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FROM HATE TO HARMONY

Encircling, approaching, and addressing hate crimes within the pan-European human rights framework

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In a way, writing a thesis is much like looking for answers on how to address hate crimes: a strenuous path full of bumps and pitfalls; a non-ideal journey during which self-doubts naturally arise and endure: from the most grueling existential ones to the most, equally grueling, quantifiable ones.

Even if you have been there before, every journey is new and challenging. Embarking upon such a path is, however, a little less strenuous when you have both old and new friends to cross paths with along the way. Whether this has been over a meal with EMA's best baker, who is really far more than that, over a Zoom conversation about best spam emails, or when trying to catch a mouse that is really much faster and much smarter than you, with a supportive talk or hug in Kosovo, or during visits in previously uncharted places where friends can now suddenly be found, I am grateful for how you have all contributed to my journey this last year; on this road less travelled by that EMA often is. Certainly, this includes the kindness, generosity, and insightfulness that we have been shown from the incredible team in Strasbourg: Florence, Amin, Peggy, and Stephanos.

Embarking on any journey can be daunting. But it is especially daunting when you do it far from those that have helped carry you along the road you were on. Those that you carry with you no matter where you go; Those that show you new paths or inspire you to keep going; Those that show you the way when you feel lost; Those that walk along with you when the road gets bumpy. Because somehow, it always gets bumpy somewhere along the way. On that road, you realize the value of crossing paths, and how they have led you along, and will continue to lead you along.

For Michael.

Abstract

Over the last decades, “hate crimes” have emerged as strong discourse of interest across Europe, increasingly subjected to European policy-making and law-making – both at a state level but also, importantly, at a pan-European institutional level. Namely, the *Europeanization* of the hate crime discourse has been evidenced by growing efforts of the Council of Europe (CoE), the Organization for Security and Co-operation in Europe (OSCE), and the European Union (EU) to address hate crimes as a shared European challenge, a human rights concern, and an area in need of harmonious European-level responses. However, much like domestic state-level approaches, the institutional-level approaches have regularly been accused of being inefficient, “piecemeal”, and out of tune.

Departing from these allegations, this paper explores European endeavors of encircling, approaching, and addressing hate crimes against the backdrop of the pan-European human rights framework. It acknowledges that the three European institutions have in fact made important contributions in trying to improve the addressing of hate crimes in Europe. However, the paper also excavates that the road to European harmony remains long and paved with many gaps and challenges. Accordingly, it suggests that we critically assess the links we draw between human rights and hate crime.

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Introduction

Michael's story: The makings of a human rights discourse

In 1997, Michael Menson, a 30-year-old musician, was walking the unlit streets of Edmonton in North London. Michael, who had just recently started living on his own after having received treatment for schizophrenia, had accidentally taken the wrong bus on his way to the nearby hospital where he had to attend a mandatory follow-up appointment. When Michael realized his mistake, he got off the bus. Four young men got off with him. As Michael approached them in the hopes that they could give him directions to the hospital, the men attacked him and forced him to the ground. With his face pressed against the pavement, Michael felt a strange sensation on his back. He realized that the men had set him on fire. An off-duty fireman soon found Michael abandoned in the streets, in a state of shock but just barely alive, his body covered by severe burns. When Police arrived at the scene a short while later, they concluded that Michael must had set himself on fire in a failed suicide attempt. As Michael was brought into an ambulance and taken to North Middlesex Hospital for acute treatment, Police left the scene without any further investigations. From his hospital bed, and in a rapidly deteriorating state, Michael somehow managed to relay the story of what had happened to him to his family and friends. Michael's brothers immediately informed the Police that Michael had told them that he had been "attacked by four white boys", one of whom had been wearing a black leather jacket. Several times thereafter, Michael's family members reached out to the Police, urging them to interview Michael and investigate the incident. Days later, an officer finally visited Michael in the intensive care unit. However, he decided not to take a statement since Michael appeared drowsy. Tragically, the Police never got another opportunity to interview Michael about what had happened. One week after the incident, Michael thus suffered a cardiac arrest and lapsed into a comatose state before he eventually died of the irreversible injuries that he had sustained that night, alone and ablaze, in the streets of London (*Alex Menson and Others v. United Kingdom* (2003), pp. 2-5).

Michael's story does not end here, however. Thus, his tragic murder eventually became the first case of a so-called *hate crime* to be discussed by the European Court of Human Rights (ECtHR) in Strasbourg. In *Alex Menson and Others v. the United Kingdom* (2003), the family of Michael sought redress for the unlawful killing he had suffered, as well as the lacking investigation that had followed in the wake of the brutal attack. The family argued that the British authorities failed to comply with

their positive obligation to carry out a proper and comprehensive investigation protected under Article 2 of the European Convention on Human Rights (ECHR) according to which "everyone's right to life shall be protected by law" (*Alex Menson and Others v. United Kingdom* (2003), p. 11). Notably, in conjunction with Article 2, the family of Michael also argued that the failed investigation into his murder reflected a discriminatory attitude towards both Michael as a victim and them as his next-of-kin, thereby breaching the prohibition of discrimination enshrined in Article 14 of the Convention (*Alex Menson and Others v. United Kingdom* (2003), p. 12). Namely, the British handling of the incident had not sufficiently acknowledged that the murder was motivated by *racist hate*: that Michael was attacked for the sole reason of being a black man. When confronted with these claims, the Court provided two important conclusions. On the one hand, it recognized that the Convention indeed does impose a duty on states to put in place both "effective criminal law provisions", that address racially motivated murders, as well as "law enforcement machinery for the prevention, suppression, and punishment" of such murders (*Alex Menson and Others v. United Kingdom* (2003), p. 12). Thus, the Court also stated that in the case of suspected hate-motivated attacks:

> It is particularly important that the investigation is pursued with vigor and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (*Alex Menson and Others v. United Kingdom* (2003), pp. 13-14).

On the other hand, the Court found that, in this particular case, the claims put forth by Michael's family members were "manifestly ill-founded".[1] This was insomuch that the individuals guilty of Michael's murder had in fact eventually been arrested and convicted of the murder, based on a legislation that does allow for consideration of the racist motive, and insomuch that the Court refused to make any further speculations as to whether the initial negligence of the investigation was based in racism or not (*Alex Menson and Others v. United Kingdom* (2003), pp. 14-15). Therefore, the Court, unanimously, rejected the case as inadmissible in line with the Convention's Article 35, para. 4 (*Alex Menson and Others v. United Kingdom* (2003), p. 18).

[1] cf. ECHR Article 35, para. 3.

The rise of the hate crime discourse - as a human rights discourse

Notwithstanding the Court's rejection of the specific claims made in relation to *Alex Menson*, the elucidation of Michael's story did become an important first step in establishing "hate crimes" as a subject matter of the ECtHR and within the collected European human rights framework as such. Namely, the Court's position that racially motivated crimes and other forms of hate-motivated attacks induce specific human rights obligations has since been reiterated by the Court on numerous occasions (Alkiviadou, 2022, p. 2021). It is, however, not only within the chambers of the ECtHR that hate crimes have emerged as a subject of interest. Within the last decades, what we may term *a hate crime discourse* has thus gained foothold across the globe, consolidating itself both in the establishment of a separate field of academic hate crime scholarship but also, perhaps even more significantly, as a popular term used to address challenges of "hatred" in local, national, as well as global contexts. "Hate crimes" have thereby obtained a notable position in the shared vocabulary of the international community, instating considerable legal, social, and political implications (Schweppe & Walters, 2016, p. 1; Garland & Funnell, 2016, p. 16; Chakraborti, 2015, p. 13). In this sense, we may consider the hate crime discourse as an essentially *internationalized* discourse: it has prospered simultaneously because "hate" can be disseminated in new and unprecedented ways in the global world, making it a genuinely transnational issue, and because people around the world increasingly mobilize around "the fight against hatred" as a common international cause (Schweppe & Walters, 2016, p. 4). To Iganski & Sweiry (2016), this internationalization is all the more relevant insofar that we recognize that hate violence amounts to "a global public health problem", manifested in everything from everyday occurrences to extreme calamities (Iganski & Sweiry, 2016, p. 96). Accordingly, we need, Iganski & Sweiry contend, a paradigmatic shift from looking at hate crimes as a niche aspect of criminal justice to considering them a source of global suffering in explicit need of international intervention (Iganski & Sweiry, 2016, pp. 96, 105).

Although this paradigmatic shift is perhaps still underway, what can unequivocally be identified is that the internationalization of "hate crimes" has indeed transplanted this category of crimes from the realm of national criminal justice to the international realm, evidenced in a wave of international efforts to address hate crimes. In Europe, efforts to address "hate crimes" in an internationalized setting have been uniquely visible. Hence, although the preoccupation with "hate crimes" originally emanated from the United States and, secondarily, the United Kingdom, and these two countries have certainly spearheaded academic and practical approaches, the hate crime discourse has, over time, gathered

equal strength in Continental Europe; As Brudholm (2015) puts it, "hate crimes" have long since come to Europe – and they clearly came to stay (Brudholm, 2015, pp. 82, 95-96). Namely, while hate crime numbers have been rising in Europe over the last decades, the region has correspondingly become an epicenter for hate crime efforts (Garland, 2012, p. 1; Schweppe & Walters, 2016, p. 4). To begin with, this consolidation is evidenced in the widescale and widespread introduction of *hate crime legislations* in individual European countries. However, the efforts have plainly extended beyond the domestic realms and reached pan-European institutional levels too. The major European intergovernmental institutions, like *the Council of Europe* (CoE), *the European Union* (EU), and *the Organization for Security and Co-operation in Europe* (OSCE), have increasingly made "hate crimes" an object of their policies and made various strides towards advancing a European hate crime approach that goes beyond individual European state borders. Increasingly mobilized by these institutions, alongside European policymakers, nongovernmental organizations, and even ordinary Europeans, "hate" has become, in Johansen's words (2016), "an outcast of current European politics", demonstrating a broader European institutional formation around joint efforts to combat "hate" (Johansen, 2016, p. 69-72). Within this formation, "hate crime" serves as an enthralling catch-all definition to cover a vast range of dispersed and complex phenomena related to prejudice, bias, and discrimination under a single label of "hate". As the Menson case demonstrated, this formation is not just political but also inherently legal. Hence, a crux of the formation seems to be that institutional pan-European approaches to "hate crime" often address the issue, directly or indirectly, through *human rights* terms. Within the European human rights framework, the hate crime discourse has thus had favorable conditions of becoming what Hilal-Harvald (2019) calls "a vivid cross-jurisdictional and multilocal political and legal discourse" (Hilal-Harvald, 2019, pp. 121-124). In other words, the hate crime discourse, at least in Europe, appears to be, concurrently, *a human rights discourse*, strongly supported and promoted by international human rights actors and engaging, albeit not always consistently, human rights vocabulary (Brudholm, 2015, p. 82).

Filling in the gaps: The disparity of European hate crime approaches

Despite the growing popularity of the hate crime concept and the efforts of pan-European institutions to address hate crimes on a European level, hate crime policies and legislations have, according to Garland (2012), developed "in a piecemeal and sometimes half-hearted fashion" across the European continent (Garland, 2012, p. 1). The reality is, in Garland's estimation, that European hate crime approaches are fundamentally disparate, reflecting an "absence of a shared transnational

understanding" of what hate crimes actually are, and how to address them. In this sense, the development of a workable European hate crime approaches, human rights-based or not, have been, in Garland's opinion, "surprisingly lackluster" (Garland, 2012, pp. 1-2). Whilst pan-European formation against "hate" has then contributed to the rise of the hate crime discourse in European politics, Garland argues that such efforts have yet to foster any "genuine meaning in and between states". What is left, instead, is a somewhat "confused picture" (Garland, 2012, pp. 2-3). The main culprit of this confusion is, according to Schweppe & Walters (2016), a general lack of international consensus on how hate crimes should be addressed as a shared international challenge. Not least because it is abundantly clear that different countries hold on to different approaches to hate crimes, making it excessively difficult to gain a proper overview of hate crime prevalence and actual results of hate crime interventions (Schweppe & Walters, 2016, p. 314).

Yet, for those familiar with hate crime scholarship, this "confusing picture" is perhaps not that surprising. Hence, hate crime scholars have, for decades, unearthed the many *gaps* associated with tackling hate crimes on national and local levels, elucidating that successfully addressing hate crimes is an inherently challenging task. Among other things, hate crimes have thus been linked to a general *knowledge gap*, insofar that the collection of hate crime data is often absent, inconsistent, or insufficient (Perry, 2014, pp. 71-72; Chakraborti, 2015, pp. 577-578). Along similar lines, Perry (2010) speaks of gaps in relation to both "*counting*" and "*countering*" hate crime (Perry, 2010, pp. 350-351), the former being related to the consistent *recording gap* of hate crimes, causing extraordinarily high dark numbers (Chakraborti, 2015, p. 14). Furthermore, Chakraborti (2015) and Mason et al. (2017) both refer to an "*implementation gap*", inferring that even when hate crime policies and legislations exist, they are often not sufficiently implemented in regard to policing and prosecuting relevant crimes (Chakraborti, 2015, pp. 583-583; Mason et al., 2017, pp. 50, 62). This is often substantiated, Chakraborti reasons, by gaps between policy interventions and existing empirical knowledge about hate crimes (Chakraborti, 2015, p. 578). Finally, the lacking implementation has been seen to result in what Walters et al. (2018) call a "*justice gap*", referring to the troubling reality that the vast majority of hate crimes fail to be addressed at all and drop out of the justice system before ever reaching the stage of conviction (Walters et al., 2018, p. 58).

Striking a tune: Harmonizing hate crime efforts?

Given both the disparity and gaps, the evolving idea of *harmonizing* hate crime approaches at a pan-European level could readily be seen as the obvious remedy. However, as mentioned, insomuch that

European states still continue to rely on considerably different approaches to addressing "hate crime", and despite European-institutional formations against "hate", it would seem that a unified European hate crime approach is still far out on the horizon. Schweppe & Walters believe that one of the most apparent barriers to developing a more effective international approach to hate crime is found in "the attitude of international and supranational organizations to the issue". Namely, they point to a lack of enforcement mechanisms at an international level (Schweppe & Walters, 2016, pp. 315-316). In many regards, the European institutions thus only act in advisory capacity and lack the enforcement powers to make their efforts sufficiently impactful. At the same time, Schweppe & Walters acknowledge that states have been expressively reluctant to provide pan-European institutions with these exact enforcement capacities (Schweppe & Walters, 2016, pp. 317-318).

The truth is that challenges of creating *harmony* in European institutional approaches are nothing new, especially when this happens against the backdrop of a human rights framework. Hence, as De Schutter (2010) has so poetically put it, European human rights may be analogized as "un concerto à plusieurs mains" (De Schutter, 2010), engaging numerous European institutions at the same time to, hopefully, perform a harmonious concert. Yet, as De Witte (2019) continues De Schutter's musical metaphor, he notes that the ideal of perfect harmony is rarely captured in European institutional reality (De Witte, 2019, pp. 225-226). Rather, the relationship between especially CoE and the EU is increasingly one of internal tension, not least in the wake of the failed accession of the EU to the ECHR and the critical stance of the EU's Court of Justice (CJEU) in its Opinion 2/13. Moreover, since the EU's equivalent to the ECHR, the Charter of Fundamental Rights (CFR), was given binding legal status in the Lisbon Treaty of 2007, the previously harmony-oriented and dialogical relationship between the two human rights institutional actors have, by some legal scholars, been reviewed as one of increasing competition and divergence (De Witte, 2019, pp. 226-227). Even though EU still recognizes ECHR rights as distinctly important,[2] according to De Witte, the EU does emphatically no longer define itself as "a participant in a human rights choir", but rather as "the guardian of the separateness of the EU legal order" (De Witte, 2019, pp. 228). Insofar the European institutions will move into "splendid isolation in the human rights field", De Witte notes, this could readily undermine the evolution of European human rights norms within a broader European-universal scope (De Witte, 2019, pp. 240-241).

[2] cf. e.g. TEU Article 6(3) or CFR Article 52(3).

While De Witte's concerns are certainly both important and valid, in the context of "hate crimes", the delicate balancing between desired universality and practical diversity is somehow inherent to the enterprise. Thus, even insofar one accepts that "hate crimes" are indeed an issue of international concern that must be addressed beyond specific national realities, addressing hate crimes internationally will inevitably involve a fine balancing act between setting international standards and respecting national specificities (Schweppe & Walters, 2016, pp. 314-315). Namely, Perry (2003) has underscored that hate crimes are "historically and culturally contingent" phenomena (Perry, 2003, p. 7), and the ways in which different societies have tackled the conceptualization and legislation of "hate" are seldomly random but, rather, deeply entrenched in specific historical, cultural, religious, and political realities (Schweppe & Walters, 2016, pp. 314-315). Accordingly, addressing hate crimes at an international level involves finding the point of equilibrium between a sufficiently universal position and a position that allows for the accommodation of national diversity, allowing individual societies to shape hate crime approaches in accordance with that their history, needs, and general values (Brudholm, 2015, p. 84). And so, it remains an open question if a truly harmonized international approach to "hate crime" is possible at all (Schweppe & Walters, 2016, p. 5).

Choosing the terms: Taking hate crimes – and human rights - seriously

If the objective is to contemplate whether a harmonized joint European approach to "hate crimes" can be achieved within the European human rights framework, eliminating inconsistencies, filling in gaps, and attaining "harmony" are not the only challenges affronting us. Namely, it can be questioned altogether if "hate crimes" belong in the human rights realm – or at least, it can be questioned how they belong there. Hence, while it has often been taken for granted that hate crimes are not just an international concern, but specifically a human rights concern, it has rarely been scrutinized in real depth whether the human rights framework is actually conducive to encircling, approaching, and addressing hate. An often overlooked but highly important debate thus concerns if, and how, hate crimes should even be addressed in human rights terms. As I have argued elsewhere (Gunthel, 2023b), it is hard not to initially agree with what has been argued by Perry & Olsson (2009), namely that hate crimes are "worthy of examination through a human rights lens" (Perry & Olsson, 2009, p. 178). However, for Perry & Olsson, considering hate crimes a human rights concern is not enough. They contend that hate crimes constitute, by nature, "a sustained a systematic violation of human rights" in need of condemnation "on its own merits". To Perry & Olsson, this recognition implies that hate crimes are to be more consistently placed on the same continuum as grosser human rights violations such as

genocide and crimes against humanity - even when most "ordinary" hate crimes come across as more mundane and everyday-like (Perry & Olsson, 2009, pp. 176, 181). To Perry & Olsson, human rights language but also human rights law are therefore highly appropriate means of addressing hate crimes at the international level (Perry & Olsson, 2009, pp. 188-190).

