

"Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe"

Annual Colloquium on Fundamental Rights

1-2 October 2015

Contribution of the International Commission of Jurists on crimes motivated by discrimination

1. Introduction

The EU Fundamental Rights Agency 2013 publication *Brief: Crimes motivated by hatred and prejudice in the EU* (the 'FRA Brief') presents a picture of hate crimes on the rise in the EU and of a discouraging failure to reverse the situation despite years of discussions and recommendations on this issue.

The FRA Brief reveals that, among those interviewed, up to a third of Roma, a third of persons of African origin, a third of Jewish people, and up to a quarter of the LGBTI population "were victims of assault, threat or serious harassment with a perceived racist motive" in the twelve months preceding the survey.¹ Furthermore, and more worryingly, the majority of these cases were not reported to the authorities and the main reasons adduced among Jews, Roma, persons of African origin or LGBTI persons include "that "nothing would change" as a result of reporting incidents, that "such incidents happen all the time" or that they "did not trust the police".²

Furthermore, the European Committee on Racism and Intolerance (ECRI) of the Council of Europe found that:

...as a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement.³

¹ *FRA Brief: Crimes motivated by hatred and prejudice in the EU*, Fundamental Rights Agency, March 2013.

² *Ibid.*, March 2013. The survey gives the following data: "the survey findings show that:

- between 57 % and 74 % of incidents of assault or threat suffered by members of minority or migrant groups in the EU were not reported to the police by their victims ... ;
- between 75 % and 90 % of incidents of serious harassment were not reported to the police ... ;
- eight out of 10 LGBT persons in the EU and Croatia who were victims of crimes motivated by bias or prejudice did not report them to the police;
- three quarters of those Jewish people who said they were victims of antisemitic harassment did not report this to the police or any other organisation."

³ *ECRI General Policy Recommendation N°8: Combating racism while fighting terrorism*, European Committee on Racism and Intolerance (ECRI), CoE Doc. CRI(2004)26, 17 March 2004, Preamble.

These developments draw a worrying picture in a continent that had said, after the horrors of the first half of the 20th century,⁴ never again. Those horrors arose from the growth of nationalism, and of sentiments of ethnic superiority and racism. The global and regional human rights legal order was designed to ensure their non-repetition. The revival of such retrogressive tendencies, in denial of the basic right to equality, formally and substantially, of all human beings, raises grave concerns for respect for human rights.

The EU and the international community have been aware of these challenges for at least the last fifteen years. The Durban Declaration and Programme of Action adopted in 2001 at the World Conference against Racism affirmed that "racism, racial discrimination, xenophobia and related intolerance constitute a negation of the purposes and principles of the Charter of the United Nations"⁵ and that:

racism, racial discrimination, xenophobia and related intolerance, where they amount to racism and racial discrimination, constitute serious violations of and obstacles to the full enjoyment of all human rights and deny the self-evident truth that all human beings are born free and equal in dignity and rights, are an obstacle to friendly and peaceful relations among peoples and nations, and are among the root causes of many internal and international conflicts, including armed conflicts, and the consequent forced displacement of population.⁶

At a regional level, in recognition of the serious problems of discrimination and xenophobia in Europe, several strategies have been adopted to tackle what are now termed as 'hate crimes'. The Council of Europe defines hate crimes as "crimes committed on the grounds of the victim's actual or assumed membership of a certain group, most commonly defined by race, religion, sexual orientation, gender identity, nationality, ethnicity, disability etc."⁷ The Organization for Security and Co-operation in Europe (OSCE) defines a hate crime as a criminal offence with a bias motive. It defines a bias motive as one which "requires some form of prejudice on account of a personal characteristic" and that "[b]ias can be felt in respect of a person, or a characteristic or an idea (where the victim symbolizes that characteristic or idea)."⁸

The EU has also made the eradication of discrimination and hate crimes a priority. The Treaty on the European Union (TFEU) affirms that the EU must, among other things, "combat social exclusion and discrimination".⁹ The EU Charter of Fundamental Rights includes the right of everyone to be "equal before the law,"¹⁰ and the prohibition of any discrimination "based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation."¹¹ Article 10 of the Treaty on the Functioning of the European Union

⁴ In short mentions : the First and Second World War, the Shoah, the massacres of national minorities preceding, during and between the two World Wars, and the Balkan Wars.

⁵ *The Durban Declaration and Programme of Action 2001*, Durban, South Africa, 8 September 2001, Preamble.

⁶ *Ibid.*

⁷ *Explanatory Memorandum to Council of Europe Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, UN Doc. CM(2010)4 add3 final, 31 March 2010, para. II.I.A.1-2.

