought" and the "freedom of conscience" are protected equally with the freedom of religion or belief,[92] while ensuring that a potentially broad interpretation is given to the types of value-systems protected under Article 18 of the ICCPR. The freedom of religion or belief is therefore not limited in its application to traditional religions and beliefs or to religions and beliefs with institutional characteristics or practices analogous to those traditional views[93] but also protects other religion or belief, including theistic, non-theistic and atheistic beliefs, as well as the right not to profess

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

90 See ODIHR and Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief (2004),* CDL (2004)061 (hereinafter "the 2004 Freedom of Religion or Belief Guidelines"), Part II.A.3, pages 4-5.

91 See, in particular, OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June-29 July 1990), paras. 5 and 5.12; and OSCE, *Ministerial Council Decision No. 3/13 on the Freedom of Thought, Conscience, Religion or Belief* (Kyiv, 2013). For an overview of other OSCE human dimension commitments, see OSCE/ODIHR, *Human Dimension Commitments (Thematic Compilation)*, 3rd Edition, particularly Sub-Section 3.1.8.

92 UN Human Rights Committee (CCPR), *General Comment no. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18 of the ICCPR),* 27 September 1993, CCPR/C/21/Rev.1/Add.4, para. 1.

93 ODIHR and Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (2014), CDL(2014)029-e (hereinafter "the 2014 Joint Legal Personality Guidelines"), para. 2.

any religion or belief.[94] Generally, while in light of the historical role of certain religious faith in a given country, a special status may be granted to them, although this should not lead to or serve as a basis for discrimination against other religious or belief communities.[95] In this respect, the ECtHR has considered that arrangements which favour particular religious communities do not, in principle, contravene the requirements of the ECHR provided that the State complies with its duty of neutrality, that there is an objective and reasonable justification for the difference in treatment, and that religious communities have a fair opportunity to apply for any privileged status if they wish so.[96] In this case, the criteria established should be reasonable in light of the public interest pursued, objective and non-discriminatory.[97] When examining whether there may be an objective and reasonable justification for a difference in treatment between religious communities, the ECtHR takes into account the historical context and the particular features of the religion in question but may also have other legitimate reasons for restricting eligibility for a specific system to certain religious denominations.[98]

82. Criminal legislation has among its objectives a deterrent and retributive purpose. In this respect, it is unclear why the criminal provision under review is exclusively limited to protect state-recognized religious communities. By referring to state-recognized community or society, it appears to exclude non-believers, atheists and other non-traditional or (non) religious or belief denominations that are not state-recognized from the scope of protection. As a consequence, where the obstruction of practicing of religion or belief and of performing religious rituals is sanctioned by means of criminal law, this should be the case no matter if the person or group of persons who are the victims of such acts are members of a state-recognized religious community or not. By introducing a differential treatment without an objective and reasonable justification for such a difference, this criminal law provision unjustly discriminates against persons based on their religion or belief. **It is recommended to amend this provisions to refer more generally to religious or belief communities.**

83. Two other aspects of this provision warrant attention. The reference to the use of 'obscene words' and 'threats' and 'bullying' indicates that this provision concerns speech targeted at certain religious groups, whereas 'insolent acts' and 'other indecent acts' are actions that could be considered to form the base offence of a "hate crime". It must be noted that the UN Human Rights Committee has expressly recognized that "[p]rohibitions of displays of lack of respect for a religion or other belief system,

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94 UN Human Rights Committee (CCPR), *General Comment no. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18 of the ICCPR)*, 27 September 1993, CCPR/C/21/Rev.1/Add.4, paras. 1-2. See also the reference to value-systems such as pacifism, atheism and veganism or certain political ideology such as communism, which the ECtHR considered *prima facie* as being covered by Article 9 of the ECHR; see European Commission of Human Rights (EComHR), *Arrowsmith v. the United Kingdom,* no. 7050/75, decision of 16 May 1977; *Angelini v. Sweden,* no. 10491/83, decision of 3 December 1986; *W. v. the United Kingdom,* no. 18187/91, decision of 10 February 1993; *Hazar, Hazar and Acik v. Turkey,* nos. 16311/90, 16312/90 and 16313/90, decision of 11 October 1991.