However, Brudholm (2015; 2016) takes a more critical approach to addressing hate crimes in human rights terms. As a point of departure, Brudholm admits that there is no way of accounting for the internationalization of hate crime in Europe "without attention to the role of human rights actors", and that the inclusion of "hate crimes" as "an issue on the human rights agenda" has been seen to add "an extra tier of accountability" and "a well-developed set of standards" through which "hate crimes" can be conceptualized, advocated, and perhaps even litigated (Brudholm, 2016, pp. 31-32). While Brudholm does not contest that hate crimes constitute "a human rights *issue*", he does however argue that whether or not hate crimes can and should also be addressed, explicitly, as "human rights *violations*" depends on "how we conceptualize both hate crime and human rights" (Brudholm, 2016, p. 31). Insofar one accepts a primarily "*dignitarian* conception" of human rights violations, hate crimes are indeed violations of human rights that, following the reasoning of Perry & Olsson, harm the basic dignity of those subjected to it (Brudholm, 2016, pp. 41-42). Conversely, insofar one takes on what Brudholm calls a *"power-regulative* conception" of human rights, the answer is not equally affirmative. Hence, this latter conception does not allow for the vast majority of hate crimes to be addressed as "human rights violations", since most hate crimes occur in-between private citizens and do not engage the human rights obligations of the state which is, in this more pragmatic conception, the sole duty-bearer of human rights responsibilities (Brudholm, 2016, pp. 39-40). According to the power-regulative conception, addressing most "ordinary" hate crimes as human rights violations would therefore be an outright "category mistake" (Brudholm, 2015, p. 93). Brudholm underscores that, from a philosophical standpoint, both conceptions may be viable, but they are not necessarily incommensurable, nor is it out of the question to say that one provides a better approach to ensure that we are "taking both hate crimes and human rights seriously" (Brudholm, 2016, pp. 33-34). Brudholm himself thus advocates the more restrictive power-regulative conception as the best means of "keeping sharp the edge of human rights claims" (Brudholm, 2015, p. 82). In this view, what is ultimately at stake in the midst of the European hate crime discourse is then not only our understanding of "hate crime" but also "our maintenance of a precise and pointed discourse on human rights violations" (Brudholm, 2015, p. 82).

Only a small number of other hate crime scholars have, like Brudholm, pushed in the direction that the link between "hate crime" and "human rights" should not be taken for granted. In the most critical end of the spectrum, Garland argues that the European institutions' mobilization of human rights to address hate crimes has largely "failed to tackle the problem effectively". Namely, human rights-based efforts have not been able to efficiently address the harmful implications of targeted hate crime victimization, and consequently, the need for more efficient approaches persists (Garland, 2012, p. 1). Schweppe & Walters more moderately fear that international human rights instruments can become "utterly redundant" insomuch that they cannot address the majority of hate crimes committed amongst private individuals (Schweppe & Walters, 2016, pp. 315-316). Certainly, there are many cases of hate crime in which it would be, as Brudholm puts it, "almost obscene" to contest that these are not human rights violations. The point is, however, Brudholm and other scholars pose, that if we rely too heavily on a primarily intuitive link between "hate crime" and "human rights", as many might when they encounter the Michael Menson case, we could end up with "a well-intended but misleading understanding" of what it requires, at least in the adjudicational context, for something to qualify as a human rights violation. And importantly, as we shall see confirmed in the course of this exploration, the mobilization of the human rights machinery does not even always hinge on the affirmation of hate crimes as human rights violations (Brudholm, 2016, pp. 33-34). A final complex challenge that Brudholm puts in front of us is then the pivotal task of pinpointing the "specific and delimited role to be played by human rights language and instruments" when addressing hate crimes (Brudholm, 2016, p. 45).

Addressing a human rights issue: Disjointed solos or harmonious choirs?

Given all of these challenges, one is inclined to ask if a harmonious pan-European approach to hate crime can actually be achieved? And if so, exactly how can and should the European institutions address hate crimes in such a way that it becomes more of a harmonious choir than a disharmonious collection of disjointed solos? In human rights terms or not? To enclose on an answer to these highly complex questions, this paper explores how "hate crimes" can, and currently are, encircled, approached, and addressed within the European human rights framework. More specifically, it investigates the efforts of the Council of Europe (CoE), the European Union (EU), and the Organization for Security and Co-operation in Europe (OSCE) in targeting hate crimes as an object of political and legal action. Situating itself within the intersections of hate crime scholarship and human rights scholarship, the investigation draws on both legal and non-legal sources to sketch out the wider

landscape of contemporary European hate crime efforts against the backdrop of the pan-European human rights framework.

I conduct my investigation in three parts. In the first part, I initiate the exploration by encircling "hate crime" as a conceptual, legal, and empirical phenomenon in order to establish a solid foundation for the further inquiry into an otherwise often elusive category. In the second part, I review hate crimes as a specific object of institutional approaches in Europe, examining the plethora of legal, quasi-legal, and non-legal components that influence the regulation and tackling of hate crimes within the institutional bounds of Europe as a region. In the third and final part, I discuss the prospects of addressing hate crimes at the international-European level in recognition of the current *punitive bias* inherent to the hate crime discourse. I sketch out three major directions that the pan-European approaches to addressing hate crimes currently take against the backdrop of the European human rights framework: a *legislative* strategy, an *adjudicational* strategy, and a *collaborative* strategy. I argue that each of these have yielded important results, but that none of them have decidedly managed to vanquish the punitive bias inherent to the hate crime discourse, nor have they essentially banished disharmony in Europe. As alternative ways forward, I explore the potentialities of *restorative* and *human rights-based* strategies, as well as a newly emerged strategy suggested by the EU in the form of joint European *criminalization*. Based on my findings, I argue that addressing hate crimes internationally and beyond the punitive bias is indeed a challenging task, and one that extends beyond European-institutional disharmonies or deficiencies. Accordingly, time has perhaps come to realign our expectations to when and how human rights can be used to address hate crime. At the very least, we need be more aware of the links we draw between hate crimes and human rights.

Chapter 1

Encircling hate crimes in Europe

In this chapter, I initiate the exploration by encircling "hate crime" as a highly contested concept, spanning across academic, legal, and popular settings. To elucidate this elusive term, I outline some of the most common traits attributed to hate crimes vis-à-vis other types of crimes, and how these typically translate into a criminal element and into hate crime legislations. I also explore the wider abstract legal framework surrounding hate crime law, contextualizing its inception and position within international law in sensu lato. Finally, I transplant these considerations into European reality by investigating the empirical prevalence of the hate crime discourse in Europe through the ways in which hate crimes have been encircled in different European jurisdictions. I conclude that encircling hate crimes in domestic European realities is indeed a story of disharmony, but also, seemingly, one of increasing commitment.

What is "hate crime"?

One hardly encounters a deliberation on "hate crimes" without being met by the same initial disclaimer: that "hate crime" is a notoriously ambiguous and disputed concept. In fact, any consideration of "hate crimes" is confronted by the profound conceptual challenges disclosed by this concept (Gunthel, 2023a, p. 34). Despite years of attempts at reaching beyond contextual definitions, the extraction of a universal conceptualization of "hate crimes" has proven to be in vain, and accordingly, the term has been described as anything from "a mystery" to an outright "conceptual swamp" (Mason et al., 2017, p. 6; Brudholm, 2015, p. 84). The conceptual contestations over "hate crime" are many. In fact, Garland notes that scholarly disagreements seem to plague "most of its key aspects" (Garland, 2012, p. 3). One of the most recurring contestations concerns the very pairing of "hate" and "crime", especially what "hate" is, and what role it does, or does not play, in instigating "hate crimes" (Gunthel, 2023b, pp. 38, 34-35; Brudholm, 2016, p. 33; Walters, 2011, pp. 314-315). This has involved disagreements as to whether "*hate*" in itself forms a motivational attitude, enticing the hateful acts (Rempel & Sutherland, 2020), or if "hate" is actually a misnomer to begin with, probing us instead to adopt alternative terms such as "bias crimes", "targeted crimes", or "prejudice crimes" (Hall, 2005; Brudholm, 2018). Insofar "hate" is maintained, the "*crime*" may instead be the subject of contestation. Hence, some scholars

have insisted that the common imagination of hate *crimes* be replaced with a notion of "hate *conflicts*", reflecting their habitual occurrence as multi-layered skirmishes in which "hate" is but one component of escalation (Walters & Hoyle, 2011). Both in academia and in policy contexts, the most contested aspect of hate crime conceptualization is, however, the bases upon which protection against hate crimes is granted to different "groups" or "identities". Thus, hate crime definitions tend to highlight specific *protected characteristics*, delineating these as grounds for protection, thereby excluding those not identified. This aspect has been contested from the beginning of hate crime scholarship, famously by Jacobs and Potter (1998) in their analysis of hate crime legislation as a form of "identity politics" (Jacobs & Potter, 1998, pp. 165-166). In more recent years, "the silo approach" or "the identity strand approach" have introduced similar contestations (Mason-Bish, 2015; Walters & Hoyle, 2011). Among others, Mason-Bish (2015) has disputed the focus on "identities" in hate crime law-making as a source of unproductive "recognition struggles", often oversimplifying and even misrepresenting group identities on the basis of popular opinions of "deserving" and "undeserving" victims (Mason-Bish, 2015, pp. 24-27; Brudholm, 2015, p. 87). In strictly legal contexts, a recurring concern is that the preoccupation with "identity" fundamentally jeopardizes the principle of equality before the law, while others worry that the constant expansion of new victim categories may water down laws and render them unenforceable (Mason, 2015, pp. 64-65).

The lack of conceptual consensus may come across as paradoxical when considering that the hate crime concept, despite its relatively short lifespan, has managed to gain such considerable traction across the world. Namely, the dramatic rise in public concern about "hate crime" and increasing popular mobilization of the word coexist with an increasing "conceptualization fatigue" within the academic field, and an increasing acceptance that no definition is likely to castoff the "widespread bewilderment as to the very concept of hate crime" (Brudholm, 2015, pp. 82-83). And yet, even insofar this bewilderment has provided grounds for consistent pleas for more conceptual uniformity in both public and professional settings, it has clearly not prevented "hate crime" from outcompeting alternative terms in the very same settings (Mason et al., 2017, p. 29; Brudholm, 2015, p. 84). Schweppe & Walters suggest that there is then a form of open-ended international consensus on the relevance of "hate crimes" as crimes that relate to some form of "hate", "prejudice" or "bias", yet new meanings are routinely added as the concept engages with global realities (Schweppe & Walters, 2016, p. 314). As we are to embark on an exploration of "hate crime" in Europe, the pressing question is of course then what concept of "hate crime" to rely on. Recalling that this exploration hinges on capturing the diversity of European approaches, it would hardly be productive to even try to attempt to settle on

a single definition. On the other hand, we also need some form of basic conceptual framework that distinguishes "hate crime" as a *concept* from popular *conceptions* of "hate crime" (Brudholm, 2015, pp. 83-84). Therefore, I will refer the well-established conceptualization that "hate crime" is to be considered an "umbrella term" (Schweppe & Walters, 2016, p. 5), forming "a spectrum" of acts motivated by "hate", "hostility", or "bias" (Brudholm, 2015, p. 84).

With this broad definition as our starting point, we may leave behind the conceptual ambiguities, at least momentarily, and ask what most conceptions of "hate crimes" have in common. Namely, a number of traits have regularly been highlighted in scholarly literature as characteristics of "hate crimes". First of all, hate crimes must, distinctly, be *crimes*. Hence, although one may distinguish between "hate crimes" and, more broadly, "hate incidents" or, as we saw, "hate conflicts", in most conceptions, "hate" must coincide with an established criminal offence under criminal law or international law (Brudholm, 2016, p. 34). Second, hate crimes are often regarded as *difference-based crimes*, insomuch that hate crime offenders act on "a real or perceived difference" between themselves and the victim (Levin & McDevitt, 2020, pp. 179-180). Famously, Perry (2001) has argued that hate crimes are thereby a form of "doing difference" (Perry, 2001). In conjunction with this, hate crimes are *identity-based crimes* insomuch that the difference perceived is anchored in some aspect of the victim's social identity rather than their personal identity (Jacobs & Potter, 1998). The "hate" involved in hate crime can thus not be any type of hatred: it must be directed towards a "protected characteristic". Accordingly, passionate vengeful "hate" of a scorn lover or a wronged business-partner would rarely qualify, whereas "hate" targeting someone's race, ethnicity, nationality, religion, or sexuality conversely would (Brudholm, 2016, p. 35; Brudholm, 2015, p. 87). This also means that hate crimes tend to be characterized by a dimension of *interchangeability* in the sense that the perpetrator could, more or less congruently, have attacked another person sharing the same targeted trait as the specific victim (Gunthel, 2023a, p. 36). This leads us to a fourth trait: that hate crimes are considered *message crimes*, communicating a hostile symbolic message to not just the victim but to all of those sharing the social identity of the victim (Dixon & Gadd, 2006). Thereby, Perry (2009) argues, hate crimes reaffirm, or set in place, specific social hierarchies, often by intimidating or oppressing those already-minoritized, as a reminder that "they are different and don't belong" (Perry, 2009, p. 72). Finally, hate crime scholarship has consistently emphasized hate crimes as uniquely *harmful crimes* (Iganski, 2001; Walters 2018). Such harms have at least three dimensions: First, the hateful attitude of the perpetrator is in itself considered harmful for society thus in need of a symbolic response (Perry & Olsson, 2009). Second, hate crimes are thought to inflict more persistent and severe harms on the individual victim

than similar types of crime (Walters, 2018; see also Gunthel, 2023b). And finally, hate crimes have indirect harms due to what Perry & Alvi (2012) call *the "in terrorem" effect* allowing them to hurt not only the immediate victim but also those communities sharing the targeted social identity, and even society at large (Perry & Alvi, 2012; Iganski, 2001; Lawrence, 2003).

"Hate" as a criminal element

The conceptual elusiveness of "hate crime" may be fatigue-inducing in academic contexts, yet another level of seriousness is added when "hate crimes" are to be encircled within a legal framework to serve as a *criminal element*. As Brax notes (2016), "hate crime" is thus a concept that "travels", invoked by not just scholars but also legislators and law enforcement agents in the context of criminal justice enforcement (Brax, 2016, pp. 50-53). Insomuch that we may operate with a fairly flexible conception of "hate crime" for scientific purposes, a criminal law standard of "hate" naturally demands a higher level of conceptual precision, as vagueness can be detrimental to achieving results during the criminal process, and because the imposition of criminal punishment on real human beings is potentially at stake. Yet, even in criminal justice settings, the elusiveness of "hate crime" seems to endure. Namely, Brax argues that there is "no single plausible answer" to what counts as the hateful element. In fact, the definition of the "hate" in "hate crimes" in most hate crime legislations is "rather vague", and depend on "a range of conceptions, corresponding to what aspects of these crime we are most interested in" (Brax, 2016, p. 53). To Brax, we will often deal with one of two scenarios: in rare cases, we deal with what can be readily categorized as "obvious hate crimes". In such cases, the criminal element of "hate" is often fairly easily encircled. Yet most hate crimes are not that easy to encircle and force criminal justice practitioners, e.g. police, prosecution, defense, and the judiciary, to engage in "some interpretative guesswork". Not only can this in itself be controversial, but it can sometimes entirely derail the legal process and contribute to implementation and justice gaps (Brax, 2016, p. 53).

Criminal justice interpretations, in Brax' view, typically encircle "hate" as a criminal element in five different ways. First, *motive*-based conceptions encircle hate crimes as specifically committed with a hateful or biased motive. These are conceptually sound in the sense that they explicate a literal connection between "the hate" and "the crime", yet they are often less clear in providing specific guidelines to establish when an action can be said to have been taken *because* of hate, not simply *with* hate, and they can be perceived problematic in their reliance on the subjectivity of emotions (Brax, 2016, pp. 53-55). Second, *intention*-based conceptions define "hate crimes" based on what the offender intended to do by committing the crime. Similar to crimes of terrorism, hate crimes are then usually

identified based on an intention to instill fear or compliance on the part of those targeted. In legal contexts, intention is often less controversial than motive insofar the former invoke the well-established concept of *mens rea* rather than probe speculations about motivation. In practice, however, "motive" and "intent" are often interrelated and sometimes overlapping (Brax, 2016, p. 55). Third, *discrimination*-based conceptions largely eliminate the importance of both motive and intent, and instead identify that a discriminatory action was conducted. Discrimination-based conceptions do not exclude the presence of a hateful motive and/or intent. They just don't rely on these when establishing the criminal element, potentially making this approach one of the more pragmatically applicable in the legal realm, though often hard to prove (Brax, 2016, p. 56). Fourth, *expression*-based conceptions consider "hate" a criminal element based on the identification of what sort of message the criminal act expressed. These conceptions are often controversial in criminal law as many contest that punitive individual measures should be confused with symbolic statements (Brax, 2016, p. 56). Fifth and finally, *effect*-based conceptions of hate crimes define "hate" as a criminal element based on the effects it causes, usually through the forementioned terminology of "harm". These conceptions are often disputed on the inherent subjectivity of "harm" and on the notion that all crimes are, per definition, harmful (Brax, 2016, p. 56).