⁸ OSCE Office for Democratic Institutions and Human Rights, *Hate Crime Laws – A Practical Guide*, 2009, p. 16-17.

⁹ Article 3.3, *Treaty on the European Union* (TEU).

¹⁰ Article 20, *Charter of Fundamental Rights of the European Union* (EU Charter).

¹¹ Article 21.12, EU Charter.

(TFEU) says that, “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹² Furthermore, “the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹³

Article 21.1 of the EU Charter enshrines one of the founding principles of the Union: that, “Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”¹⁴

Finally, article 47 of the Charter protects the right of everyone to an effective remedy before a tribunal for violations of rights “guaranteed by the law of the Union,” i.e. not only by the EU Charter but by any EU legal provision. In this context, the article further provides as follows:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

It is a duty of the EU, within its justice and home affairs mandate, to:

endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.¹⁵

Under this competence, the EU enacted the *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law* (hereinafter, ‘the Framework Decision’). This Framework Decision requires Member States to criminalize, investigate and prosecute certain acts concerning racism and xenophobia, defined in its articles 1 and 2 (and mainly relating to incitement to violence or hatred, and certain other forms of expression). Its article 4 further obliges Member States, in relation to criminal offences *other* than those enumerated in articles 1 and 2, to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by courts in the determination of the penalties.”¹⁶ The present submissions do not directly address the criminalisation of incitement to hatred, nor other acts limited to expression without violence.¹⁷ The present submissions focus

¹² Article 10, *Treaty on the Functioning of the European Union* (TFEU).

¹³ Article 19.1, TFEU.

¹⁴ Article 21.2, EU Charter. See also, article 18, TFEU.

¹⁵ Article 67.3, TFEU.

¹⁶ *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law* (hereinafter, ‘the Framework Decision’), article 4.

¹⁷ Criminalisation of non-violent forms of expression raise distinct policy and legal issues in relation to the right to

instead on ensuring that when discriminatory motivations are present for other kinds of criminal offences, in particular those involving violence, that the motivation should weigh in favour of an increased penalty and gives rise to additional procedural obligations, in accordance with article 4 of the Framework Decision.

As the European Commission affirmed in its evaluation of the Framework Decision, the “fight against racism and xenophobia must be framed within a fundamental rights context.”¹⁸

2. The EU and Member States’ obligations under EU and international law

EU law on discrimination, including with respect to violent offences motivated by discriminatory hate or prejudice, is influenced by international human rights law. The *International Convention on the Elimination of All Forms of Racial Discrimination*, for instance, requires among other things that States Parties must “declare an offence punishable by law ... all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”.¹⁹ States Parties also undertake to prohibit and to eliminate racial discrimination in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice, as well as the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution,²⁰ whether public or private.²¹ Similar obligations regarding violence, incitement to violence, and equality within the justice system, apply under the *International Covenant on Civil and Political Rights*.

The European Convention on Human Rights (ECHR), according to article 52 of the EU Charter, sets the minimum standard for the content of rights under the EU Charter. The European Court of Human Rights has consistently held that, under article 1 ECHR, States are required to take the necessary legislative, administrative, judicial and/or other measures to prevent the commission of violent crimes; and to ensure that if committed they are effectively investigated, prosecuted and appropriately punished. The Court has found additional procedural obligations to apply where such acts of violence may be motivated, in whole or in part, by prejudice based on a prohibited ground of discrimination, requiring States, for example, to take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the violent attack.²²

freedom of expression, which are beyond the scope of the present submissions. See, for example, discussion in the Human Rights Committee, *General Comment no. 34, on freedoms of opinion and expression under the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/34, 12 September 2011.

¹⁸ *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, EU Doc. COM(2014) 27 final, 27 January 2014 (‘2014 European Commission Evaluation Report’), p. 2.

¹⁹ Article 4.1(a), *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

²⁰ Article 5.1, ICERD. States who have subscribed ICERD must “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination,” article 6 ICERD.

²¹ Committee on Elimination of Racial Discrimination (CERD), *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, UN Doc. A/60/18, 65th session (2005), pp. 98-108, para. 6: “under article 6 of the Convention, States parties are obliged to guarantee the right of every person within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.”

²² On this point, see, *Beganović v. Croatia*, ECtHR, Application no. 46423/06, 25 June 2009, paras. 93-94; *B.S. v*

The Court has affirmed that “effective measures of deterrence against grave acts ... can only be achieved by the existence of effective criminal-law provisions backed up by law enforcement machinery.”²³ The passage of law prohibiting such hate crimes, in itself, is insufficient to protect minority groups effectively from crimes motivated wholly or in part by hate or prejudice.