95 See e.g., See ODIHR and Venice Commission, *Guidelines for Review of Legislation Pertaining to Religion or Belief (2004),* CDL (2004)061 (hereinafter "the 2004 Freedom of Religion or Belief Guidelines"), Part II.B.3, p. 6; ODIHR and Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (2014), CDL(2014)029-e, para. 40; UN Human Rights Committee (CCPR), *General Comment no. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18 of the ICCPR),* 27 September 1993, CCPR/C/21/Rev.1/Add.4, para. 9, which states that "*[t]he fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the [ICCPR], including articles 18 and 27, nor in any discrimination against adherents of other religions or non-believers".*

96 See e.g., ECtHR, *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, 26 April 2016, paras. 163-164 and 183; and *Alujer Fernandez And Caballero Garcia v. Spain,* no. 53072/99, decision of 14 June 2001. See also ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, 8 April 2014, para. 113, where the Court held as follows: "*Wherever the State, in conformity with Articles 9 and 11, legitimately decides to retain a system in which the State is constitutionally mandated to adhere to a particular religion [...], as is the case in some European countries, and it provides State benefits only to some religious entities and not to others in the furtherance of legally prescribed public interests, this must be done on the basis of reasonable criteria related to the pursuance of public interests*".

97 *Ibid.*

98 *Ibid.* para. 175 (ECtHR case of *İzzettin Doğan and Others v. Turkey*).

including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20 para. 2 of the Covenant" i.e., when constituting incitement to discrimination, hostility or violence.[99] The criminalization of all these behaviours intending to disrupt a religious ceremony or rites without it necessary reaching the level of seriousness required to amount to incitement to discrimination, hostility or violence would therefore appear disproportionate. Further, the terminology used in this provision, including "insolent acts", "obscene words" and "other indecent acts" can be subject to wide, broad and arbitrary interpretation. Also, the term "bully" has no legal connotation, yet it appears to have been defined through Lithuanian case law as "… the degradation of honour and dignity, the portrayal of a person or group of people as a laughing stock."[100]

84. Prohibitions of displays of lack of respect for a religion or other belief system must comply with the strict requirements of Article 19 (3) as well as Articles 2, 5, 17, 18 and 26 of the ICCPR. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[101] The *Recommendation 1805(2007) on Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of their Religion*, the Parliamentary Assembly of the Council of Europe underlined that *"[f]or speech to qualify as hate speech […], it is necessary that it be directed against a person or a specific group of persons*" and recommended that "*National law should penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion.*"[102] It further underlines that *"…as far as it is necessary in a democratic society in accordance with Article 10 [(2)] of the [ECHR], national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence*."[103]

85. It is recommended **to review this provision and define it narrowly and clearly to meet the principle of legal certainty, foreseeability and specificity of criminal law taking the aforementioned benchmarks into account, especially reconsidering vague and broad terms such as obscene, indecent, or insolent. In addition, the legal drafters should consider if the 'actions' part of this provision can fall under the scope of general public disturbance provisions, where, if these actions were taken with the intention to target a specific religion, the aggravating circumstance provided under Article 60 (1) (12) of the Criminal Code could be applied**.

99 See UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, 12 September 2011, para. 48 See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *2010 Joint Declaration on Ten Key Threats to Freedom of Expression*, 3 February 2010, Section 2 on Criminal Defamation.

100 MesVisi, Report on Hate crimes and hate speech: an overview of the situation in Lithuania, p. 22.

101 See UN Human Rights Committee, *General Comment No. 34* on Article 19 of the ICCPR, CCPR/C/GC/34, 12 September 2011, para. 48.

102 Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1805(2007) on Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of their Religion*.

103 *Ibid.* Rec. 1805 - Recommendation - Adopted text (coe.int)

RECOMMENDATION G.

To review Article 171 of the Criminal Code and define it narrowly and clearly to meet the principle of legal certainty, foreseeability and specificity of criminal law taking, especially reconsidering vague and broad terms such as obscene, indecent, or insolent. In addition, the legal drafters should consider if the 'actions' part of this provision can fall under the scope of general public disturbance provisions, where, if these actions were taken with the intention to target a specific religion, the aggravating circumstance provided under Article 60(1)(12) of the Criminal Code could be applied

6. DISCRIMINATION

86. Article 169 of the Criminal Code provides that a person who carries out actions aimed at preventing a group of persons or a person belonging thereto from participating on an equal basis with others in political, economic, social, cultural, labour or other activities, or at restricting the rights and freedoms of such a group of people or a person belonging to such a group, be punished by community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to three years. Of note, such provisions would not fall within the scope of "hate crime laws" as there is no criminal base offence, hence the first essential element of a "hate crime" is therefore missing.

87. While in most jurisdictions, discrimination is a matter of civil or administrative law, in some it carries criminal penalties. A number of OSCE participating States have introduced legal provisions criminalizing discriminatory acts committed by private persons and/or by public officials.[104] The related criminal offences are, however, often depicted in very broad and vague terms, which are unlikely to comply with the need for specificity of criminal law.

88. Also, the very use of criminal legislation for any discriminatory act, even potentially indirect discrimination, could be questioned in light of the principle of *ultima ratio* of criminal law. It must be emphasized that the legitimacy of criminal law depends on it being used sparingly, *ultima ratio*, as reflected in international law and practice. This was expressed in for example, in the EU approach to Criminal Law which states: "*whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals…*"[105]

89. Further, including such a broad definition of discrimination in the Criminal Code is problematic for a number of other reasons. Because it can take many different forms and levels of severity, as highlighted above, criminalizing discrimination may be both

104 See e.g., Albania, Bosnia and Herzegovina, Croatia, Estonia, France, Latvia, Lithuania, Luxembourg, Moldova, Montenegro, Serbia, Slovenia, etc.