For a moment, we may briefly return to the forementioned question of whether "hate" is in fact a misnomer in the context of encircling "hate" as a criminal element. Hence, it is important to note that despite "hate" having caught on in popular and political mobilizations of "hate crime", formal legal hate crime provisions rarely engage "hate" at all (Mason, 2015, p. 60). Accordingly, I have previously argued that, in the context of hate crime legislation, we will more often encounter "a silent hate" (Gunthel 2023b, p. 38). Notably, whereas popular and political mobilizations of "hate crime" often call attention to "the hate" rather than "the crime" (Johansen, 2016, p. 73), legal approaches tend to operate in the opposite direction. And arguably, there is a reason for this insomuch that emotions, regardless of how we define them, is patently a contested element in law. Despite growing attention to emotions, the legal field maintains, according to Peršak (2019), a strong "ambivalence towards emotion as an element of law-making and adjudication", implicating that emotions are ideally avoided, sometimes neglected, and routinely condemned in law at large (Peršak, 2019, pp. 47-48). At the same time, there are clearly areas of law that, more or less deliberately, incorporate emotions, e.g. incitement clauses, terror provisions, or "heat of passion" considerations (Peršak, 2019, pp. 48-49). Recognizing this resistance to emotions in law, once again, we may appreciate that the hate crime discourse has proved an impressing ability to prevail in spite of its elusiveness.

The legal encirclement of hatred

Clearly, even in criminal law contexts, the elusiveness of "hate crime" makes it difficult to encircle. For the exploration to come, it is therefore relevant to establish that "hate" will often mean different things in different realms of the same legal system. As Mason (2015) notes, *legislative* interpretations will, for instance, often differ from the *operational* interpretations deployed by law enforcement. Furthermore, provisions may be read in a third way when, or *if*, they reach the courts and are engulfed by *adjudicational* interpretations (Mason, 2015, p. 60). Consequently, even if we group together different legal measures under one category of *hate crime legislation*, they might vary substantially from one another. One thing is, however, pretty common for these types of legal measures: they tend to display a form of *criminal law bias*, or *punitive bias*. Namely, although hate crime legislation can technically take different forms, they are almost always punitive measures. Mason contends that the hate crime discourse was thus conceived as an essentially retributivist discourse, proliferated in many countries by high-profile cases of violence that have swayed public opinion - and thereby often policymakers - to adopt punitive legislations (Mason, 2015, p. 59). Such punitive measures tend to belong to one of three categories: *Penalty enhancement models*, the most common in Europe, criminalize "hate" by adding it on top of the primary criminal sentencing, often through a formal enhancement criterion enshrined in the penal code. *Sentence aggravation models* are similar yet operate under a higher level of judicial discretion in the sense that they allow for the hateful element to be taken into account but does not prescribe it as a formal requirement. *Substantive offence models* are the most extensive type of hate crime legislation, defining hate crimes as stand-alone offences similar to many hate speech provisions. This model is decently rare in Continental Europe, but has been applied in the United Kingdom, as well as parts of Canada, Australia, and the United States. Importantly, different models can overlap within the same jurisdictions (Mason, 2015, pp. 60-61).

Legal encirclements of "hate crime" not only involves a penalty model, however, but also pertains to determining a certain *threshold* as to when the hateful element has been sufficiently established. Here, Mason points to two applicable legal tests: First, according to the so-called *animus test*, or *motive selection test*, the threshold is adequately reached when the perpetrator has committed the act because of a general animus against the victim's perceived social group. In this test, "hate", and thereby guilt, is established when a hateful motive can concurrently be established. This punishing of a perpetrator's potential thoughts has often attracted criticism for being essentially un-legal, whereas others have defended that motive is in fact a regular subject of legal reasoning (Mason, 2015, p. 62). Second, the

discriminatory selection test, or *group selection test*, arguably establishes a lower threshold in the sense that it is only necessary to prove that the perpetrator practically selected the victim in some recognition of the protected characteristic, rather than requiring a more general motive of animus to be proven. Thereby, the test can potentially include a wider range of situations than those undergoing the animus test. The discriminatory selection model has therefore sometimes been criticized for including crimes that are not, essentially, hate crimes, such as opportunistic crimes or mildly biased crimes, potentially diluting the anti-prejudice message of hate crime legislation (Mason, 2015, p. 62). Finally, it is worth mentioning that a third distinction has become specifically relevant in Europe: that is the distinction between more restrictive conceptions of "hate" as a *motivating* factor versus more expansive conceptions of hate crimes as merely matters of *demonstration* or *manifestation*. Namely, whereas most European countries have applied the more restrictive conception that the threshold of hate is met when the hate crime is motivated either "in whole" or perhaps "in part" by "hate" (Brudholm, 2015, pp. 86-87), the United Kingdom has adopted the expansive approach according to which speculations about a motive can be avoided if the perpetrator "demonstrated" the relevant hostility during the offence – often based on the manifestation of hateful slurs or insults (Mason, 2015, pp. 62-63). The expansive model has led the United Kingdom to become the European country with by far the most recorded, prosecuted, and sentenced hate crimes. This has both been praised as a much-needed response to the justice gap of hate crime, but also criticized for setting the bar too low and failing to distinguish between true animus and slurs uttered "in the heat of the moment". In sum, we may note that when formulating hate crime legislation and when establishing where the "hate threshold" should lie, answers are given in "very different ways under different legislative and judicial frameworks" (Mason, 2015, p. 63).

Notably, the justificatory foundation of hate crime legislation has not always been undisputed. Hence, critics have questioned if the legal encirclement of hate crimes is a problematic way of imposing harsher sentences on someone because of their thoughts or feelings, rather than on the basis of their acts, infringing upon the absolute right to freedom of thought. Others have questioned the assumed deterrence effect of such legislations or posed that they are disproportionate measures (Mason & Dyer, 2013; Morgan, 2002; Hurd, 2001; Dixon & Gadd, 2006). Furthermore, it has been raised that the preoccupation with "hate" can occasionally become so all-encompassing that it ends up "outshining" the recognition of crime as, in itself, a moral wrongdoing, condemnable with or without "hate" (Brudholm, 2016, pp. 34-35). For those advocating hate crime legislations, two main arguments are conversely often stressed: Again, the argument of *harm*. For instance, Lawrence (1999) insists that

"the unique harm" that is associated with hate crimes is not only sufficient grounds for justifying hate crime legislation that specifically penalizes hate crimes, it in fact "compels it" (Lawrence, 1999, p. 175). The second argument is of a moral nature in the sense that it assumes the hate crime perpetrator's culpability to be greater than that of those committing similar offences. In this view, the offender's hateful intention or act is so "particularly heinous" that it justifies enhanced punishment (Mason, 2015, p. 65; Brax, 2016, p. 60).

The origins and delineations of hate crime law

The encirclements of "hate" in hate crime legislation have not emerged out of nothing. Rather, hate crime law is intertwined in a broader international framework of human rights and jus cogens principles. To contextualize "hate" as an international legal concern, and to understand the origins of hate crime legislations, we may therefore for a moment dwell on some of these underlying rights and principles.

Engaging a legal concept far older than the international human rights framework itself, protection against hate crimes can be seen in the context of the widely recognized *right to life and physical security*. Having been considered a *natural right* at least since the early contract theories proposed by Hobbes, Locke, and Rousseau, the right to life and physical security is, in the words of Shue (2008), one among few human rights, whether enshrined in law or not, that qualifies as a "*basic right*" and should always be subjected to "social guarantees" as it indicates to humanity "the morality of the depths"; "the line beneath which no one is to be allowed to sink" (Shue, 2008, pp. 83, 89). Namely, Shue argues that for any other right to be even remotely enjoyed, the right to life and physical security must be ensured. No regime of rights can then function unless individuals are protected against, inter alia, violence and murder (Shue, 2008, 90-99). Accordingly, this "supreme right" has been enshrined in numerous branches of international law, including in Article 3 of the Universal Declaration on Human Rights (UDHR), affording everyone "the right to life, liberty and security of person", and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) proclaiming that the "inherent right to life" must be protected "by law" and not "arbitrarily deprived". In the European human rights framework, both Article 2 of the ECHR and Article 2 of the CFR enshrine the right to life, supplemented by other relevant articles of the Conventions. Within international law, it is widely recognized that this right imposes both a negative obligation of states to not deprive life themselves, but also, in the context of crime, a positive obligation to put in place effective criminal justice mechanisms and adequate remedies to address violations of this basic right.

As we encountered in the Introduction, some have argued that hate crimes are violations of human *dignity* (Perry & Olsson, 2009). In the dignitarian conception, hate crimes are thereby linked directly to the core human rights principle of "dignity" which has been highlighted from the inception of the international human rights framework. According to Blázques (1982), "the philosophical-legal principle of dignity" has thus especially shaped the first and perhaps most symbolic human rights document, the UDHR (1948) (Blázques, 1982, p. 110). For instance, the UDHR Preamble proclaims the inviolability of "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", and Article 1 of the Declaration famously underscores that "all human beings are born free and equal in dignity and rights". Although I myself have argued that the UDHR plays a relatively limited role in the context of operationalizing hate crime protection (Gunthel 2023b, p. 51), the Declaration is sometimes considered a form of jus cogens (Özdan, 2022; Acosta-López & Duque-Vallejo, 2008) and is inevitably forming the background for many abstract interpretations of the rights enshrined in all subsequent human rights documents, including the ECHR.

Finally, hate crime is fundamentally connected to the international *prohibition of discrimination* and its corresponding *right to non-discrimination*, present both in the UN Charter (1945) and the UDHR. Article 2, para. 1 of the UDHR stipules that "everyone is entitled to all the right and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status". The prohibition of discrimination has since been reiterated and enshrined in many international and regional human rights instruments, including in Article 27 of the ICCR, Article 14 of the ECHR and, in a more general sense, in Protocol no. 12 to the ECHR, as well as in Article 21 of the CFR. Moreover, European institutions have adopted a number of specific measures, including the EU Employment Equality Directive (2000) and the EU Racial Equality Directive (2000), accentuating non-discrimination as a central European value (Benoît-Rohmer, 2017, pp. 151-153). In some contexts, the right to non-discrimination also extends to a more positively formulated obligation to ensure *anti-discrimination* measures, e.g. through active minority protective measures. In the European human rights framework, such protection has been granted or promoted, for instance, by CoE's Framework Convention for the Protection of National Minorities (1995), OSCE's Ljubljana Guidelines on Integration of Diverse Societies (2012), and the EU Copenhagen Criteria (1993).

A last thing to emphasize is that, despite its interconnectedness with other well-established legal concepts, "hate crime" must also be delineated from some of these. First of all, "hate crime" is often conflated with *hate speech*. However, although these both revolve around a distinction of a hateful element and are often invoked and recorded in unison, they are fundamentally different legal categories. Thus, as we have seen, "hate crimes" are pre-existing offences upon which the hateful element is added. Contrarily, "hate speech" is the crime itself, insofar that it is the hateful element of the speech that makes this speech unlawful. Whereas "hate crime" has, as mentioned, been criticized as an indirect infringement of the right to freedom of thought, "hate speech" is unequivocally a formal limitation on the right to freedom of expression. Adjudicating "hate speech" is therefore a legal balancing of the right to expressive freedom, on the one hand, and other legitimate legally recognized counter-concerns or rights on the other, such as the security of those targeted (e.g. in cases of threats or incitement), or more general interests of maintaining a tolerant society (e.g. in cases of racist hate speech). Contrarily, hate crimes are not, prima facie, a matter of balancing but, as we have seen, of placing the crime below or above the threshold. Moreover, "hate speech" is typically legislated as a standalone offence, for instance, in Article 20, para. 2 of the ICCPR. A second delineation to be made concerns the relationship and distinction between "hate crimes" and *international crimes* as stipulated under Article 5 of the Rome Statute, namely, *crimes against humanity* (Article 7), *crimes of genocide* (Article 6), and *war crimes* (Article 8). In a few situations, such atrocities can thus be conducted based on a hateful element similar to the motivations we have dealt with in the context of hate crimes (Axelson, 2016, pp. 277-278). However, although hate crimes and international crimes can coincide, international law does not explicitly address the hateful element in international crimes. Admittedly, crimes against humanity and genocide could rightly be regarded as the most ultimate form of hate crime. Yet, when the objective is to explore approaches to the vast majority of "ordinary" hate crimes, it is a necessary strategic decision to delineate these from the hate crimes that explicitly constitute international crimes. Lastly, insofar international crimes are the ultimate hate crime, some would equally argue that hate crimes are the ultimate form of *discrimination*. However, true as this may be in principle and despite the clear link between "hate crimes" as crimes with a discriminatory element and "discrimination" in general, "hate crimes" and "discrimination" are also not synonymous terms. Similar to "hate speech", many acts of discrimination are thus only unlawful because of the presence of the discriminatory element.

A story of disharmony: Encirclements of hate crime in European states

A few decades ago, no one hardly ever spoke about "hate crimes" or "hate crime laws" in Europe (Mason, 2015, p. 59; Brudholm, 2015, p. 83; Garland, 2012, p. 1-2). They did perhaps speak of "racism", "prejudice", or "discrimination", but rarely did they speak about "hate crime". However, with the rise over the hate crime discourse over the past decades, the proliferation of laws designated to address hate crimes has grown exponentially, influenced by numerous international developments (Mason, 2015, 59). The hate crime discourse was first conceived in the United States as early as in the 1960s in the context of the civil rights movement (Garland, 2012, 1-2). During the 1970s and 1980s, the mobilization caught on which led to the adoption of the first hate crime law to be issued in California, igniting numerous others to come in the 1990s (Johansen, 2016, p. 72; Mason, 2015, p. 59). It was not until the late 1990s, however, that the hate crime discourse decisively traversed the Atlantic, and when it did, it went ashore the British Islands first. Thus, the United Kingdom was among the first countries after the United States to implement bias-based legislation as part of their criminal law framework (Garland, 2012, p. 2; Johansen, 2016, p. 72). In Continental Europe, it was more of a difficult birth, but finally, in the early 2000s, Germany adopted a hate crime provision which was soon followed suit by Sweden, Denmark, and the Netherlands. For the most part, the European focus was largely limited to "racist crimes" (Johansen, 2016, p. 72). However, during the 2000s, countries increasingly embraced a more diverse range of identity categories, forming the contemporary understanding of "hate crime" that we know today (Schweppe & Walters, 2016, p. 5). Nonetheless, the "slow start" of the hate crime discourse in Continental Europe, combined with a different geographic reality to that of the United States or the United Kingdom, have seemingly had lasting consequences. Not only in the sense that Continental Europe offers a much smaller corpus of academic scholarship than the United States and the United Kingdom, but also, according to Garland, in "little evidence of shared understandings of the concept" across European states (Garland, 2012, p. 2). Namely, the conceptual ambiguities that haunt "hate crime" have resulted in diverging interpretations and definitions across different European countries and in-between the European institutions (Garland, 2012, pp. 2-3; Brudholm, 2015, p. 83).

This seeming European disharmony was affirmed in the 2018 EU-funded comparative report *Lifecycle of a Hate Crime*, tracking the course of hate crimes through the criminal justice system of five (technically six) different European jurisdictions: the Czech Republic, Latvia, Sweden, Ireland, and England and Wales. The research was conducted over a period of five years (2011-2016) and concludes

that the six countries display substantially different approaches of encircling hate crimes (Haynes et al., 2018, pp. 54, 58). While the report identifies that most of the European countries have a legislative framework in place, it finds great disparity in the practical application of hate crime provisions within and across states (Haynes et al., 2018, pp. 125, 3, 47). Significantly, Ireland is the only participating jurisdiction that does not provide a formalized legal framework, relying solely on judicial discretion (Haynes et al., 2018, pp. 44-47, 12). Contrarily, England and Wales have the most extensive legislative frameworks, allowing the hateful element to be addressed both as a stand-alone offence and as a sentence-aggravating factor, depending on the targeted protected characteristic (Haynes et al. 2018, pp. 47-48). In the middle of the spectrum, Latvia, Sweden, and the Czech Republic primarily address hate crimes in the context of sentencing, but also have in place formal procedures of penalty enhancement (Haynes et al., 2018, pp. 12, 45). The countries' different legal encirclements were further reflected in different understandings of the hate crime concept among criminal justice actors, and in the extent to which hate crimes were clearly delineated from hate speech (Haynes et al., 2018, pp. 52-54). Another disharmony in-between the countries concerned protected characteristics. While "race", "ethnic or social origin", and "religion or belief" were included in all countries, protection of other categories varied. By far, the widest catalogue of protected characteristics was provided by the British-Welsh framework (Haynes et al., 2018, pp. 14-15, 29, 48). Furthermore, some countries allowed for the open-ended inclusion of "other similar circumstance" (in Sweden) and "other similar biases" (in the Czech Republic), while others did not (e.g. in Latvia) (Haynes et al., 2018, pp. 48-49). When interviewing criminal justice professionals, including prosecutors and defense lawyers, in each country, these reported highly different attitudes towards broadening the range of protected characteristics. In the Czech Republic, there was a general resistance, whereas in England and Wales attitudes were often favorable (Haynes et al., 2018, pp. 49-50).

While the report uncovers great disparities, all of the domestic realities seemed to share the presence of some of the by now well-known "gaps". For instance, all jurisdictions evidenced "clear signs of under-recording and under-reporting" (Haynes et al., 2018, p. 55). Here, the disharmony was rather found in diverging recording methods, preventing credible cross-jurisdictional comparisons and severely limiting the ability to monitor both at a state level and at a European level (Haynes et al., 2018, pp. 108). Implementation also proved problematic in all jurisdictions. Countries had, however, different approaches to investigation, including police recording, availability of specialized hate crime training, hate crime guidelines, and hate crime units, as well as to victim inclusion and support (Haynes et al., 2018, pp. 55-67). In the realm of adjudication, the "hate" threshold especially differed. In some

countries, the threshold was set fairly high, whereas in other countries, like in the United Kingdom, it was set lower (Haynes et al., 2018, p. 76). It also differed if the adjudicate was provided sentencing policies and guidelines in the context of adjudicating cases of hate crime, whether expert opinions were engaged during adjudication, and whether hate crime specialization was provided for prosecutorial staff (Haynes et al., 2018, pp. 82-86, 67-76). Beyond the realm of enforcement, disharmony was identified in the countries' adoption of national hate crime strategies or action plans, their collection and publication of public hate crime data, and their disaggregation of hate crime data from data on e.g. hate speech or discrimination (Haynes et al., 2018, pp. 50-51, 98). Noteworthily, in all jurisdiction, the report finds indications of justice gaps insomuch that the hate crime element is habitually "filtered out" during the justice process, even in countries that have solid framework. Yet exactly how this filtering out happens depend on the specific weaknesses of the particular national system (Haynes et al., 2018, pp. 95, 70-81).