The duty of the authorities to investigate and prosecute²⁴ includes the additional requirement mentioned above: the authorities must take all reasonable steps to establish whether any hatred or prejudice connected to a protected characteristic may have played a role in the attack, whenever there is reason to suspect such a motivation.²⁵ This requirement might be described as a duty to unmask the hate or prejudice that was the motive for a crime.²⁶ Although often assessed in the context of article 14,²⁷ the Court has made clear that this also forms part of the positive obligation to effectively investigate under article 3, in conjunction with articles 1 and 13.²⁸

The Strasbourg Court has recognized that treating an act of violence that is motivated by prejudice on equal footing with a violent attack that has no such motivation may give rise to a violation of article 14.²⁹ That is to say: “a failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ...”³⁰ Further, it is worth noting that the prohibition of torture and other inhuman or degrading treatment or punishment under article 3 ECHR, and, consequently, under article 4 EU Charter, “cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, the treatment can be qualified as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them[, hence d]iscriminatory remarks and insults must in any event be

Spain, ECtHR, Application no. 47159/08, 24 July 2012, paras. 58-59; *Nachova and others v. Bulgaria*, ECtHR, Applications nos. 43577/98 and 43579/98, 6 July 2005, paras. 160-161; *Šečić v. Croatia*, ECtHR, Application no. 40116/02, 31 May 2007, paras. 66-70; *Milanović v. Serbia*, ECtHR, Application no. 44614/07, 14 December 2010, paras. 96-97; *Fedorchenko and Lozenko v. Ukraine*, ECtHR, Application no. 387/03, 20 September 2012, para. 65; *Virabyan v. Armenia*, Application no. 40094/05, 2 October 2012, para. 218; *Bekos and Koutropoulos v. Greece*, Application no. 15250/02, 13 December 2005, para. 69.

²³ *O’Keefe v. Ireland*, ECtHR, GC, Application no. 35810/09, 28 January 2014, para. 148. See also, *X and Y v. the Netherlands*, ECtHR, Application no. 8978/80, 26 March 1985, para.27; *Beganović*, ECtHR, *op. cit.*, para. 71; *M.C. v Bulgaria*, ECtHR, Application no. 39272/98, 4 December 2003, para. 149.

²⁴ *M.C. v Bulgaria*, ECtHR, *op. cit.*, para. 153 (emphasis added).

²⁵ *Beganović*, ECtHR, *op. cit.*, paras. 93-94; *B.S. v Spain*, ECtHR, Application no. 47159/08, 24 July 2012, paras. 58-59; *Nachova*, ECtHR, *op. cit.*, paras. 160-161; *Šečić*, ECtHR, *op. cit.*, paras. 66-70; *Milanović v. Serbia*, ECtHR, *op. cit.*, paras. 96-97; *Fedorchenko and Lozenko v. Ukraine*, ECtHR, *op. cit.*, para. 65; *Virabyan v. Armenia*, ECtHR, *op. cit.*, para. 218; *Bekos and Koutropoulos v. Greece*, ECtHR, *op. cit.*, para. 69.

²⁶ See, generally, *Making hate crime visible in the European Union: acknowledging victims’ rights*, Fundamental Rights Agency, 2012.

²⁷ Article 14, *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) : “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

²⁸ *B.S. v Spain*, ECtHR, *op. cit.*, para. 59: “[T]he authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure respect without discrimination for the fundamental value enshrined in Article 3. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made ...” See also, *Nachova*, ECtHR, *op. cit.*, para. 161; *Bekos*, ECtHR, *op. cit.*, para. 70; *Identoba v. Georgia*, ECtHR, Application no. 73235/12, 12 May 2015, para. 67; *Members of the Gldani Congregation of Jehovah’s Witnesses and Others v. Georgia*, ECtHR, Application no. 71156/01, paras. 138-42; and *Mudric v. the Republic of Moldova*, ECtHR, Application no. 74839/10, 16 July 2013, paras. 60-64.

²⁹ *Beganović*, ECtHR, *op. cit.*, paras. 93-94; *B.S. v Spain*, ECtHR, *op. cit.*, paras. 58-59; *Nachova*, ECtHR, *op. cit.*, paras. 160-161; *Šečić*, ECtHR, *op. cit.*, paras. 66-70; *Milanović*, ECtHR, *op. cit.*, paras. 96-97; *Fedorchenko*, ECtHR, *op. cit.*, para. 65; *Virabyan*, ECtHR, *op. cit.*, para. 218; *Bekos*, ECtHR, *op. cit.*, para. 69.