105 European Parliament, EU Approach to Criminal Law, cited in OSCE Guidelines on Foreign Terrorist Fighters (FTF Guide).

impractical and disproportionate.[106] It could result in a significant number of parties being liable to prosecution for acts of discrimination that are towards the lower end of the scale of seriousness. Resorting to the criminal courts to deal with all acts of discrimination provides for a relatively inflexible approach that is likely to have a limited effect on stimulating processes of change in society. For instance, although a prosecution may have a deterrent effect in respect of carrying out further acts of discrimination, it does not offer guidance as to how to prevent discrimination in the first place or how to deal with complaints when they arise.[107]

90. In light of the foregoing, **the legal drafters could reconsider the scope of the provision to only deal with cases of direct and intentional discriminatory acts of the most serious nature while providing a clear definition of what is meant by "discrimination" for the purposes of the Criminal Code. Such a definition could then specify what kind of "hindering" and/or "restricting" are addressed and which rights are being referred to**.[108] 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".

RECOMMENDATION H.

To reconsider the scope of Article 169 of the Criminal Code to only deal with cases of direct and intentional discriminatory acts of the most serious nature while providing a clear definition of what is meant by "discrimination" for the purposes of the Criminal Code and to specify in this definition that temporary special measures aimed at accelerating de facto equality shall not be considered "discrimination".

7. Recommendations Related to the Process of Preparing and Adopting Amendments to the Criminal Code

87. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 OSCE Copenhagen Document, para. 5.8).[109] It is also worth recalling that OSCE commitments require legislation to be adopted "*as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (Moscow Document of 1991, par

106 See e.g., regarding the criminalization of discrimination in the workplace, ILO, *Technical explanatory note: The criminalization of discrimination* (June 2016).

107 *Ibid.*

108 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.

109 Available at <http://www.osce.org/fr/odihr/elections/14304http://www.osce.org/fr/odihr/elections/14304>.

18.1). The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input during the law-making process.[110]

88. Especially when amending "hate crime" legislation and to ensure that the adopted legislation is effective, it is fundamental that it is developed through inclusive and extensive public consultation, including with representatives of civil society and targeted communities and groups, academia, experts and the public in general. These consultations can raise the level of the debate, bringing a different perspective to practical questions and policy choices while also helping contributing to a transformation in attitudes.[111] Furthermore, consultations within government as well as with law enforcement and criminal justice authorities, as future implementers, should also be organized to inform the drafting of the legislation but also focus attention on and raise awareness of the nature and extent of such crimes, which may ultimately contribute to increase the level of responses to hate crime.[112]

89. For consultations on draft legislation to be effective, they should provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.[113] To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,[114] meaning not only when the draft is being prepared but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public discussions and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence and trust in the adopted legislation and in the institutions in general.[115]

90. Further, given the potential impact of hate crime legislation on the exercise and protection of human rights and fundamental freedoms, it is also essential that the development of legislation in this field be preceded by an in-depth regulatory impact assessment, including on human rights compliance, completed with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option.[116]

91. Moreover, once a hate crime law is enacted, its implementation should be monitored and assessed, which will help to identify problems in applying the laws in practice and consider potential solutions, as well as can also contribute to raising awareness of the laws, including among potential victims and perpetrators.[117] Hence, a consistent monitoring and evaluation system of the implementation of the hate crime provisions and their impact should be put in place that would continuously evaluate their operation and effectiveness, once adopted.[118]

110 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, Part II.A.5.
111 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 13.
112 *Ibid.* page 30.
113 See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.
114 See e.g., *ODIHR Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to participate in public affairs.
115 See e.g., ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland*, Warsaw, Opinion-Nr.: NHRI-CHE/312/2017, 31 October 2017, para. 95.
116 See e.g., ODIHR, *Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan* (11 December 2019), Recommendations L and M; and Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.
117 See *2022 ODIHR Practical Guide on Hate Crime Laws*, page 72.
118 See e.g., OECD, *International Practices on Ex Post Evaluation (2010).*

92. In light of the foregoing, ODIHR calls upon the public authorities to ensure that any future legislative initiatives in this sphere, is preceded by an in-depth regulatory impact assessment and is subject to open, inclusive, extensive and effective consultations, including with representatives of civil society, targeted communities and groups and the general public, offering equal opportunities for women and men, and under-represented persons or groups to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including when the planned reform and subsequently the draft legislation are discussed, including before the Parliament.

[END OF TEXT]