The report draws the main conclusion that, across the different European jurisdictions, "there is no uniformity in the manner in which a hate element is addressed through the criminal process" (Haynes et al., 2018, p. 94). It then goes on to provide a number of recommendations for the elimination of European disharmony. First, it recommends the implementation of "a common and inclusive definition of hate crime" across European member states to harmonize the catalogue of protected characteristics in accordance with European law, namely the ECHR and the CFR. This definition should relate to a formal European criminalization model with the hateful element either formalized as an aggravated offence or as a sentencing factor, supplemented by a general European guideline on the threshold of "hate", e.g. if countries should apply tests of motivation or demonstration, or "in whole" or "in part" tests. Importantly, the report emphasizes that this approach should be enforced at a legislative European-institutional level (Haynes et al., 2018, pp. 123-128). Second, the report recommends the introduction of a joint EU Action Plan on Hate Crime to serve as a template for the introduction of national plans and strategies. The plan should entail tactics for EU-wide hate crime monitoring, improved reporting, guidance policies for criminal justice professionals, guidelines on effective criminal justice interventions to address underlying causes, victim support initiatives, and preventive education strategies (Haynes et al., 2018, pp. 123-124, 130). Third, the report recommends the execution of an EU-wide survey to establish the prevalence, impacts, and experiences of reporting hate crimes in Europe at large and to generate "comparable cross-national data" that neither conflate hate crimes with other offences, nor rely too heavily on national constructions producing an inability to compare across countries (Haynes et al., 2018, pp. 123-124, 130-132). Fourth, the report suggests a

more general review of the current monitoring and compliance mechanisms to advance the jurisdictional progress in European member states (Haynes et al., 2018, pp. 123-124). Finally, member states should be obligated to provide sufficient victim support during criminal hate crime proceedings, and ensure that reporting is further facilitated, including through data collection by the state and through third party monitoring (Haynes et al., 2018, pp. 141-143).

The report is not alone in identifying disharmony in European domestic encirclements of "hate crime". Thus, similar conclusions have been drawn by other studies. Whereas the 2018 report focuses largely on hate crime approaches within the EU (at that time, including the United Kingdom), equal disparities have been found in the jurisdictions of the CoE and the OSCE (Garland & Funnell, 2016, p. 23). For instance, Bleich (2007) argue that "the big three" of European politics, United Kingdom, Germany, and France, have all historically adopted very different approaches to hate-motivated violence. Specifically, whereas the United Kingdom has taken the most extensive and "repressive" approach by focusing on consolidation of the policing and adjudication of hate crimes, Germany has instead taken on a more "distributive" approach by devoting resources for civil society to counter extremism, and France has taken on a third approach, focusing primarily on educational and symbolic efforts. Bleich therefore concludes that, in spite of increasing Europeanization, coordination between countries is still to be desired (Bleich, 2007, pp. 149-159). Likewise, Garland observes massive differences in how "hate crime" is encircled in expansive ways in the United Kingdom and far more restrictively in the rest of Europe (Garland, 2012, p. 8). Finally, in recent contribution by Van der Aa et al. (2021), the "widely disparate" European encirclements of "hate crime" are again observed (Van der Aa et al., 2021, p. 170). This study, albeit on a smaller scale and with some methodological caveats, makes an inventory of domestic hate crime encirclements in 20 EU member states through a survey among national experts. It too finds numerous notable variations between the countries (Van der Aa et al., 2021, pp. 172-173, 180). Like the 2018 report, the survey observes a lack of a universally accepted hate crime definition across European countries, although most countries have in place a legal framework, again with Ireland as exception (Van der Aa et al., 2021, p. 175). Again, national legislations differ in their inclusion of specific protected characteristics, including how exhaustive their catalogues are, and if they provide an open-ended of "similar grounds". Bulgaria, Poland, and Italy are the most restrictive, whereas e.g. Belgium, Germany, and Spain include the widest ranges. In line with historical tendencies, "race", "'ethnic origin" and "religion" are always or mostly included (Van der Aa et al., 2021, pp. 174-175). A few countries stand out with unique categories such as "citizenship" (Malta) and "social status or descent" (Germany, Lithuania, and Belgium). Other notable

exceptionalisms include the enhanced focus on right-wing extremism and antisemitism in the German and Austrian frameworks (Van der Aa et al., 2021, p. 175). In addition to confirming disharmony in the legislations themselves, the survey also confirms disparity in regard to investigation, prosecution, and other procedural measures such as victim protection, reporting barriers, and identifies a general problem of the hateful element being filtered out through the criminal process (Van der Aa et al., 2021, pp. 175-179). Interestingly, all of these studies thus suggest that the vast majority of European states have actually committed themselves to some form of domestic legislative framework addressing "hate crime". However, it would also appear that these measures are rarely sufficiently efficient, and the ways in which "hate crimes" are encircled in individual countries vary substantially, producing great disharmony across the region, and underscoring yet another aspect of what is, undeniably, an intrinsic elusiveness of the very concept of "hate crime".

Chapter 2

Approaching hate crimes in Europe

In the previous chapter, we encountered how the general elusiveness of the concept of "hate crime" expressed itself in substantial challenges in encircling such crimes both in academic and legal realms. This conceptual elusiveness was evidently reflected in a general disharmony across the European region in how countries encircle "hate crime" in the context of their domestic criminal justice systems. Several studies concluded that this disparity should be addressed on a European institutional level to harmonize the different countries' presently inconsistent hate crime approaches. In this chapter, I therefore explore the current efforts undertaken by the three major European intergovernmental institutions, CoE, EU, and OSCE, to enclose on a better understanding of whether, and how, hate crimes can and are being approached against the pan-European human rights framework. As we shall see, the three institutions have all made significant efforts to try to formulate a joint European-level approach to hate crime, within their respective mandates, to harmonize the efforts of their participating states. These commitments have sometimes had distinct legally binding dimensions but most often, they have been formulated by quasi-legal bodies or constitute various forms of soft law, policy, or collaboration, and states have not always seemed entirely willing to comply with these recommendations and general standards. Namely, it would appear that while European institutional efforts are certainly multiple and sometimes progressive, they have yet to definitively banish the problem of disharmony.

A pan-European approach to hate crime?

In the last several decades, the European region has been the focal point of a unique process often referred to as *Europeanization*. In its broadest definition, this infers a process in which individual European states increasingly adopt (or adapt) their legislations to the frameworks of the European intergovernmental institutions (IGOs), particularly EU but also CoE and OSCE (Roter, 2014, p. 7-8). This "Europeanization" has both normative, legal, and practical impacts, inescapably tied to the emergence, internalization, and maintenance of specifically "European" values and norms. Namely, a core component of Europeanization is, arguably, the proliferation of human rights as one such European cardinal value. Article 3, para. 5 of the Treaty on the European Union (TEU) thus

underscores that the Union must contribute to "the protection of human rights". Similarly, "human rights" serve as one of the three primary values of CoE, in addition to "democracy" and "the rule of law" (CoE, 2023). Finally, OSCE, albeit founded to focus on regional and global security, also asserts "human rights" as one of its main focus areas (OSCE, 2023). Europeanization has, despite many bumps and bruises along the way, habitually had a transformative normative effect beyond mere legislative changes (Roter, 2014, p. 7). Accordingly, it seems quite reasonable to hypothesize that a joint European approach to "hate crime" would be a way forward to establish harmony and efficiency in hate crime approaches across the region. In fact, as this chapter will showcase, the disharmony of domestic European hate crime approaches has actually been addressed and attempted remedied by the European institutions in various ways, routinely against the backdrop of the European human rights framework (Garland, 2012, pp. 2-3). Among other things, European institutions have addressed the "chronic lack of reliable and comprehensive data on hate crimes across the region" (OSCE, 2014), called for "hate" to be "unmasked" (FRA, 2012), and established a duty to criminalize, investigate, and prosecute hate crimes (ECRI, 2017[2002]). As we shall see, of the three European institutions, OSCE has been an especially active actor in developing and disseminating joint European hate crime policies, but CoE and EU have also made strides in this regard, albeit sometimes in more disjointed ways. All three institutions have rather consistently expressed that hate crimes jeopardize and undermine European values of human rights, equality, and non-discrimination (Whine, 2016, p. 214). And yet, despite this relatively consistent European-institutional condemnation of "hate crimes", it can nonetheless be posed, as we saw, that there remains to be formulated an overarching pan-European approach to hate crime. In particular, the European institutions' efforts have been accused of being, equal to domestic European efforts, "a piecemeal approach" (Haynes et al., 2018, p. 24).

This alleged lack of a pan-European approach is significant insofar that there is in fact, according to Whine (2016), a human rights-based duty of European states to address hate crimes – and to address them efficiently. He argues that a pan-European duty to combat hate crimes arises under the general European commitment to human rights but also, more specifically, as a consequence of the developed caselaw of the ECtHR. Moreover, in Whine's opinion, three pan-European agreements are especially central in the formation of this duty: first, the accession of the European countries to the ECHR and its judicial mechanisms. Second, the accession of European states to the EU, insofar that the Treaty on the Functioning of the European Union (TFEU) requires EU member states to ensure security through the combating of crime, racism, and xenophobia. And third, the ratification of the CFR, given legally binding status in 2009, which safeguards human dignity and protects against discriminatory acts

(Whine, 2016, p. 213). Despite these commitments, hate crimes are rampant in Europe. Namely, while the hate crime discourse has grown and consolidated itself in the European continent, hate crime numbers continue to rise, probing international organs and agencies to call for greater efforts by the European institutions in addressing hate crimes (Whine, 2016, p. 214). Still, pan-European efforts remain, in Garland's opinion, "relatively narrow and under-developed" (Garland, 2012, p. 10). Whine agrees, stressing the lack of monitoring across Europe which makes it excessively difficult to estimate the true scope of the problem of "hate crimes" within the region and hinders the formulation of more effective policies and more appropriate allocation of resources (Whine, 2016, pp. 214-215). Both therefore resonate the recurring evaluation of European efforts as expressive of "a piecemeal approach".

But are we really dealing with "a piecemeal approach"? And how exactly have the different European institutions taken on the many challenges of the elusive "hate crime"? In what follows, I will identify what I consider the most significant efforts undertaken by OSCE, CoE, and EU to formulate a European-level hate crime approach. I have selected these three organizations, first and foremost, because they all in their own way have turned "hate crime" into a matter of shared European concern by attempting to outline a pan-European commitment to address hate crime on a joint European level. This demarcation means that I will not map the many important efforts undertaken by European non-governmental organizations (NGOs), nor by the international organs and agencies under the United Nations system. Instead, I have delimited my investigation to the efforts undertaken by *CoE*, with particular focus on the European Commission against Racism and Intolerance (ECRI) and the European Court of Human Rights (ECtHR), *EU*, with particular focus on the European Union Agency for Fundamental Rights (FRA), and finally *OSCE* with particular focus on its Office for Democratic Institutions and Human Rights (ODIHR). These are not only the most influential European institutional actors to have addressed hate crimes in international contexts (Whine, 2015, p. 96; Schweppe & Walters, 2016, p. 316), but they also all constitute central actors in what I term *the pan-European human rights framework*, each an individual singer in the potential choir of European human rights protection within the institutional bounds of Europe as a region. Thus, in order for harmony to arise, they should ideally be in tune with one another. Furthermore, the three institutions all play a part in the general Europeanization of human rights concerns, hate crimes included, and are particularly pivotal subsystems in the way they can influence their participating states. However, it is equally pertinent that the conception of unanimity does not go too far, and some lines are drawn between these three actors and their respective efforts. When reviewing the limited existing hate crime scholarship

on European approaches to hate crime, I have thus noted that these do not always take into account the distinctiveness of each subsystem, including the limits and scope of the different institutional mandates. Yet, I would stress that it is crucial for our ability to evaluate the European institutional efforts fairly and accurately that we do not conflate the efforts of the three different subsystems, as this would neglect that they are afforded very different capacities of action vis-à-vis their participating states. Nor can we overlook the synergies and discords between these three institutions as they operate roughly within the same geographical area and, sometimes but not always, in overlapping ways.

The Organization for Security and Co-operation in Europe (OSCE)

The Organization for Security and Co-operation in Europe (OSCE), formerly the Conference on Security and Co-operation (CSCE), was founded in 1975, establishing in its founding document, the Helsinki Final Act (1975), the institution's special objectives of promoting inter-European cooperation and contribute to regional security protection. Today, the organization regulates the collaboration between 57 participating states. OSCE is constituted by four primary decision-making organs: The Ministerial Council (MC), comprised by relevant ministers from the participating states, the Permanent Council (PC), governing the operational work of OSCE, the Forum for Security Co-operation (FSC), covering politico-military agreements and security-building measures, and finally, the Meetings of Heads of State or Government Summits, constituting the highest political body that outlines strategies and institutional priorities of the Organization as a whole (OSCE, 2023b).

At first glance, OSCE might not seem as significant a European institutional player as EU or CoE, especially when considered from a human rights perspective. However, in the context of approaching hate crime, it is not unreasonable to claim that OSCE has in fact been the banner-bearing European institution to initiate the process of taking the hate crime discourse seriously at a European level and framing it, emphatically, as a human rights concern. This began at the institution's conference in Copenhagen in 1989. Here, the Organization adopted the so-called Copenhagen Document (1990) in which the participating states expressed "their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government" and reaffirming that "the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace" and thus states need to "support and advance those principles" (OSCE, 1990, p. 3, paras. 1-2). In this regard, the participating states of the Organization declared that they "clearly and unequivocally condemn (..) racial and ethnic hatred, antisemitism, xenophobia, and discrimination against anyone as well as persecution on religious and ideological grounds", declaring their "firm intention" to "intensify

efforts to combat these phenomena in all their forms" and to "provide protection against any acts that constitute incitement to violence against persons of groups based on national, racial, ethnic, or religious discrimination, hostility or hatred" (OSCE, 1990, p. 21, para. 40). Notably, OSCE was also the first European organization to adopt the term "hate crime" at the Organization's Ministerial Council Meeting in 2003 in Maastricht. In the final document of this Meeting, the Council declared that OSCE shall "strive to combat hate crime which can be fueled by racist, xenophobic and anti-Semitic propaganda" (OSCE, 2003, p. 7, para. 37), encouraging participating states to "collect and keep records on reliable information and statistics on hate crimes". In recognition of "the importance of legislation to combat hate crimes", participating states were asked to inform OSCE about "existing legislation regarding crimes fueled by intolerance and discrimination" and, where appropriate, seek its assistance in "the drafting and review of such legislation" (OSCE, 2003, p. 79, para. 6). At another Ministerial Council Meeting, in Brussels in 2006, the Council announced the commitment of the Organization to "promote capacity-building of law enforcement authorities through training and the development of guidelines on the most effective and appropriate way to respond to bias-motivated crime" (OSCE, 2006, p. 42, para. 7) and encouraged participating states to "step up their efforts in implementing their commitments to collect and maintain reliable data and statistics on hate crimes", including by facilitating "the capacity development of civil society to contribute in monitoring and reporting hate-motivated incidents and to assist victims of hate crimes" (OSCE, 2006, p. 42, para. 11). In 2009, the OSCE efforts culminated in a dedicated decision (Decision No. 9/09). This Decision, inter alia, stipulates that participating states should collect and publish hate crime data and statistics (OSCE 2009, p. 36, para. 1), enact hate crime legislation and effective penalties (para. 2), ensure reporting, including by civil society organizations (para. 3), provide specialized hate crime training for professionals dealing with hate crimes (para. 4), ensure support, assistance, and access for hate crime victims (para. 5), and ensure proper investigation, conviction, and public acknowledgement and condemnation of hate crimes (para. 6).

Fairly early, the primary decision-making bodies of the OSCE then formulated a broad-scoped declaratory approach to hate crime, providing some general guidelines for their participating states. The most important subsidiary body of the OSCE to promote the actual implementation of this broad-stroked approach has been the Organization's Office for Democratic Institutions and Human Rights (ODIHR). The main objective of this body is to provide states support, assistance, and expertise with the purpose of promoting "democracy, rule of law, human rights and tolerance, and non-discrimination" in Europe. The ODIHR does so in a variety of ways, e.g. by reviewing national

legislations, providing advice for governments, and by developing and conducting training programs in a range of relevant fields (ODIHR, 2023a). As indicated by the name, ODIHR has a strong human rights dimension. The body is thus tasked with ensuring "respect for human rights and fundamental freedoms", enhancing dialogue between different actors, including states and civil society organizations (ODIHR, 2023b). Despite OSCE's primary role as a security organization, ODIHR's mandate thereby reflects the Organization's "broad concept of security" encompassing not just traditional military approaches but also "the human rights dimension of security" (ODIHR, 2023c). The central role of ODIHR in the hate crime efforts of OSCE is clearly underscored in the 2009 Ministerial Decision. Namely, the Decision urges states to periodically report "reliable information and statistics on hate crimes" to ODIHR (OSCE, 2009, p. 36, para. 9), and to draw on resources developed by the ODIHR, including educational tools, training, and awareness raising, in order to ensure "a comprehensive approach to the tackling of hate crime" (OSCE, 2009, p. 36, para. 10). Finally, the Decision clarifies that it is the task of ODIHR to explore a number of central areas of "bias-motivated violence" (OSCE, 2009, p. 37, para. 12).