³⁰ *Šečić*, ECtHR, *op. cit.*, para. 67.

considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3.”³¹

3. Implementation of the duty to combat violent hate crime in EU Member States

Already in 2005, the UN Committee on the Elimination of Racial Discrimination found that, globally:

the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries.³²

In its 2014 evaluation of the Framework Decision, the European Commission found certain “gaps” in the implementation by States of their obligations in relation to the racist and xenophobic motivation of crimes.³³

The European Parliament found in 2013 that “although all the Member States have introduced the prohibition of discrimination into their legal systems in order to promote equality for all,” nevertheless “discrimination and hate crimes – i.e. violence and crimes motivated by racism, xenophobia, anti-Gypsyism, anti-Semitism or religious intolerance, or by a person’s sexual orientation, gender identity or membership of a minority group, or on the basis of the non-exhaustive grounds listed in Article 21 of the Charter of Fundamental Rights – are on the rise in the EU”.³⁴

One of the main obstacles in the fight against hate offences, as seen in the statistics presented above, is **under-reporting**. The OSCE has listed, on the basis of over 600 interviews, several key reasons why victims may not report hate offences. These include:

- Fear of re-victimization or retaliation by perpetrators;

³¹ *Identoba v Georgia*, ECtHR, *op. cit.*, para. 65.

³² CERD, *General recommendation XXXI*, *op. cit.*, Preamble. It also stated that it should not be underestimated “[t]he potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities. States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons belonging to the groups referred to in the last paragraph of the preamble”, at para 4(b).

³³ More specifically, see, *2014 European Commission Evaluation Report*, *op. cit.*, p. 7 : “[f]ifteen Member States (CZ, DK, EL, ES, HR, IT, CY, LV, LT, MT, AT, RO, FI, SE and SK) have made use of the first option provided for in Article 4 by stipulating in their criminal codes that racist and xenophobic motivation shall be considered an aggravating circumstance with regard to all crimes. Eight Member States (BE, BG, DE, FR, HU, PL, PT and UK) stipulate that a racist or xenophobic motivation shall be considered an aggravating circumstance with regard to certain (often violent) crimes such as murder, serious bodily harm and other violence against persons or property. Three Member States out of the latter group also use the second option provided for in Article 4, as they have criminal-law provisions stating that racist motivation may be taken into account by the courts (BE) or have provided case law and detailed statistics which demonstrate that racist and xenophobic motivation is taken into consideration (DE and UK). PL, PT and SI refer to general criminal-law provisions which stipulate that the general motivation of the perpetrator shall be considered and EE refers to the aggravating circumstance of other base motives. HU refers to a considerable amount of registered hate crimes and convictions but has not yet provided the relevant case law. NL refers to an official guidance document which states that racist or xenophobic motivation should be taken into account, while IE and LU simply state that motivation can always be considered by the courts.”

³⁴ European Parliament, *European Parliament resolution of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime*, P7_TA(2013)0090, para. F.

- Feelings of humiliation or shame about being victimized;
- Uncertainty about how/where to report the incident or how reporting will help them;
- Lack of confidence that law-enforcement agencies;
- Language barriers;
- Fear of being deported;
- Fear of having their identity or status exposed.

The OSCE also pointed to lack of understanding, amongst victims and others, of what constitutes a hate crime, and the frequent failure of victims and witnesses to report such offences. They noted the lack of training for officials in how to deal with and interview victims of hate offences; inadequate guidance on how such offences should be reported; lack of interest by prosecutors in handling hate offence cases; and cases of bias within the law-enforcement establishment.³⁵

4. International guidance and recommendations

The question of how to effectively tackle and eradicate racism and xenophobia has been high on the agenda of the EU institutions for the last ten years. It has been a priority issue at the global level at least since the Durban Conference of 2001. The *Durban Declaration and Programme of Action 2001* affirmed “the need to put an end to impunity for violations of the human rights and fundamental freedoms of individuals and groups of individuals who are victimized by racism, racial discrimination, xenophobia and related intolerance”.³⁶ The Declaration strongly reaffirmed “as a pressing requirement of justice” that:

victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance ... should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination...³⁷

Since the Durban Conference, international organizations, including mechanisms of the UN and the EU, have formulated a range of recommendations and standards. The European Commission identified the need, in order to enhance the effectiveness of investigations, for among other things: “practical tools and skills to be able to identify and deal with the offences”; instilling sufficient knowledge of relevant legislation and clear and detailed guidelines; having specialized police units and prosecutors’ offices; and providing specific training for police, prosecutors and judges, as well as exchange of information and good practices.³⁸

Recommendations of international human rights bodies and EU institutions, agencies and conferences, designed to ensure protection of human rights in the context of

³⁵ OSCE/ODIHR, *Hate Crime Data-Collection and Monitoring Mechanisms A Practical Guide*, Warsaw, 2014, p. 5.