We may sketch out especially three aspects of the hate crime approach formulated by OSCE and realized under the ODIHR: a *definitional* aspect, a *reporting* aspect, and a *guiding* aspect. To elaborate on the first, an important contribution of the ODIHR is to be found in its attempt to introduce a pan-European definition of "hate crimes", similar to what we have seen called for in the previous chapter. This definition was first presented as part of the ODIHR's publication *Hate Crimes: A Practical Guide* from 2009. Here, OSCE defines hate crimes as having two elements: first, the act is "a criminal offence (..) under ordinary criminal law" and, second, this "base offence" is committed with "a bias motive", that is in the sense that "the perpetrator intentionally chose the target of the crime because of some protected characteristic" shared by a group, including "race, language, religion, ethnicity, nationality, or any other similar common factor" (ODIHR, 2009, pp. 16-17). The ODIHR definition does not specify what specific characteristics should be protected in domestic hate crime legislations, acknowledging that such choices are best left up to the states themselves (ODIHR, 2009, pp. 16-17). Notably, within hate crime scholarship, referrals to this relatively wide-ranging definition are quite common (Van der Aa et al., 2021, p. 172). The ODIHR definition is thus considered fairly progressive among many scholars insomuch that it defines "bias" in a rather expansive way, not limiting it to outright "hate", nor does "hate" have to be the primary motive of the crime (Chakraborti, 2015; Garland, 2012; Garland & Funnell, 2016). Even though other scholars have been more critical of the definition, ODIHR has seemingly made a genuine attempt at a workable European definition defying

the conceptual elusiveness of "hate crime". A second aspect of the OSCE approach revolves around the collection of hate crime data across Europe. In line with the 2009 Decision, ODIHR is thus responsible for a reporting procedure according to which the participating states (should) report their national hate crime data to the Office on an annual basis. ODIHR then processes and publishes the data in publicly accessible annual reports, supplemented by data submitted by civil society organizations (OSCE, 2023c). ODIHR's compiled data are available through the OSCE's specially dedicated Tolerance and Non-Discrimination Information System (TANDIS). Data are collected through questionnaires to states' designated National Point of Contact (NPC). In addition to these data submitted by the states, NGOs can also submit hate crime data and reports, and ODIHR can, and does, also consult other IGOs, e.g. organs of the UN or EU agencies. The ODIHR data collection is quite unique in a European context (e.g. in comparison with FRA) insofar that it allows for such a wide range of data (Whine, 2016, pp. 222-223). Lastly, ODIHR displays its uniquely multi-faceted approach insomuch that it also has a wide-scoped focus on the strengthening of criminal justice professionals and other frontline professionals dealing with hate crimes and victim support enhancements (Whine, 2015, p. 99). Namely, ODIHR has issued a great number of reports, guides, and training programs on how to approach hate crimes. Apart from the forementioned general Practical Guide from 2009, the Office has also issued practical guides on the prosecution of hate crimes (2014), hate crime data collection and monitoring (2014), and a resource guide for NGOs in the context of hate crimes (2009). Parallelly, ODIHR has launched two significant training programs for first responders and criminal justice professionals in the form of the Training against Hate Crimes for Law Enforcement Program (TAHCLE) and the Prosecutors and Hate Crimes Training Program (PACHT).

While OSCE has made some distinct and comprehensive steps in formulating a pan-European hate crime approach, the efforts have some clear shortcomings. In particular, these shortcomings are related to the general limitation of the mandate of OSCE. Namely, ODIHR can only act in an cooperative capacity as OSCE membership does not give rise to binding obligations (Haynes et al., 2018, pp. 42-43). So, while OSCE can provide imperative support in regard to both legislation and implementation, participating states do have the option of ignoring such advice without being subjected to any major sanctions. Schweppe & Walters here suggest that more clear enforcement mechanisms are needed for the ODIHR approach to be truly efficient (Schweppe & Walters, 2016, p. 317). If we zoom in on the individual aspects of the OSCE approach to hate crime, the shortcomings can be specified further. For one, despite common scholarly referrals, the ODIHR hate crime definition has generally struggled to gain definite foothold across the region beyond scholarship. In particular, Garland notes that the

definition, albeit progressive, "has not filtered down to state level" where European countries more often rely on more restrictive conceptions and seem reluctant to actually adopt the ODIHR definition (Garland, 2012, pp. 2, 5; Schweppe & Walters, 2016, p. 318). At the same time, the broad ODIHR definition sometimes clash with definitions employed by other European actors (Garland, 2012, p. 5). Furthermore, despite its comprehensiveness, the OSCE data collection system is also not without flaws and challenges. ODIHR itself has admitted that inconsistent recording and reporting practices across the European region make it difficult to properly estimate where the most severe problems with hate crime are. Thus, many European states do not consistently report adequate data, neither in terms of quantity nor quality. One of the apparent implications is that the OSCE hate crime reporting system is a rather unreliable source of hate crime data and scarcely provide grounds for accurate cross-national analyses (Chakraborti, 2015, pp. 13-14; Whine, 2016, pp. 222-223). High hate crime figures in the OSCE data system can then simply indicate that a particular country is actually reporting data and low figures can conversely signify sporadic reporting (Garland & Funnell, 2016, pp. 20; Whine, 2015, pp. 98-99). According to OSCE figures, it would for instance appear that hate crimes are vastly more widespread in the United Kingdom (e.g. 44,419 reported hate crimes in 2011) than in Italy (68 reported hate crimes in 2011), but ODIHR itself admits that this mainly suggests that United Kingdom is among the few diligently reporting states, whereas Italy is not (ODIHR, 2012, pp. 23-25).

The Council of Europe (CoE)

When considering European human rights, the Council of Europe (CoE) is arguably the first institution to come to mind. Hence, CoE is the institution under which the European Court of Human Rights (ECtHR) has been established, its institutional core being the mandatory commitment of the 46 member states to the European Convention on Human Rights (ECHR). CoE therefore also reasonably refers to itself as "the Continent's leading human rights organization" (CoE, 2023). After years in the making, CoE was founded in 1949 and its organizational structure became the template for many other regional and international organizations to come. Today, CoE consists of numerous interrelated bodies, the primary of which are the Council's democratic body, the Parliamentary Assembly (PACE), the political body, the Committee of Ministers, and finally the Court itself, uniquely constituting the Council's independent judicial body. Compared to OSCE, CoE arguably has a more extensive institutional mandate. Thus, accession to the ECHR is not only a mandatory membership requirement, the Court can also issue binding legal judgements when member states have been found to violate Convention rights of individual complainants. In other regards, however, CoE takes on advisory and

supportive functions similar to OSCE. Over the last decades, CoE too has formulated a distinct institutional approach to hate crimes. However, upon closer examination, this approach appears to be is comprised by two ends of a rather wide spectrum. In one end, we find the fairly restrictive adjudication practices of the ECtHR. In the other, we encounter a more expansive approach championed by the quasi-legal body, the European Commission against Racism and Intolerance (ECRI).

As mentioned previously, the ECtHR has played an important role in the Europeanization of the hate crime discourse by rendering hate crimes a formal legal concern in Europe. After the Court declared the Menson case inadmissible in 2003, the Court has since considered numerous applications related to alleged "hate crimes" and established, arguably in quite unequivocal terms, that it is within the competencies of the Court to adjudicate hate crimes – at least in certain scenarios. Before we dive deeper into some of the most significant judgements, it is important to note that litigation of hate crimes at the Court inevitably hinges on the claim that one or more rights enshrined in the ECHR have been violated by the impugned member state. In hate crime scholarship, Article 14 of the Convention is often emphasized as the predominantly relevant article in this regard (Garland & Funnell, 2016, p. 19). Article 14 stipulates that: "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", thereby constituting the prohibition of discrimination within the context of the Convention. However, it is sometimes neglected that Article 14 is an accessory article.[3] Accordingly, Article 14 can only be invoked in conjunction with other articles. Insofar an open-ended definition of "hate crimes" principally allows for many types of crimes to be added a hateful element, in reality, most cases at the Court have, like the Menson case, revolved around claims of rather severe violations, especially violations of Article 2, the right to life, and sometimes Article 3, the right to not be subjected to "torture or to inhuman or degrading treatment or punishment". Markedly, the hate crime jurisprudence of the Court suggests that "hate crimes" can pose violations of the ECHR in especially three scenarios: in cases where the Contracting State itself instigates the crime; in cases where the State has failed to conduct effective investigations; or in cases where the State has failed to take adequate measures to prevent "hate crimes" (Alkiviadou, 2022, p. 2023; Mačkić, 2016, pp. 243-244). A debated topic is whether the Court has also established a positive obligation of states to adopt hate crime

[3] Contra Article 1 of Protocol no. 12 to the Convention.

legislation. Albeit potentially disputable, I would claim that there is a somewhat shared consensus within legal scholarship that state obligations *do* imply access to an effective remedy in accordance with Article 13 of the Convention but *do not* extend to an explicated duty to introduce formal special legislation. Yet, even in the absence of special hate crime legislation, the obligation to, in the Court's own words, "unmask" the hateful element still applies (Haynes et al., 2018, p. 42). Another thing to note about the caselaw of the Court, is that cases have concerned a relatively limited number of protected characteristics, namely "race" and, in fewer instances, "religion" and "sexuality". It is, however, safe to assume that other characteristics, at least those mentioned in Article 14, could also be invoked (Haynes et al., 2018, p. 42).

The landmark judgement of the Court's hate crime caselaw is, arguably, *Nachova and Others v. Bulgaria* from 2005. Building on the recognition that suspected hate crimes should be investigated "with vigour and impartiality" and encompassed by "law enforcement machinery" that the Court pointed out in *Alex Menson*, in *Nachova*, the Court further found the specific complaints admissible and later determined a violation. The case was evaluated both by the Chamber and by the Grand Chamber of the Court. The latter largely upheld the decision made by the former, albeit with some minor corrections. The case concerned the killing of two Bulgarian men of Roma origin by the Bulgarian military police, allegedly with an added hateful element. The two men were members of the Bulgarian armed forces but had been detained for unauthorized absences. During this detention, the men escaped and hid in their grandmother's house, located in a predominantly Roma neighborhood. Bulgarian military police eventually surrounded the house, and when the two men tried to leave, unarmed, they were shot and killed by a military police officer carrying an automatic rifle. A subsequent domestic investigation into the murders concluded that the use of firearms had been lawful (*Nachova and Others v. Bulgaria* (2005), pp. 3-9). Contrarily, the ECtHR found violations of Article 14 in conjunction with Article 2. In regard to Article 2, the Court affirmed that it implies two dimensions of state obligation. First, a substantive duty of the State to protect the right to life "by law" and to not intentionally deprive life except in situations of "absolute necessity" (*Nachova and Others v. Bulgaria* (2005), para. 95; see also *McCann and Others v. United Kingdom* (1995)). Second, a procedural duty of the State to carry out an effective investigation into alleged breaches of the substantive limb. This investigation must be "independent and impartial" (cf. *Güleç v. Turkey* (1998)) and not left up to the victim's next-of-kin (*Nachova and Others v. Bulgaria* (2005), pp. 19-21; see also *İlhan v. Turkey* (2000), mutatis mutandis). The Court underscored that the procedural duty is amplified when lives have been deprived by state agents (*Nachova and Others v. Bulgaria* (2005), para. 160).

However, the applicants in *Nachova* did not only claim that the killing had been unlawful. They also argued that it had been a hate crime insomuch that the military officer, according to witnesses, had uttered "You damn Gypsies!" ("мамка ви циганска") before firing the fatal shots (*Nachova and Others v. Bulgaria* (2005), para. 35). Both the Chamber and eventually the Grand Chamber sided with the applicants. The Court here emphasized both "the duty on State authorities to conduct an effective investigation irrespective of the victim's racial or ethnic origin" as well as "the additional duty to take all reasonable steps to unmask any racist motive in an incident involving the use of force by law enforcement agents" (*Nachova and Others v. Bulgaria* (2005), para. 126).

The duty to "*unmask*" hatred has since been repeated time and again – both by scholars, legal commentators, and by the Court itself in subsequent caselaw. By and large, the Court has maintained its substantive position since *Nachova*, but it has elaborated on the ways in which the unmasking duty is triggered. A few years after *Nachova*, the Court was confronted with another hate crime case involving claims against Bulgaria. In *Angelova and Iliev v. Bulgaria* (2007), applicants thus complained that Bulgarian state authorities had failed to fulfil their duty to "unmask" a hate-motivated murder. Similar to the *Menson* case, the complaint was filed by the family members of a murder victim who had been unprovokedly attacked by a group of private individuals. Similar to *Nachova*, the killing appeared to be motivated by the victim's Roma origin. Despite a fairly rapid identification of the assailants by the police, no one was brought to trial for 11 years (*Angelova and Iliev v. Bulgaria* (2007), pp. 2-9). The Court found, unanimously, violations of Articles 2 and 14. In regard to the hateful element, the Court problematized that the anti-Roma motive of the crime had been known to authorities from a very early stage of the investigation, however, this did not result in a charge of a hate-motived offence. The Court specifically accentuated that the duty of states to "unmask" involves both unmasking "any racist motive", as emphasized in *Nachova*, but also "to establish whether or not ethnic hatred or prejudice may have played a role in the events", even if this is admittedly "difficult in practice". Failing to do so, by "treating racially induced violence and brutality on an equal footing with cases that have no racist overtones", would be, in the opinion of the Court, to "turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights", irreconcilable with Article 14 (*Angelova and Iliev v. Bulgaria* (2007), pp. 23-24, para. 115).[4]

[4] In *Škorjaneć v. Croatia* (2017), the Court established that the unmasking duty extends to "hate crimes by association" where the victim is targeted by a criminal offence because their "actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristics" (*Škorjaneć v. Croatia* (2017), pp. 13-14, para. 56).

Claims of anti-Roma hatred has been a recurring element of the ECtHR's hate crime judgements, either in the context of Article 2 or Article 3. For instance, in *Stoica v. Romania* (2008), a Roma-origin individual had been severely beaten by Romanian police officers. He alleged that this ill-treatment was induced by a hateful element insomuch that the officers had asked him if he was "Gypsy (ţigan)" before the incident had occurred (*Stoica v. Romania* (2008), p. 2, para. 7). Witnesses confirmed the applicant's version of events. The Court determined that both the beating and the subsequent investigation into the incident reflected "clearly stereotypical" elements, adequately suggesting the presence of a bias motive (*Stoica v. Romania* (2008), p. 21, paras. 122 and 128). Therefore, the Court found a violation of Article 14 in conjunction with Article 3. Very analogous conclusions were drawn in *Balázs v. Hungary* (2015), where the applicant had been attacked by another private individual, calling ham, among other things, "a dirty gypsy" (*Balázs v. Hungary* (2015), p. 2, para. 10). Despite clear indications of a hate-motived crime, the prosecution of the crime did not adequately elucidate this. In *Balázs*, the Court also stressed the view that "not only acts based solely on a victim's characteristic can be classified as hate crimes", rather "perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to" (*Balázs v. Hungary* (2015), p. 19, para. 70).

The latter point of "mixed motives" had already been highlighted a few years before in *Milanović v Serbia* (2010). This case concerned an intersecting combination of anti-Roma hatred and religious hatred, probing the Court to add that the unmasking obligation extends to the unmasking of "religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events" (*Milanović v Serbia* (2010), p. 16, paras. 96). The applicant was a member of the Hare Krishna community and was subjected to consistent threats by local members of a far-right movement that he would be "burned for spreading his Gypsy faith". The applicant had informed Serbian police that he felt in danger (*Milanović v Serbia* (2010), p. 2, paras. 8-9). The applicant's fears were later confirmed as he was attacked on two different occasions, once being hit over the head with a wooden bat, and once inflicted numerous cut wounds (*Milanović v Serbia* (2010), p. 2, paras. 10-11). The Court agreed with the applicant that Serbian authorities had failed to properly address the imminent danger to him. As in *Angelova*, the Court emphasized that realizing the obligation to investigate hate crimes is "difficult in practice" (*Milanović v Serbia* (2010), p. 16, para. 16). Still, the authorities had disregarded the systematic targeting of the applicant prior to the ill-treatment, and the authorities had also seemingly treated the threats against the victim in a negligent fashion based on the applicant's religious adherence and his "strange appearance" (*Milanović v Serbia* (2010), p. 17, paras. 97-101). Another

case that added a new characteristic to the hate crime jurisprudence of the Court is *Identoba and Others v. Georgia* (2015). In this case, the Court added the duty to unmask "the role of possible homophobic motives for the events in question" (*Identoba and Others v. Georgia* (2015), pp. 20-21, para. 77). It concerned homophobic violence, committed against members of an NGO promoting LGBT+ rights in Georgia during a peaceful protest in Tbilisi (*Identoba and Others v. Georgia* (2015), pp. 20-21, pp. 1-6). The Court found violations of Article 14 in conjunction with Article 3 as well as Article 11, the right to freedom of assembly and association.

As noted by Mačkić (2016), the hate crime jurisprudence of the ECtHR clearly outlines "one way in which the phenomenon of discriminatory violence may be addressed at an international (European) level" (Mačkić, 2016, p. 243). In human rights terms, the Court justifies an enhanced penal approach to hate crimes based on the notion that these crimes pose "a particular affront to human dignity" (*Lakatošová and Lakatoš v. Slovakia* (2016), p. 21, para. 94). As "a supervisory human rights organ for the whole of Europe", the Court has thereby sent a clear message to European state authorities, that they must address hate crimes (Mačkić, 2016, pp. 243-244). However, the message has also sometimes been criticized for not being strong enough. In particular, Mačkić argues that the Court affords states some appreciation in deciding how to address hate crimes. Moreover, the Court has often displayed "reluctance" or even "unwillingness" to consider the hateful motive under Article 14 once it has established violations of either Article 2 or Article 3. These elements pose, in Mačkić's opinion, *"missed opportunities"* of the Court to play a more decisive role in addressing the issue of inadequate domestic approaches (Mačkić, 2016, pp. 233-237). Such "missed opportunities" include cases like *Anguelova v. Bulgaria* (2002), where the Court found a violation of Article 2 but dismissed the claim under Article 14, *Carabulea v. Romania* (2010), where the Court did not find it "necessary to examine this complaint separately" (*Carabulea v. Romania* (2010), para. 168), and *Karaahmed v. Bulgaria* (2015), where the Court again refused a specific consideration of a hateful motive under Article 14 (Mačkić, 2016, pp. 236-237). Mačkić's claim can be underscored by the Court's own narrowing of the unmasking duty, noting that it is "an obligation to use best endeavors, and is not absolute". Hence, the unmasking duty merely entails that state authorities "do whatever is reasonable in the circumstances" (*Identoba and Others v. Georgia* (2015), p. 17, para. 67).

The restrictive approach of the ECtHR is, arguably, contrasted by the approach of another CoE body, the European Commission on Racism and Intolerance (ECRI). ECRI constitutes a monitoring body specializing in questions related to "the fight against racism, discrimination (..), xenophobia,

antisemitism, and intolerance in Europe" (ECRI, 2023). ECRI's mandate extends to the reviewal of member state legislations and policies, as well as monitoring of European states' implementation of relevant measures to combat discrimination and intolerance. ECRI realizes its mandate in at least two significant ways: By formulating *General Policy Recommendations* (GPRs) for all member states, and by conducting state-specific evaluation based on a five-year reporting cycle. "Hate crimes" constitute a significant area of attention for ECRI but engulfed in a broad-scoped focus on addressing the political and legal environments that give rise to such crimes. In the context of *country-specific reporting*, ECRI incorporates monitoring of how member states address hate crimes, including compliance with ECRI's own GPRs. Results are then published as part of the country reports compiled by ECRI's staff and independent experts. Moreover, ECRI often sums up hate crime efforts within CoE jurisdiction in its annual *general reports*, allowing for some status-making on hate crimes in Europe.[5] Both country reports and general reports are often used by other European bodies, not least FRA and ODIHR, reflecting, according to Whine, an increasing tendency of these three bodies to draw on each other's hate crime-related, and to coordinate and cooperate (Whine, 2016, p. 223).

Whereas the ECtHR has been more hesitant to legally establish an obligation of states to implement special hate crime legislation, ECRI's GPRs show a different approach. ECRI's GPR no. 1 (1996) thus stipulates that states should ensure national legislation that "expressly and specifically counter racism, xenophobia, antisemitism and intolerance", including by providing that "racist and xenophobic acts are stringently punished" by "defining common offences but with a racist or xenophobic nature as specific offences" or by "enabling the racist or xenophobic motives of the offender to be specifically taken into account" (ECRI, 1996, p. 4). The pivotal GPR No. 7 from 2002, amended in 2017, goes further by specifying that states must criminalize intentional incitement to, acts of, or threats of hatred based on race, color, religion, nationality, or national and ethnic origin (ECRI, 2017[2002], para. 18.). Hateful motivations should thus constitute "an aggravating circumstance" (ECRI, 2017[2002], para. 21). Two additionally relevant ECRI recommendations are found in, respectively, GPR No. 4 (1998), and GPR No. 11 (2007). The former recommends that states "take steps to ensure that national surveys on the experience and perception of racism and discrimination from the point of view of potential victims are organized" (ECRI, 1998, p. 3-2). The latter promotes the role of police in combating racism and intolerance, urging that police "thoroughly investigate racist offences, including by fully taking the racist motivation of ordinary offences into account", that police establish and operate "a system for

[5] See e.g. ECRI, 2022.

recording and monitoring racist incidents, and the extent to which these incidents are brought before the prosecutors and are eventually qualified as racist offences", help encourage victims and witnesses to report racist incidents, and that police adopts "a broad definition" of racist incidents (ECRI, 2007, paras. 11-14). Despite the strong emphasis on "racist" motives in ECRI's GPRs, in accordance with its original mandate, it is worth noting that ECRI has since expanded its de facto competence to cover a broader range of hateful motives, including, and sometimes controversially, intolerance towards victims' sexuality and gender.

The significant difference between the restrictive approach outlined by the ECtHR when adjudicating claims of ECHR violations vis-à-vis the expansive recommendations offered by ECRI may be striking. However, in my opinion, they are not necessarily indications of disharmony. Rather, they suggest that the two bodies operate within inherently different mandates and with different objectives. Hence, we may recall from the previous chapter how a narrower encirclement of "hate crime" may be required in some legal contexts rather than others. Correspondingly, acting in an advisory capacity, ECRI can deploy more expansive encirclements of "hate crime" to encourage ambitious approaches by member states. On the other hand, the ECtHR's approach is limited by the ways in which ECHR can be invoked, a heightened requirement of causal link between the hateful element and the crime, as well as limitations in the Court's mandate to decide how states should define their own criminal legislations.

The European Union (EU)

A final European institution whose hate crime approach is worth exploring is, of course, the European Union (EU), arguably the very embodiment of Europeanization. Indeed, the EU constitutes an unprecedented economic-political European-level cooperation with unique supranational competencies, thereby exceeding the mandates of both OSCE and CoE. This epitomic version of the Union was established with the adoption of the Maastricht Treaty in 1993, however, it had been preceded by a number of other European collaborative structures, including the European Coal and Steel Community (ECSC) founded as far back as in the early 1950s. Today, the EU consists of three main decision-making bodies, the Commission, representing the main executive body with "the right of initiative" to propose EU legislation, the Parliament, representing the democratic body of the Union, and the Council of the EU, representing the governmental political body, comprised of national ministers from the EU member states. The European Council, not to be confused with the EU Council, may be added as a fourth body, serving as the highest strategic political body, comprised of the member states' heads of states. The work of these four bodies is supported by a financial body, the European

Central Bank (ECB), responsible for price-regulation in the Eurozone, and two independent legal bodies, the European Court of Justice (CJEU) and the European Court of Auditors (ECA). The former focuses on the legal adjudication of EU law at large, the latter on financial matters only (EU, 2023). When compared to CoE and OSCE, EU covers a quite limited number of participating states, as only 27 countries have achieved EU membership. Namely, the EU enforces the strictest membership conditions of the three institutions.

The main focus of EU has often been economic development and common trade. Perhaps relatedly, EU can be accused of having been the "slowest starter" when it comes to formulating an approach to "hate crime" as a European human rights issue. Hence, in spite of the strong EU commitment to the principle of non-discrimination enshrined in Article 21 of the EU Charter of Fundamental Rights (CFR), and in Article 19 of the Treaty on the Functioning of the European Union (TFEU) and Article 13 of the Treaty on the European Union (TEU) that both allow for Union bodies to "take appropriate action to combat discrimination", it was not until 2008 that EU embraced the hate crime discourse through a dedicated instrument. After seven years in the making, *the Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law* (2008/913/JHA) was thus adopted, constituting the first specialized hate crime legislation at EU level. Insofar that the EU started slower than the two other institutions, its uniquely extensive mandate allowed it to implement perhaps the most significant European-level legislation addressing hate crime. While the Framework Decision, a now abolished form of secondary EU-law, did not entail the same effects as its closest kin, the EU Directive, it did principally obligate EU member states to implement its objectives in the national systems within two years (ultimo 2010). The goal of the Framework Decision was to introduce a set of minimum standards in recognition of domestic disharmonies. Its Preamble thus states that "since the objective of this Framework Decision, namely ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties, cannot be sufficiently achieved by the Member States individually", common and compatible rules are "better achieved at the level of the European Union" reasoning that "the Union may adopt measures" in accordance with the principles of subsidiarity and proportionality (Preamble, para. 13). On the other hand, the Framework Decision equally acknowledges that "since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonization of criminal laws is currently not possible" and the Decision is therefore "limited to combating particularly serious forms of racism and xenophobia by means of criminal law" (Preamble, para. 6). With this caveat, Article 1 of the Framework Decision obligates

member states to ensure that their national legislations make punishable public incitements to "violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin", and international crimes with a hateful element (Article 1, para. 1, litra a and c). The preamble further provides a legal definition of "hate" as referring to "hatred based on race, color, religion, descent or national or ethnic origin" (Preamble, para. 9). In the context of hate crimes, the most significant article of the Framework Decision is, however, Article 4. This provision stipulates that member states must ensure that "racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties". With these provisions, the Framework Decision became, as observed by Peršak (2022), the first and only existing legal EU instrument that "harmonizes the definition of and criminal penalties for some specific forms of hate speech and crime", namely, on the grounds of race, color, religion, descent or national or ethnic origin (Peršak, 2022, pp. 87-88).

In 2012, another significant EU-level instrument followed the Framework Decision. EU thus adopted the so-called *Victims Directive* (2012/29/EU). This Directive was the in fact the first EU legislation to use the term of "hate crime" (Haynes et al., 2018, p. 27). Like the Framework Decision, the Victims Directive aimed to set in place minimum standards, this time on the rights, support, and protection of victims of crime. Standards had to be implemented no later than ultimo 2015. The Directive was noteworthy in the sense that it specifically addresses hate crime victimization, emphasizing hate crime victims as particularly vulnerable and thus in need of enhanced support and protection. The relevant provision is, in this regard, Article 22 of the Directive. It underscores that member states must identify victims with "specific protection needs" due to their "particular vulnerability to secondary and repeat victimization, to intimidation and to retaliation" and provide these with "special measures in the course of criminal proceedings" (Article 22, para. 1). Such special measures should especially encompass victims "who have suffered considerable harm", including victims of "crime committed with a bias or discriminatory motive (..) related to their personal characteristics", in particular victims of "hate crime" shall be "duly considered" (Article 22, para. 3). The Directive then goes on to explicate how special measures should be provided hate crime victims and other vulnerable groups during the course of investigation (Article 22, para. 2, litra a-d) and during the course of criminal proceedings (Article 22, para. 3, litra a-d). In general, the Directive also puts focus on reporting issues, albeit not in the specific context of hate crimes, obligating member states to ensure that crime victims are increasingly encouraged to report crimes, and that they are met by respectful, professional, and non-discriminatory

responses in order to "increase victims' confidence in the criminal justice systems of Member States" and "reduce the number of unreported crimes". Relatedly, member states must collect and publish crime data to inform "effective policymaking" (Preamble, paras. 9 and 63-64).

In the context of exploring the hate crime approaches of OSCE and CoE, we saw that subsidiary bodies, namely ODIHR and ECRI, played a quite substantial role in supporting and monitoring the efforts of participating states to comply with the European-level approach. The corresponding EU body is, in this regard, the European Union Agency for Fundamental Rights (FRA). This independent EU body was established in 2007 based on the founding Regulation (No. 168/2007, now 555/2022) to promote and protect fundamental rights under the CFR; in the words of FRA themselves, to "help bring the Charter to life for everyone in the EU" (FRA, 2023). Notably, FRA's mandate was strengthened with an amendment of the Regulation as recently as April 2022. Article 2 of the Regulation stipulates that FRA is to provide both member states and Union bodies with assistance and expertise support that their making and implementation of EU law respects fundamental rights. Arguably, FRA has played an increasingly active role in contributing to EU efforts of approaching hate crimes at a European level. FRA has especially done so in two ways: by gathering EU-wide hate crime *data*, and by providing general *advice and specific recommendations* on the implementation of EU hate crime standards.

FRA has arguably backed some significant efforts to try to fill the notorious "knowledge gap" associated with hate crimes in Europe. The predecessor of FRA, the European Union Monitoring Centre on Racism and Xenophobia (EUMC), thus carried out the first EU-wide survey on the experiences of "migrants" with racism and xenophobia in 12 different EU member states in 2001-2004. In 2006, it published the results of this survey evidencing, inter alia, that many EU member states severely lacked efficient means for the recording and publication of data on racial and xenophobic discrimination, noting the familiar challenge of conducting cross-national comparisons (EUMC, 2006). Building on the EUMC survey, FRA conducted a number of more specified surveys on, respectively, antisemitism (FRA, 2012), LGBT+ discrimination (FRA, 2013), and violence against women (FRA, 2014). Although all of these surveys were not specific to hate crime, they all substantiated that hate crimes constituted a growing problem in Europe and that legislation and practices targeting this problem were in need of improvement, including a more collected European approach. The data gathering reached a new level of comprehensiveness with FRA's two EU-MIDIS surveys from 2012 and 2017. Similar to the EUMC survey, these collected experiences of discrimination, but this time of European "minorities" rather than of "migrants" (FRA, 2017). As

mentioned, these surveys were unprecedently comprehensive. Namely, the EU-MIDIS II gathered data from 25,000 respondents across Europe and established that "the proportions of those experiencing (..) physical violence and harassment motivated by hatred (..) remain at levels that raise serious concern" (FRA, 2017, p. 13).

FRA's data gathering has also resulted in a number of general publications. A key contribution is here the 2012 report *Making hate crimes visible in Europe* (FRA, 2012). In this report, FRA provides a definition of hate crimes as "violence and crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity", and emphasizes that such crimes are "not only harm the victim" but are also "generally prejudicial to fundamental rights, namely to human dignity and with respect to non-discrimination" (FRA, 2012, p. 7). The report identifies a number of general challenges of disparity and inefficiency affronting effective hate crime approaches in Europe, including "gaps in data collection across the EU", and "a great degree of variation in how the 27 EU Member States deal with hate crime" (FRA, 2012, pp. 8, 42). FRA comments on a general challenge for European states to strike the right balancing point when establishing and adapting a legal hate crime definition, insofar that too narrow approaches have tended to result in under-recording, and under-prosecution, whereas too broad definition have proved difficult to implement in practice (FRA, 2017, pp. 42, 28). The report concludes that both the EU and its member states must make hate crimes "more visible" to address "the related fundamental rights violations", not least by "holding perpetrators accountable" and by "encouraging victims and witnesses to report crimes and incidents" to increase "their confidence in the ability of the criminal justice system to deal with this type of criminality decisively and effectively" (FRA, 2012, p. 7). FRA accordingly recommends an EU-level penalty enhancement approach or at least "hate" should be implemented as an aggravating circumstance in European domestic criminal codes (FRA, 2012, p. 11). In addition to this general contribution, FRA has also provided a number of opinions and reviews on the implementation of EU efforts. In 2013, FRA reviewed the compliance of EU member states with the Framework Decision with some additional considerations to the recently adopted Victims Directive. In this Opinion, FRA provided 25 action recommendations for EU and its member states to improve their approach to hate crimes. Among other things, FRA recommended that domestic hate crime laws observe the Victims Directive in accordance with the protected characteristics mentioned in Article 21 of the CFR; that approaches engage a clear and consistent terminology; that approaches involve penalty enhancements models; that different measures are taken to respect hate crime victims in accordance with the Victims Directive;

that reporting and awareness-raising efforts are strengthened; and that hate crime data collection is improved, and national action plans devised (FRA, 2013, pp. 11-16, 24-27).

Although FRA is arguably the most important subsidiary EU body in the context of formulating and supporting an EU-level hate crime approach, another relevant body was launched by the European Commission in 2016 in the form of the EU High-Level Group on Combating Racism, Xenophobia, and Other Forms of Intolerance. This body superseded the Expert Group on the Framework Decision that had monitored the implementation of the Framework Decision. The High-Level Group is "a platform to support EU and national efforts in ensuring effective implementation of relevant rules and in setting up effective policies to prevent and combat hate crime and hate speech" by aiding the exchange of best practices between member states, conducting thematic discussions on relevant challenges, and to provide guidance and support cooperation between stakeholders (The European Commission, 2019). The High-Level Group is composed of representatives from the EU member states and from relevant organizations, e.g. the European Network Against Racism (ENAR), and the Open Society European Policy Institute (OSEPI). Notably, FRA, ECRI and ODIHR are also members of the High-Level Group, and specifically participate in the High-Level Group's subgroup on hate crime. ECRI and FRA oversee another subgroup on hate speech (Haynes et al., 2018, p. 33).

When reviewing the EU efforts, we note some considerable achievements unique to the EU approach. Namely, the Framework Decision is, in the words of FRA, "a milestone in combating crimes committed with a racist motive", establishing for the first time legally binding minimum standards in the context of addressing racism and xenophobia through criminal law definitions and sanctions at a European level (FRA, 2013, p. 4). Furthermore, the Victims Directive maintains the EU effort of committing its member states to a more coordinated approach to hate crimes through hate crime victim rights. However, the actual implementation of these standards remains challenging. In a 2014 report, the European Commission thus also admitted that "a number of Member States have not transposed fully and/or correctly all the provisions of the Framework Decision" (The European Commission, 2014, p. 9). Similar implementation issues have haunted the Victims Directive, as numerous member states have yet to fulfill its minimum norms, and even when general standards are met, hate crime victimization in particular remains an Archilles' Heel (Haynes et al., 2018, p. 58; Van der Aa et al, 2021, p. 180). Beside implementation gaps, the Framework Decision limits its standards to "racism" and "intolerance" and therefore fails to address hate crime beyond these categories. Haynes et al. further note that the EU approach affords states too much freedom to choose their legislation form and

its interpretations, despite continuous encouragement of the penalty enhancement model or the aggravated circumstance model. Accordingly, even when states comply with the EU standards "on paper", "the extent to which those laws are operationalized, understood, and implemented varies significantly across Member States" (Haynes et al., 2018, pp. 25-26). It is also worth noting that although the CFR plays an important role as the backdrop for EU efforts, it has not resulted in any significant jurisprudence on the part of the CJEU. Here, the ECtHR caselaw remains the point of reference in a European context.