³⁶ Article 26, *Durban Declaration and Programme of Action 2001*. See, article 88 : “any form of impunity for crimes motivated by racist and xenophobic attitudes plays a role in weakening the rule of law and democracy and tends to encourage the recurrence of such acts.” *Outcome Document of the Durban Review Conference of 2009*, para 57, called on States “to combat impunity for acts of racism, racial discrimination, xenophobia and related intolerance, to secure expeditious access to justice, and to provide fair and adequate redress for victims.” See also, para. 98.

³⁷ Article 104, *ibid.*

³⁸ *2014 European Commission Evaluation Report, op. cit.*, p. 9.

addressing racism and xenophobia include recommendations on:

- **Criminal legislation:**³⁹ A number of bodies have variously recommended that States enact a motivation-based aggravating circumstance applicable to all criminal offences;⁴⁰ introduce enhanced penalties;⁴¹ and enact specific offences, distinct from the common or ordinary offence, for criminal acts having a racist or xenophobic nature;⁴²
- **Information and awareness:** A number of bodies recommend that States provide legal information to persons belonging to victims and other members of targeted groups, including on the progress of the proceedings, their rights and the remedies available to them;⁴³ facilitate the reporting, including measures to build trust in police and other state institutions;⁴⁴ increase the victims' and witnesses' confidence in the criminal justice system and law enforcement;⁴⁵
- **Legal aid:** Bodies have recommended that States provide free legal information centres, legal aid and assistance and interpretation for victims;⁴⁶
- **Recording and reporting:** Bodies have recommended that States instruct competent services to gather information on any bias behind the criminal offence, on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted, and that this information be reported to the authorities and in appropriate databases;⁴⁷ introduce legislation requiring collection and publication of data pertaining to hate crimes;⁴⁸ and ensure that accurate data and statistics are collected and published;⁴⁹
- **Disciplinary measures:** Bodies have recommended that States ensure that any "refusal by a police official to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions, and those sanctions should be increased if corruption is involved";⁵⁰ and provide for one or more independent bodies entrusted with the investigation of alleged acts of discrimination

³⁹ Durban Declaration and Programme of Action 2001, Programme of Action, article 84.

⁴⁰ CERD, *General recommendation XXXI*, op. cit., para. 4(a); *ECRI General Policy Recommendation N°7: National legislation to combat racism and racial discrimination*, ECRI, CoE Doc. CIR(2003)8, 13 December 2002. See also, *ECRI General Policy Recommendation N°9: The fight against antisemitism*, ECRI, CoE Doc. CRI(2004)37, 25 June 2004.

⁴¹ FRA, *Making hate crimes visible in the European Union*, op. cit., page 11. See also, European Parliament, *Resolution of 14 March 2013*, op. cit., Para. 10; "ensure that all relevant EU criminal law instruments, including the Framework Decision, incorporate a broader spectrum of graduated sanctions, including, where appropriate, alternative penalties such as community service, while fully respecting fundamental rights, including the freedom of expression." FRA, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime*, FRA Opinion – 02/2013, Vienna, 15 October 2013, p. 14

⁴² *ECRI General Policy Recommendation N°1: Combating racism, xenophobia, antisemitism and intolerance*, ECRI, CoE Doc. CRI(96)43 rev, 4 October 1996. See also, *General policy recommendation n° 5: Combating intolerance and discrimination against Muslims*, ECRI, CoE Doc. CRI(2000)21, 16 March 2000; *ECRI General Policy Recommendation N°8*, op. cit.

⁴³ CERD, *General recommendation XXXI*, op. cit., paras. 7 and 17(c); *ECRI General Policy Recommendation N°1*, op. cit.. See also, *General policy recommendation n° 5*, op. cit.; *ECRI General Policy Recommendation N°8*, op. cit..

⁴⁴ *Council Conclusions on combating hate crime in the European Union*, JHA meeting, 5-6 December 2013, para. 4 ; *ECRI General Policy Recommendation N°11: Combating racism and racial discrimination in policing*, ECRI, CoE Doc. CRI(2007)39, 29 June 2007, paras. 11-13.

⁴⁵ FRA, *Making hate crimes visible in the European Union*, op. cit., page 11.