A story of multiplicity: European-level approaches to "hate crime"

Taken together, the efforts of OSCE, CoE, and EU signify a "complex network of laws and policies that have attempted to address the problem of hate crime in Europe" (Haynes et al., 2018, 43). Each of the institutions have made some important contributions. OSCE has provided a joint definition which has gained some traction, and it has established a platform of hate crime data collection, albeit its utility remains limited. Under the umbrella of CoE, the ECtHR has established a human rights obligation of states to address hate crimes, and ECRI has promoted a broader obligation to implement special criminal legislation. Finally, EU has supplied binding minimum requirements for states and contributed with region-wide data collection. Notably, the human rights aspect is present in all three approaches, often in form of referral back to the "unmasking" obligation established by the ECtHR. Furthermore, the three institutions also seem to engage in some collaboration with one another, e.g. in the exchange of data, in internal referrals, and in the cooperation in the EU High-Level Group. On the other hand, it seems that none of the three institutional approaches have really been be able to crack the code of banishing the disharmony and inefficiency of hate crime approaches undertaken across European states. And while the European institutional efforts are both multiple and multifaceted - some legal, some political, and some organizational - they only partially rely on the same framework. As much as the three institutions might be seen to cover the same things and refer to the work of each other, this does indeed not amount to the establishment of a single legislative framework for hate crimes across the region. And so, disharmony apparently persists.

Chapter 3

Addressing hate crimes in Europe

In the previous chapter, I explored some of the most significant achievements of OSCE, CoE, and EU in formulating European-level approaches to address hate crimes with the hopes of putting an end to the recurring problem of disharmony among states. I concluded that although the European institutions, each in their own ways, have made important contributions, none of them have definitively succeeded in formulating a uniform European hate crime approach to sufficiently convince their participating states. In this sense, the recurring allegation that European institutional approaches are "piecemeal" could ostensibly be confirmed. However, before we draw such a conclusion, we need to take a few steps back and reconsider the extent to which hate crimes can, in the first place, be addressed within an international human rights framework. In this chapter, I therefore begin by questioning how hate crimes can be addressed in human rights terms considering the punitive bias inherent to the hate crime discourse. I then outline the three primary strategies currently applied by the European institutions: legislation, adjudication, and collaboration. Given the enduring European disharmony, I explore alternative paths, including restorative and human rights-based strategies, that may help shed the punitive bias, and European-level criminalization strategies that contrarily work with the punitive bias. I argue that perhaps accepting the punitive bias is in fact the most promising way forward to address disharmony in Europe. In any case, we need to be more aware of the links we draw between hate crime and human rights.

Addressing hate crimes beyond the punitive bias: From criminal justice to international human rights

Having extensively reviewed the life cycles of hate crimes across Europe, Haynes et al. conclude that hate crime is "not only a pressing concern for international penal policy", but also expressively continues to be "an important human rights issue across Europe" (Haynes et al., 2018, p. 43). As previously mentioned, it is hardly controversial to categorize hate crimes as, exactly what Haynes et al. do, a human rights *issue*. Accordingly, we have seen how the European institutional approaches all put emphasis on the human rights aspect of addressing hate crimes, substantiating that the European hate crime discourse tends to be proliferated as a human rights discourse too. Yet, I also began this

exploration by sketching out the under-elucidated conundrum of exactly how hate crimes are to be addressed in human rights terms insofar the utility depends, as Brudholm noted, on particular conceptions of "hate crime" and of "human rights": whether broader dignitarian conceptions or more restrictive power-regulative conceptions are deployed (Brudholm, 2015; 2016). The most contentious questions are then *if* and *how* hate crimes can be addressed directly as human rights *violations*. From what we have seen of the approaches adopted by the three European institutions, it appears that both dignitarian and power-regulative notions are at play when hate crimes are addressed against the backdrop of the European human rights framework. For instance, whereas the ECtHR, as the primary legal body to adjudicate hate crimes at an international-European level, largely relies on a power-regulative approach, ECRI, FRA, and ODIHR are freer to mix and switch between dignitarian and power-regulative conceptions, although the different mandates of each body also influence how broad-scoped their addressing of hate crimes as human rights violations can be in particular contexts. Another element that affects the ways in which hate crimes are addressed in human rights terms concerns the instrument invoked. Thus, these can range from highly dignitarian declarations like the UDHR or various preambles to far more restrictive measures, e.g. in specific interpretations laid out by the ECtHR when adjudicating real-life cases. This blend of dignitarian and power-regulative invocations can fuel interpretations of European approaches as not just "piecemeal" but outright conflicting. Namely, it may strike the observer that some institution bodies convey the policy that hate crimes can and should be addressed as human rights violations in sensu lato, while at the same time, the adjudicational or legislative measures undertaken under the umbrella of the same institution only address limited aspects, e.g. investigation. Certainly, this can infer the perception that different European bodies are in themselves in disharmony when it comes to deciding exactly how to take hate crime – and human rights – seriously.

To automatically assume that disharmony evidences a lack of institutional commitment would, I believe, be unfair. Foremost, the "confused picture" of European institutional approaches is, in my opinion, a foreseeable biproduct of a profound tension inherent to the hate crimes discourse: The reality that although the hate crime discourse has consolidated itself in Europe as a human rights discourse, strategies of addressing hate crime are strongly centered around what I earlier termed a *punitive bias*. For this reason, "hate crimes" often figure more naturally within a domestic criminal justice regime than they do within the European-international human rights framework. To illuminate this punitive bias, we may observe that since the inception of "hate crimes", the primary way of addressing them has been through the imposition of more severe punishments on perpetrators through criminal law

responses. Hence, we have also seen that despite the extensive disparity in hate crime approaches across Europe, the vast majority of them are punitive in nature; the social justice they seek to achieve is to be served through the channels of retributivist penal justice. Accordingly, Mason notes that criminal law is inevitably placed "at the heart of the anti-hate crime movement", as "hate crime" has been constructed as a particular social problem with a particular kind of solution: first and foremost, a punitive legal response (Mason, 2015, pp. 65-66). Haynes et al. reason that this inclination towards punitive legal responses may be explained by these being "the most direct means of responding to hate crime at our disposal", causing punitive measures to become the most prevalent response to hate crimes (Haynes et al., 2018, p. 121). Regardless, Schweppe & Walters argue that the punitive bias is pervasive not only in the national systems but also reinforced by international bodies (Schweppe & Walters, 2016, p. 318).

Numerous hate crime scholars have questioned the efficacy of punitive strategies to hate crimes. For instance, Perry (2010) warns against "an over-reliance on punitive measures", arguing that punitive strategies have not only proven ineffective in preventing hate crimes, but have sometimes even been counterproductive by increasing inter-group hostilities (Perry, 2010, pp. 361, 367). Chakraborti also highlights "the shortcomings of exclusively punitive responses" and points instead to "the use of educational programs and restorative interventions as a more effective route to challenging underlying prejudices and preventing future offending" (Chakraborti, 2015, p. 583). To Mason, it is not just lack of efficacy that should prompt us to question punitive strategies. Hence, in many cases, punitive strategies constitute "a well-intentioned but problematic legal response to the social problem of crime" insomuch that these measures aim to recognize the harms inflicted on hate crime victims but, paradoxically, foster primarily perpetrator-focused responses. Accordingly, Mason suggests that "it is time that we pushed harder to imagine a path to legislating against hate, and promoting social justice, that is not paved with penal punitiveness" (Mason, 2015, pp. 59, 66-67). Chakraborti agrees, suggesting that perhaps one more "gap" is to be identified in the deep aperture between the victim-oriented intention of hate crime legislation and its practical offender-centered expressions that shift attention to the criminal process in a far wider extent than to the restoration of the individuals and communities that have suffered the harms (Chakraborti, 2015, p. 583).

To find a new path, as suggested by Mason, we need, in Alkiviadou's words, "a well-rounded approach". This will inevitably involve punitive measures, as we are dealing with *crime*, but it also needs to address questions of "prevention and rehabilitation" (Alkiviadou, 2022, p. 2016). Arguably,

human rights emerge as an appealing alternative pathway to embark on. Namely, their universal language permits a symbolic condemnation of hate crimes but also, markedly, put to the forefront certain instrumental obligations of states to practically protect the rights and dignity of individuals involved in hate crimes, certainly victims but offenders too. And yet, the results excavated through this exploration suggest that there are also some obstacles on this path. In particular, while hate crime laws' inherent need for drawing lines between "deserving victims" and "non-deserving victims" based on "group characteristics" may be defended by the need for anti-discrimination protection of minorities, it does not fit too well with the conception of universal rights without distinction. Furthermore, the strong focus on establishing the guilt of the individual hate crime perpetrator leaves a certain fissure against the human rights objective of holding accountable states, laying bare that human rights can often only indirectly address harms inflicted within horizontal relationships between individuals or communities. The cardinal question is, however, how human rights should serve alongside punitive measures. This question arises not because human rights are, sui generis, juxtaposed to criminal justice. After all, punitive measures should ultimately serve to rectify the violation of the victim's rights, and the two approaches often draw on the same imaginaries of justice, democracy, and individual freedom (Bassiouni, 1993). The division should therefore not be overstated. Nevertheless, human rights-based justice does differ from punitive justice in some key respects: in what it does and to whom. Hence, criminal justice is largely a communication between state and offender and executes justice through retributive negative acts taken against the offender. Contrarily, human rights are more routinely a communication between state and victim, and human rights-based justice is a broader concept, often served through positive acts of attributing and ensuring rights, e.g. through compensation, restoration, or protection. In the context of hate crime, the implications of this are twofold: On the one hand, the differences render human rights a potential path away from punitive justice. But it also means that addressing hate crime through human rights, at least when the punitive bias is around, is perhaps not always as intuitive as we make it to be.

Addressing hate crimes through human rights: The three current European strategies - and their shortcomings

As indicated in the previous chapter, the three European institutions have all contributed to the creation of "hate crimes" as a human rights discourse by inferring the human rights relevance of addressing these crimes. It could readily be suggested that this is perhaps more of a strategic-practical matter than it is a substantive-philosophical one, insofar the human rights framework can thereby serve a legal-

political backdrop for instituting domestic obligations through the referral to human rights accountability mechanisms. Even so, a sound reason for scrutinizing the classification of hate crimes within the human rights framework is that human rights claims plainly have limits (Brudholm, 2015, pp. 83-84). As instinctively meaningful as a human rights approach can seem, it is thus also worth evaluating the results it has yielded in the European context; if, and how, it has proven to be, as Brudholm puts it, a "prudent long-term strategy" to address hate crimes in human rights terms (Brudholm, 2016, pp. 45-46). Based on the previous chapter, I believe that we may deduce three main strategies undertaken by the European institutions in addressing hate crimes in human rights terms at an international level: a *legislative* strategy, focusing on implementing a joint legal framework that all participating states must adhere to, an *adjudicational* strategy, allowing for some hate crimes to be addressed through international-level human rights adjudication, and finally, the most prevalent, a *collaborative* strategy, in which the European institutions aim to support and enhance domestic approaches through non-binding measures. Notably, the extent to which these strategies actually rely on addressing hate crimes in human rights terms beyond the abstract differ, and again, the different mandates of the institutions and their subsidiary bodies also highly influence which strategies they have been able to adopt. However, I would claim that none of the three strategies have managed to definitely remedy the disharmony of disparate state approaches, nor have they essentially shifted the hate crime discourse away from the punitive bias.

If we begin with the legislative strategy, one may argue that the EU has been the most active institutional player in attempting this strategy of implementing binding legislation to obligate European states to address hate crime in harmonious ways and, sometimes, in ways that go beyond punitive strategies. Contrarily, OSCE serves as an entirely cooperative body, and as such has not been able to adopt this strategy beyond declaratory means. Moreover, while CoE does possess some capacity to adopt legislative strategies, it has mainly been limited to the abstract legal framework of Article 14 of the ECHR and its realization in the hate crime-specific jurisprudence of the ECtHR. In EU contexts too, an abstract link has been drawn to Article 21 of the CFR, often with concurrent referral to Article 14 of ECHR and the ECtHR's interpretations. In this respect, there seems to be a mostly harmonious utilization of the two conventions as a legislative backdrop for instating a European obligation to address hate crime – despite small discrepancies between the protected characteristics entailed by the two conventions (Peršak, 2022, p. 97). While the EU strategy has not been able to draw in any substantial way on caselaw from its own court, the CJEU, it has been able to refer to primary EU law beyond the CFR to conjecture an obligation to address hate crimes under the EU non-discrimination

principle, including on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation cf. Article 19 of TFEU. It is, however, the Framework Decision and the Victims Directive that form the primary basis for identifying the EU as the institution that has most readily drawn on a legislative strategy, as these two instruments have decidedly imposed binding legal obligations on states to address hate crimes specifically. As already alluded to, this legislative strategy has, however, neither proved fully able to reduce disharmony, nor has it essentially managed to shift the narrative away from punitive measures. Hence, the Framework Decision mostly revolves around punitive approaches, and its limited scope on "racism" and "xenophobia" reifies, to Alkiviadou, the "hierarchy of hate in the European spectrum" in which a rather limited group of people can attain hate crime protection through the imposition of enhanced penalties on their offenders (Alkiviadou, 2022, p. 2020). To some, this shortcoming of the Framework Decision could be remedied by its replacement with a new EU Directive that covers all relevant forms of biases (Whine, 2016, p. 226). Insofar this would repair the lack of comprehensive utility of the Framework Decision, it is, however, scarcely a guarantee of increased harmony. Thus, the recurring criticism posed against the Framework Decision is that it affords European states too much freedom in deciding how to comply with the Decision, and that states have too often wrought this freedom to remain passive. Accordingly, if the objective is European harmonization, a new directive might not be enough to ensure the transposition of a common European standard through legislative means. Notably, the Victims Directive constitutes a clearer human rights-based legislative contribution insomuch that it genuinely shifts the focus from punitive obligations to restorative obligations – and importantly, it does so not on a declaratory level, like most measures of other European institutions, but on a formal legislative level. In no disregard of the Victims Directive's value as an expressively human rights-based instrument, it has, however, too often slipped into the implementation gap (Whine, 2016, p. 227).

While the legislative strategy of especially the EU has struggled to attain compliance within a quite wide playing field, a much narrower playing field is provided by the second European-institutional strategy, that of international human rights adjudication. Again, this strategy has largely been out of reach for the OSCE, insomuch that it has no attached court. As already mentioned, this strategy has also been limited in the EU context insomuch that the CJEU has not contributed beyond its general non-discrimination caselaw – a reality shaped by a general acceptance of the ECtHR's jurisprudence but mostly by the different complaint access to the CJEU vis-à-vis the ECtHR. This leaves CoE, and specifically, the ECtHR, as the only truly active European-institutional player to carry out this strategy. To begin with, there can be little doubt that the Court addresses hate crimes in human rights terms as

it is restricted to act on the basis of the human rights and obligations enshrined in the ECHR. We have also seen that the Court's establishment of a state obligation to "unmask" bias motives serves as a common reference point for all three institutions to substantiate the human rights aspect of hate crimes. Adjudication at the ECtHR further shows its human rights dimension in the sense that its goal is not just to attribute guilt to the impugned state but also, ultimately, to provide rectification for victims as a last resort option, e.g. through means of compensation (Mačkić, 2016, p. 243). According to Mačkić, there are several strong suits of the adjudicational strategy to hate crimes in the European-international context (Mačkić, 2016, p. 237). On a principal level, addressing the most serious hate crimes, in which the state can be imposed some form of liability, is in line with one of the original intentions with the Court: that it should act as an "alarm bell" to identify increasing "totalitarianism" in European states, especially insofar this expresses itself in states' acceptance of, or active participation in, persecution of maligned minority groups (Mačkić, 2016, pp. 238-239). Another strength of the adjudicational strategy is that the Court utilizes its "agenda-setting function", both in order to act as an anti-majoritarian waypoint in polemic national realities, as international judges are often more detached from such polemics than national judges, but also in the sense that it clearly communicates non-discrimination as a fundamental European value and raises cross-state awareness (Mačkić, 2016, pp. 240-243). Finally, insofar the legislative approach has provided a quite wide playing field for states to maintain their own approaches, and rarely with the desired results, the Court can conversely eliminate considerations of e.g. a margin of appreciation when it comes to the adjudication of Article 2 and Article 3 violations as these are broadly accepted to be non-derogable (Mačkić, 2016, pp. 241-242). These strengths suggest that the adjudicational strategy can in fact "help to address hate crime internationally" when hate crimes have a more systemic nature that states have failed to observe or even have contributed to (Mačkić, 2016, pp. 237, 243).

Although the adjudicational strategy has apparent strengths, we have also encountered that international adjudication under ECHR have some clear limitations in how far it can go when addressing cases of hate crime. Namely, adjudication is largely limited to address the minor category of what we earlier termed "obvious hate crimes" (Brax 2016), whereas the vast majority of "ordinary hate crimes" are rarely addressable for adjudication. In obvious cases, the Court can thus substantively address hate crimes committed by state agents, but in most other hate crime cases, the Court can often only address states' neglect of their procedural obligation to investigate, prosecute, and remedy (Micus, 2015, pp. 7, 33) – and so far, this has been narrowed down to only severe cases where the substantive right to life and physical security has been violated. Finally, although the Court enjoys a certain level

of normative authority, the actual impact of its judgements remains contested. Mačkić thus argues that the ECtHR's judgements are "essentially declaratory" and "shaming" in nature insomuch that the Court can declare that a violation has occurred and that compensation must be awarded, but it cannot impose punishments on state agents or others that have committed hate crimes, quash national decisions, strike down domestic laws, require legislation to be changed, or in other ways force states to take particular measures if they refuse to do so (Mačkić, 2016, p. 237). While ECtHR's adjudicational strategy has then played an important normative role in addressing hate crimes in Europe in human rights terms, its practical impact seems correspondingly limited by its lack of punitive capacity (Mačkić, 2016, pp. 243-244). In this sense, the adjudicational strategy has, albeit in a different way than the legislative strategy, also not escaped the punitive bias.