⁴⁶ *Durban Declaration and Programme of Action 2001*, Programme of Action, article 161; CERD, *General recommendation XXXI*, op. cit., paras. 8 and 17(b); *ECRI General Policy Recommendation N°1*, op. cit.. See also, *ECRI General Policy Recommendation n° 5*, op. cit.; *ECRI General Policy Recommendation N°8*, op. cit.; *ECRI General Policy Recommendation N°11*, op. cit., paras. 25-28

⁴⁷ CERD, *General recommendation XXXI*, op. cit., para. 11; FRA, *Making hate crimes visible in the European Union*, op. cit., page 11 ; *ECRI General Policy Recommendation N°1*, op. cit.. See also, *General policy recommendation n° 5*, op. cit.; *ECRI General Policy Recommendation N°8*, op. cit.; *ECRI General Policy Recommendation N°9*, op. cit..

⁴⁸ FRA, *Making hate crimes visible in the European Union*, op. cit., page 11 ; *ECRI General Policy Recommendation N°11*, op. cit., paras. 11-13; *Outcome Document of the Durban Review Conference of 2009*, para. 59.

⁴⁹ *ECRI General Policy Recommendation N°9*, op. cit.

⁵⁰ CERD, *General recommendation XXXI*, op. cit., para. 12.

committed by members of the police, border control officials, members of the army and prison personnel.⁵¹

- **Ensure that any hate bias is properly investigated and prosecuted:**⁵² Bodies have said States should unmask biased motivations of criminal offences;⁵³ prosecute relevant cases *ex officio* and with high priority;⁵⁴ require courts to consider any evidence of bias as a motive and state on the record the reasons for applying or not applying an enhancement to sentence on this ground;⁵⁵
- **Provide victims with recognized status (*partie civile*) and rights in investigation and trial:** Bodies recommended States to provide victims with such status and rights, in criminal or civil proceedings, at no cost to themselves⁵⁶ allowing them to participate in the proceedings; and ensuring they have the right to seek to reopen the case or challenge the decision not to investigate, prosecute or bring to trial⁵⁷ including under article 11 of the Victims Directive;⁵⁸
- **Protection measures:** Bodies have affirmed that States must protect victims and families from intimidation and reprisals;⁵⁹
- Bodies have recommended that States **ensure access to effective remedy and reparation;**⁶⁰
- **Training:** States are to provide relevant training for law enforcement, judicial authorities, EU agencies,⁶¹ and prosecutors;⁶²
- Bodies have recommended that States **give NGOs the power to bring civil cases, intervene in administrative cases or bring criminal complaint** regarding relevant offences, even without referring to a specific victim or on his or her behalf;⁶³
- **Coordination:** Bodies have recommended that States establish specialised units in police services, community policing,⁶⁴ structures to monitor hate-motivated offences and to draft policies;⁶⁵ prepare national action plans, improve the exchange of information, facilitate good practice exchange;⁶⁶

⁵¹ ECRI General Policy Recommendation N°11, *op. cit.*, paras. 25-28; Durban Declaration and Programme of Action 2001, Programme of Action, article 71.

⁵² Durban Declaration and Programme of Action 2001, Programme of Action, article 89; CERD, *General recommendation XXXI*, *op. cit.*, para. 15; ECRI General Policy Recommendation N°1, *op. cit.*. See also, ECRI General Policy Recommendation n° 5, *op. cit.*; ECRI General Policy Recommendation N°8, *op. cit.*; ECRI General Policy Recommendation N°11, *op. cit.*, paras. 11-13; FRA, *Opinion of the European Union Agency for Fundamental Rights*, *op. cit.*, p. 13; *Conference Conclusions*, FRA Conference 2013 'Combating hate crime in the EU : Giving victims a face and a voice, 12-13 November 2013, Vilnius, Lithuania, para. 2.6; *Council Conclusions on combating hate crime in the European Union*, *op. cit.*, para. 3.

⁵³ European Parliament, *Resolution of 14 March 2013*, *op. cit.*, Para. 9.

⁵⁴ ECRI General Policy Recommendation N°1, *op. cit.*. See also, ECRI General Policy Recommendation n° 5, *op. cit.*; ECRI General Policy Recommendation N°8, *op. cit.* 2004.

⁵⁵ OSCE/ODHR, *Hate Crime Laws, A Practical Guide*, 2009, pp. 35-37.

⁵⁶ CERD, *General recommendation XXXI*, *op. cit.*, para. 17(a).

⁵⁷ FRA, *Making hate crimes visible in the European Union*, *op. cit.*, Page 11.

⁵⁸ FRA, *Opinion of the European Union Agency for Fundamental Rights*, *op. cit.*, p. 14.

⁵⁹ CERD, *General recommendation XXXI*, *op. cit.*, paras. 17(d), 19(c); ECRI General Policy Recommendation N°11, *op. cit.*, paras. 25-28; *Council Conclusions on combating hate crime in the European Union*, *op. cit.*, para. 6.

⁶⁰ Durban Declaration and Programme of Action 2001, Programme of Action, article 106; *Outcome Document of the Durban Review Conference of 2009*, paras. 27 and 100; CERD, *General recommendation XXXI*, *op. cit.*, para. 19(d); ECRI General Policy Recommendation N°1, *op. cit.*. See also, ECRI General Policy Recommendation n° 5, *op. cit.*; ECRI General Policy Recommendation N°8, *op. cit.*; *Conference Conclusions*, FRA Conference 2013, *op. cit.*, para. 5.4.

⁶¹ European Parliament, *Resolution of 14 March 2013*, *op. cit.*, Para. 12.

⁶² ECRI General Policy Recommendation N°9, *op. cit.*; *Council Conclusions on combating hate crime in the European Union*, *op. cit.*, para. 7; Durban Declaration and Programme of Action 2001, Programme of Action, article 89.

⁶³ ECRI General Policy Recommendation N°11, *op. cit.*, paras. 25-28; Durban Declaration and Programme of Action 2001, Programme of Action, article 162.

⁶⁴ FRA, *Opinion of the European Union Agency for Fundamental Rights*, *op. cit.*, p. 17. See also, *Conference Conclusions*, FRA Conference 2013, *op. cit.*, para. 4.1-4.3.

⁶⁵ *Conference Conclusions*, FRA Conference 2013, *op. cit.*, para. 3.2.

⁶⁶ *Conference Conclusions*, FRA Conference 2013, *op. cit.*, paras. 3.4-3.5-3.6. See also, *Council Conclusions on combating hate crime in the European Union*, *op. cit.*, para. 13.

- **Ratification of international treaties and complaint mechanisms:** Bodies have urged States to accept the individual communication mechanism of the UN Committee on Elimination of Racial Discrimination; include all grounds of discrimination under article 21 of the EU Charter in legislation to implement the EU Framework Decision;⁶⁷ and have urged the EU itself to sign and ratify the ICERD.⁶⁸

These recommendations represent an important resource, but their translation into real change at national level, including in EU Member States, remains a significant challenge.

5. Analysis and Recommendations

The approval of the Crime Victims Directive (2012/29/EU), introducing in EU Member States a set of minimum rights for victims of criminal offences, represents a further important step in that it requires an individual assessment of the situation of the victim and states that, in this assessment, "particular attention shall be paid to ... victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics".⁶⁹ The implementation in national law and practice of the Directive should therefore enhance the fight against hate crimes. Following on this, the last report of the FRA on *Victims of crime in the EU: the extent and nature of support for victims*⁷⁰ provides with useful good practices with regard to the establishment and effective functioning of victims support services aimed at breaching the gap between the justice system and the victims.

As the enactment of the Crime Victims Directive shows, the TFEU provides a strong basis for measures to counter and eradicate violence motivated by discrimination or prejudice, in particular in articles 82 and 83 TFEU. These provisions allow the EU to develop rules and procedures on mutual recognition of judgments and judicial decisions, facilitate judicial co-operation and support the training of the judiciary and judicial staff⁷¹ as well as to take measures to protect the rights of victims of crime.⁷²

However, it is clear that the greatest weakness in addressing violent hate crime currently arises not from the absence of a strong legal framework at national, EU or international levels, or in the lack of good practice guidelines and recommendations. The problem lies primarily in the failure of effective national implementation, which has meant that, despite development of the law, and despite authoritative recommendations from international and EU human rights bodies, the frequency of commission of violent hate crimes appears to have increased, and impunity for such crimes has persisted.

⁶⁷ FRA, *Making hate crimes visible in the European Union*, op. cit., page 11; *Conference Conclusions*, FRA Conference 2013, op. cit., para 1.1.

⁶⁸ European Parliament, *Resolution of 14 March 2013*, op. cit., Para. 9.

⁶⁹ Article 22.1, *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* (Directive 2012/29/EU).

⁷⁰ *Victims of crime in the EU: the extent and nature of support for victims*, Fundamental Rights Agency, Vienna, 2014.

⁷¹ Article 82.1, TFEU.

⁷² Article 82.2, TFEU. These measures can be enacted "To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension".

There is general agreement at the EU and global level that the most serious problem in tackling such crimes is under-reporting.⁷³ There is also consensus that amongst the most significant causes of under-reporting is the victim's belief that reporting the crime will be useless if not counter-productive. It follows from these findings that victims perceive that the remedy offered to them (i.e. to trigger the crime's investigation, prosecution and trial), and the related reparation, is ineffective. This situation reveals that the focus of the problem most likely resides with a lack of effective implementation of the Member States' obligation to provide victims with an effective remedy (article 47 EU Charter) in cases of crimes motivated by discrimination (article 21 EU Charter).

The ICJ considers that there are two main reasons for this lack of implementation: 1) lack of political or institutional will in Member States; 2) lack of implementation tools tailored to the laws, legal institutions and culture of the single national legal system.

The first gap requires that Member States fulfil their obligations to take active steps to ensure implementation of the law, through effective measures of law enforcement, as well as promotion, training and guidance, in relation to crimes motivated by discrimination. However, in the absence of political will to take such measures, lack of effective national implementation can be addressed by the European Commission itself, since it has the power to conduct infringement proceedings in relation to the implementation of the Framework Decision.⁷⁴ This power should be used in collaboration with civil society, which can provide an independent assessment of the implementation of EU law in Member States. Furthermore, the work of the European Committee on Racism and Intolerance (ECRI) of the Council of Europe, of the FRA, of the OSCE, and of the several national human rights and anti-discrimination institutions and civil society is already available to provide an assessment of the situation country by country.

The second gap requires that international and EU-level recommendations be translated into terms that take account of varying and complex national contexts. This should lead to more than legislative reform – and in some States may require little or no reforms to the law, only to policy and practice. There is a need for national research and debate, informed by comparative experiences to assess how international laws and standards on crimes motivated by discrimination can be implemented effectively in the national legal system and in national practice. Judges, lawyers, prosecutors and law enforcement authorities need to be engaged in this process, with the participation of civil society. The process needs to focus not only on the legislative implementation of the recommendations and good practices but also, and in particular, on the feasibility and peculiarities of implementation in legal practice and culture.

The effective implementation of the EU Framework Decision article 4 obligations to address crimes, particularly violent crimes, motivated by discrimination requires in-depth discussions on procedural and practical guidelines and modalities for implementation at the national level, including reforms of internal regulations, practices or working methods, to ensure realization of the right to an effective remedy in relation to such crimes.

⁷³ See, among others, FRA, *Opinion of the European Union Agency, op. cit.*, p. 13 (for anti-semitism); *Conference Conclusions*, FRA Conference 2013, *op. cit.*, p.2.

⁷⁴ *2014 European Commission Evaluation Report, op. cit.*, p. 2.

Some issues that could be tackled in these detailed and practical implementation discussions may include: 1) the adoption of new working methods for police and prosecutorial forces to encourage reporting by groups that are usually reluctant to contact authorities; 2) development of a new survey and reporting methodology within the judiciary, designed to draw out any discriminatory motivation behind a crime, and which could lead judges to more fully and explicitly consider this aspect; 3) allowing, whether through detailed legal reform of administrative, civil or criminal procedure or other means, civil society organizations to bring civil or administrative cases by themselves or on behalf of victims or groups of victims, or to report incidents for the purpose of criminal prosecutions.

Following a seminar in Thessaloniki, 28-29 April 2014, the FRA established a Working Party on Improving Reporting and Recording of Hate Crime in the EU, for an initial period of two years. The terms of reference of the Working Party, which held its inaugural meeting in Rome on 4 November 2014, focus on encouraging victims to report and improving recording of hate crime; enhancing multi-agency partnership; and training for law enforcement and criminal justice staff. The Working Party, which does not appear to include civil society members, operates in accordance with the principle of transferability of the practices and "information concerning the process and conditions in which practices are realised in their current national setting."⁷⁵

The ICJ hopes that the establishment of this Working Party represents a commitment on the part of the EU to ensure States have effective measures in place to prevent and address crimes motivated by discrimination, including obligations under article 4 of the Framework Decision. The ICJ regrets that civil society has not been involved in the Working Group. Nevertheless, it may provide an important starting point for concerted work by the EU to address the complexity and difficulties of effective national implementation, in light of international law and standards. The ICJ considers that it is the time for the European Union institutions to take up the opportunity to unite the efforts of all those concerned in the administration of justice – judges, court administrators, lawyers, civil society, judicial organizations, bar associations and government officers – throughout the EU to work together on the detailed technical assistance needed for an effective implementation of the right to an effective remedy for victims of crimes motivated by discrimination. It is time to make the final step to bridge the gap between the remedy and the victims.

⁷⁵ Working Party, *Inaugural Meeting Report*, p. 2. The WP includes 27 Member States, the European Commission, ECRI, ODIHR, and the FRA.