The final and by far most utilized strategy of the European institutions when addressing hate crimes is through various forms of monitoring, advisory, supporting, or collaborative activities, including the issuing of specific and general recommendations, knowledge-gathering and exchange, and the establishment of cooperative fora. OSCE, and ODIHR especially, have used this strategy in accordance with their cooperative mandate, but both FRA and ECRI also operate according to this strategy. While one can hardly draw one general conclusion on such a wide range of measures, spanning from ECRI's legislation-like General Policy Recommendations, over the reporting measures of the OSCE, to the data-gathering conducted by FRA, what may be posed is that they have all played parts in addressing the infamous "gaps", including lack of data, lack of implementation, lack of counting tools, and lack of justice. In my opinion, the EU High-Level Group reflects a particularly interesting body, insomuch that all of the three IGOs cooperate in this body, alongside European member states, and other relevant stakeholders. Another interesting expression of the collaboration strategy is found in the OSCE attempt of harmonizing through a collected reporting system and through a shared open-ended hate crime definition. As Perry has pointed out, the OSCE has thereby worked towards a "fuller" implementation of the hate crime discourse at a European level in the ways in which it has integrated the hate crime concept with other well-established concepts: for one, the concept of "human rights" but also the Organization's core concept "security". In Perry's opinion this has constituted a prolific strategy of internationalizing "hate crime" and has in fact helped develop a general acceptance of "the hate crime model" as a responsibility triangle shared by the IGOs, member states, and civil society (Perry, 2014, 79-80). The clear shortcoming of this compounded group of initiatives is, of course, that they have not definitively eliminated European disharmony. Hence, despite efforts towards the contrary, there are still significant knowledge gaps, gaps in counting and countering hate crimes, implementation gaps,

and justice gaps across the European region; there is still a lack of a joint European hate crime definition with sufficient impact in European states; and there is still a massive lack of compliance across Europe.

But why is it so hard to attain European harmony within this field? Especially when the European institutions have increasingly, and by now for decades, conjugated around anti-hate crime strategies? To Garland, the problem is that European-level hate crime efforts under the umbrella of "European human rights" is "an umbrella full of holes"; a matter of "compounding rather than solving" (Garland, 2012, pp. 6-7). In Garland's opinion, the usage of the transnational human rights framework invoked in European strategies has itself been a catalyst of "piecemeal" consequences, as it relies too much on a naïve hope that states will voluntarily define their approach in more consistent ways. In this sense, European institutions have been too willing to accept European states' "lack of commitment" and too willing to respect national histories "flavoring a nation's hate crime policy and practice" (Garland, 2012, p. 7; Garland & Funnell, 2016, p. 27). While Garland maintains that "rigidly identical laws and policies" adopted across all European states are not the answer either, the tensions inherent to the hate crime discourse has continuously highlighted disparity rather than united European states in the fight against hatred (Garland, 2012, pp. 12-13). The transnational "human rights approach" has therefore failed to deliver an approach to hate crimes meaningful to European states and too often refrained from truly tackling the disharmonious realities it sets out to mend (Garland, 2012, p. 13). In a later contribution with Funnell (2016), Garland furthers this criticism, suggesting that well-intentioned European-level hate crime policy efforts of e.g. FRA and ODIHR "appear to have little influence over whether states actively seek to address and combat hate", and even legally binding treaties, e.g. the Framework Decision, have failed to provide the necessary impetus for states to truly harmonize (Garland & Funnell, 2016, pp. 27). The human rights approach of the European institutions has then neither achieved sufficient practical impacts nor symbolic impacts, and accordingly, the growing hostility to "difference" in Europe has not just persisted but seems to be increasing (Garland & Funnell, 2016, p. 27). While Garland & Funnell acknowledge that addressing hate crime is "especially challenging in an international context", the European institutional strategies should abandon their "top-down human rights-based approach" and instead help foster more "bottom-up initiatives" developed at the local level (Garland & Funnell, 2016, pp. 16-17, 28).

Escaping the punitive bias: Alternative strategies of addressing hate crimes

Regardless of whether or not one agrees with Garland and Funnell's position, the disharmony we have encountered during this exploration, and the shortcomings of the current strategies, would reason that we look afresh at the role of law in tackling hate in the contemporary European social landscape (Alkiviadou, 2022, p. 2014). I have myself argued that legal responses, in particular criminal law responses, can only be one part of a wider all-encompassing process of addressing "hate". To address hate crimes, we thus need "a plethora of approaches, not a singular legal response" (Gunthel, 2023a, p. 39). To this end, different alternative or supplementary approaches to hate crime have been put forward over the last decades, including *restorative* approaches (Walters, 2016; 2018), and "educative and conciliatory models" (Perry, 2010, p. 367). While these approaches have often been treated with sympathy, they have rarely caught on compared to punitive strategies (Schweppe & Walters, 2016, pp. 315-316). We may therefore consider some alternative human rights-oriented strategies that could potentially provide novel future pathways of addressing hate crimes at the European level.

In fact, the EU Victims Directive constitutes a remarkable example of a more victim-oriented approach that puts the obligation of states to ensure the hate crime's victim's right of restoration at the forefront rather than the state's obligation to punish the hate crime offender in a particular way. The Victims Directive can thereby be seen to resonate a smaller subsection of hate crime scholarship, proposing a *restorative justice* strategy when addressing hate crime. Walters (2016; 2018) is among the core proponents of this strategy. He draws on the ideas of Howard Zehr's restorative justice paradigm (Zehr, 1990) to rethink how hate crimes can be addressed in ways that shift the emphasis from the condemnation of wrongdoing to the reparation of harm. This strategy has a principal human rights dimension insofar that it addresses hate crime as "a wound in human relationships which requires convalescence", bringing together the relevant stakeholders in order to repair the inflicted harms through dialogical processes (Walters, 2018, p. 62). Such an approach has been echoed by the United Nations in its Resolution on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002), highlighting restorative strategies as "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator" (UN, 2002, pp. 40-41). Insomuch hate crimes are accepted to be particularly harmful in their targeting of victims "because of who they are", Walters argues that such crimes cannot be adequately addressed by "the conventional approach" of criminal law measures (Walters, 2018, pp.

56-57). Namely, Walters suggests that "there is little evidence to show that hate crime laws yield any meaningful reparative benefits directly to victims, or to society by reducing overall levels of hate crime offending". While Walters does not argue that punitive measures should be altogether abandoned, other means will be necessary to truly address the harms caused hate crime, and to effectively challenge the underlying causes of "hate" (Walters, 2018, p. 57).

If a restorative approach could be one alternative strategy for the European institutions to explore as a means of addressing hate crimes beyond the punitive bias, another approach is entirely unexplored in hate crime scholarship: A *human rights-based approach* (HRBA) to hate crime. Traditionally, the human rights-based approach has been the applied in the context of development, accenting human rights standards as ways of analyzing the "inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress and often result in groups of people being left behind" (UN, 2023). As underscored by the United Nations, there is not a universal HRBA recipe, however, in the Common Understanding on HRBA to Development Cooperation (2003), it is noted that the objective of such approaches is to further the realization of the human rights principles in all aspects of tackling and addressing specific problems. The focus is thus to enhance the capacities of, respectively, duty-bearers to meet their human rights obligations and rights-holders to claim their rights (UN, 2023). Beyond development, HRBA strategies have increasingly been transplanted to other areas of international concern, including crimes with transnational dimensions. For instance, in the context of human trafficking, the UN Special Rapporteur on Trafficking in Persons has suggested that "states should shift their focus away from criminal investigation to giving priority to the human rights of the individual victims" by adopting strategies that ensure "human rights rather than a crime control perspective" (OHCHR, 2011). The United Nations Office on Drugs and Crime (UNODC) and scholars have likewise promoted a HRBA approach to supplement the primarily punitive approach to international corruption (UNODC, 2023; Peters, 2018). Similar suggestions have been made in the contexts of transnational crime and law enforcement (EUCRIM, 2020; UN, 2017). To the best of my knowledge, HRBA strategies have only sparsely been explored by the European institutions. However, in 2019, FRA Director, Michael O'Flaherty, advocated an increased European focus on "fundamental rights-based policing" (O'Flaherty, 2019), and the CoE has previously reported on human rights-based language in responding to hate speech (CoE, 2021).

Embracing the punitive bias: Addressing hate crimes through European criminalization?

While alternative human rights-oriented strategies of addressing hate crimes are certainly worth exploring in a European-institutional context, both restorative approaches and, especially, human rights-based hate crime approaches remain in their infancy. Furthermore, while such approaches could surely help the international addressing of hate crimes to be more victims' rights-oriented than purely punitive, based on what we have seen, there is not much reason to believe that they would fare any better than existing strategies. Perhaps this showcases the limits of the European hate crime discourse as a human rights discourse, and perhaps we in fact need to embrace the punitive bias to advance a uniform European-level hate crime approach. Therefore, the final strategy to be highlighted is the strategy of addressing of hate crimes through joint European *criminalization*.

Previously, we have encountered ECRI's promotion of a general European obligation to criminalize hate crimes, alongside many other European recommendations of penalty enhancement models. However, in reality, European states have remained fairly free to choose their own model of legislation, resulting in disharmony and often inefficiency. Yet, a new initiative from the EU may sketch out a way forward for enforcing a common European standard on hate crime criminalization. In her 2020 State of the Union speech, the President of the European Commission, Ursula von Der Leyen, thus announced the Commission's intention to propose an extension of the list of so-called *EU crimes* under Article 83 of TFEU to include both "hate crime" and "hate speech". Namely, she stressed the need for "a Union that goes from condemnation to action" when addressing hate crimes, as "hate is hate – and no one should have to put up with it" (The European Commission, 2021, p. 1). About one year later, in December 2021, the Commission formalized this announcement in an official Communication (COM(2021) 777), entitled *A more inclusive and protective Europe: Extending the list of EU crimes to hate speech and hate crime*. This stated the aim of triggering an EU Council Decision to extend the list of EU crimes in order to enable the Commission, in a second stage, to propose the adoption of "directives establishing minimum rules on the definitions and sanctions of hate speech and hate crime" (The European Commission, 2021, p. 3). The Commission underscored that addressing hate crimes is a pivotal strategy in the Commission's efforts to promote "EU core values" and to ensure that "the EU Charter of Fundamental Rights is upheld". It also emphasized that "all forms and manifestation of hatred and intolerance are incompatible with the values of respect for human dignity, freedom, democracy, equality, rule of law, and respect for human rights, including the rights of persons

belonging to minorities, upon which the EU is founded" (The European Commission, 2021, p. 1). Finally, hate crimes must be addressed to prevent "sufferance" and limitations on fundamental rights, as "hate undermines the very foundations of our society". Accordingly, "hate has no place in the EU" and "should be fought with all available means, including through criminal law" (The European Commission, 2021, pp. 1-2).

The first step of the Commission's initiative is, as mentioned, to extend the list of EU crimes. Article 83(1) of TFEU thus provides an exhaustive list of, currently, ten areas of crime in which the European Parliament and the EU Council have a special option of establishing "minimum rules concerning the definition of criminal offences and sanctions" across EU member states "by means of directives adopted in accordance with the ordinary legislative procedure". Insomuch that criminal justice is usually an area within the competence of member states, Article 83 is a special allowance of the EU to ensure judicial cooperation in criminal matters, but only "in the areas of particularly serious crime" where there is "a special need to combat them on a common basis" due to their "cross-border dimension" and "the nature or impact of such offences". These EU crimes include, at the moment, terrorism, human trafficking, sexual exploitation of women and children, drug trafficking, arms trafficking, money laundering, corruption, counterfeiting, computer crimes, and organized crime. Article 83(1) allows the Council to add new areas of crime, insofar they meet the criteria and insofar the decision is unanimous and consented to by the European Parliament. The second step of the Commission's initiative involves the activation of Article 83(2), which allows the establishment of EU-level minimum rules when "the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures". These directives may be approved by the ordinary or special legislative procedure according to the harmonization measures adopted. Once, "hate crime" is integrated into the list of EU Crimes, the Commission would thus have the competence to propose this form of substantive legislation to harmonize European approaches to hate crime through, first, a joint definition, and, second, a joint model of criminal penalties.

Article 83 is really a quite unique EU law provision, allotting the exceptional legal basis for the Union to deal with crimes, including in the form of substantive criminal law measures, at the EU level (Csonka & Landwehr, 2019, p. 263). As a general rule, the Union has no comprehensive mandate to harmonize or codify substantive criminal law, and only a limited mandate to harmonize procedural criminal law. This means that the Union cannot adopt criminal code procedures, nor enforce

harmonization on criminal justice procedures, unless this falls within a very specific set of situations (Csonka & Landwehr, 2019, pp. 261-262). The idea of an EU-level joint criminalization approach was born several decades ago, not least with the adoption of the Lisbon Treaty (2007) that ushered a new enthusiasm around addressing crime at the EU level, even though the Treaty itself did not really expand the Union's competence in regard to substantive criminal law-making (Reynders, 2019, p. 225; Csonka & Landwehr, 2019, pp. 261-262). What the Lisbon Treaty did do was, however, to outline the competence of the EU to ensure European security through the approximation of criminal laws "when necessary" (Csonka & Landwehr, 2019, p. 262). Such "necessity" is seen to arise in three scenarios: when crimes are identified as EU crimes (TFEU Article 83(1)), when approximation is needed to ensure effective implementation of EU policies (TFEU Article 83(2)), and when approximation is needed to protect financial interests of the Union (TFEU Article 325(4)). The CJEU has correspondingly confirmed that although criminal law-making does not fall under the EU competence imprimis, the Union is not prevented from delivering EU-based criminal legislation, especially when this may serve to ensure the protection of fundamental rights (Csonka & Landwehr, 2019, pp. 262-263).

But what are really the prospects of an EU-level criminalization of hate crime? On the one hand, the Commission's initiative seems to constitute a substantial move to combat hate crime through EU-based harmonization, signifying a strong EU commitment to recognize hate crime as an EU-wide problem (Bąkowski, 2022, p. 2; Peršak, 2022, pp. 85-86). A few conceptual aspects are noteworthy about the initiative: that it changes the terminology to "hate" and "hate crime", and explicitly engages "hate" rather than e.g. "bias", and that it abolishes the singular focus on "racism" and "xenophobia" of the Framework Decision. Most noteworthy is, however, the legislative prospects of the initiative. Hence, currently, the EU possesses no real competence to criminalize hate crime beyond what it is entailed by the 2008 Framework Decision (Bąkowski, 2022, p. 1). Contrarily, as an EU crime, EU bodies would be given new means of addressing hate crime through EU-level criminal standards and an obligation to harmonize to these – albeit within the confines of a directive. Although this EU-level criminalization is of a strongly punitive nature, according to Peršak, it could be an important first step towards filling the "gap in the protection of the individual's rights". Hence, a joint criminalization could provide the missing link for attaining efficiency and harmony, while still consolidating a symbolic EU-level recognition of the egregious nature of hate crime victimization from a rights perspective (Peršak, 2022, pp. 101-102, 96-97). Naturally, these prospects hinge on "hate crimes" meeting the criteria necessary to be integrated into Article 83 of TFEU. In Peršak's analysis there are, however, no major reasons

why hate crimes should not qualify. First, hate crimes, together with hate speech, can be considered an "*area of crime"*, insofar these are coupled together as crimes that share the presence of a hateful element targeting protected characteristics (Peršak, 2022, pp. 109-110). Second, despite the occasional scholarly disputes, hate crimes are widely accepted to be "*particularly serious*" in their specific harmful nature, which is also emphasized by the European Commission in their communication (Peršak, 2022, pp. 110-113). Third, although it would initially seem that the criteria of having "*a cross-border dimension*" resulting from "*the nature or impact*" of the offence poses a potential downfall for hate crimes insomuch that neither the nature nor the impact of hate crimes are, inherently, of transnational character, one can conversely argue that "hate" is in itself a globally transmitted phenomenon. So, even when crimes that result from "hate" are not always committed actively across borders, the hate motivating them may very well be, as the transmission of hateful attitudes in one EU member state can inspire hate crime targeting in others (Peršak, 2022, pp. 113-114). Finally, the growing empirical prevalence of hate crimes in Europe seems to readily supply the attention to "*developments of crime*" that allows for adoption of new crimes (Peršak, 2022, p. 116).

But even if "hate crimes" could be integrated as an EU crime, there are, arguably, still some hurdles to overcome if the criminalization strategy is to be truly promising. First of all, EU criminal law measures are evidently not uncontroversial. In fact, Csonka & Landwehr (2019) note that EU member states' appetite for EU criminalization initiatives have been waning significantly since the early years after the Lisbon Treaty (Csonka & Landwehr, 2019, pp. 261, 266). To accommodate for such potential reluctance of member states, Peršak argues that the EU must undertake the criminalization strategy in a *"*careful and incremental" fashion, especially in the area of harmonizing penalty models (Peršak, 2022, pp. 85-91). Another substantial challenge is of course the reification of the punitive bias. Hence, as we have seen, hate crime scholars are increasingly arguing against punitive strategies. Relatedly, the international criminal justice watchdog organization, Fair Trials, comprising a wide range of European civil society organizations, has also warned against the new Commission initiative. In a letter to the Commission President and the EU Commissioner for Equality from September 2021, Fair Trials thus urged the Commission to drop its *"*criminalization approach to hatred", representing in their view "a continued overreliance on criminalization as a policy response to social harm" (Fair Trials, 2021, pp. 1-2). Although the Organization commends the Commission's "political will to counter hatred" and to "protect those most vulnerable (..) especially given the rollback of human rights" in some EU member states, "recent expansion of hate crime laws has not worked" and it remains doubtful if "increased reliance on the criminal justice system and harsher sentencing offer a meaningful or

effective policy response to symptoms of much deeper structural problems". Rather, Fair Trials worry that an EU-level criminalization strategy will only entrench existing problems, even to the point that "punitive responses perpetuate the cycle of hatred" (Fair Trials, 2021, pp. 2-3). Instead, Fair Trials encourages the EU to "lead by example and take a different path" (Fair Trials, 2021, p. 2).

Peršak agrees that criminalization is not always "the answer, the best answer, or the only answer". Therefore, she also suggests that the EU criminalization strategy is be supplemented by non-punitive tools. That said, Peršak still believes that hate crimes constitute such a major concern in Europe that it does in fact warrant an EU-level criminal law strategy (Peršak, 2022, pp. 118-119, 85-91). In my view, there are definitely grounds for hesitance. Punitive or not, we have thus encountered that EU directives have not been able to overcome the implementation gap so far. Nonetheless, in a swamp of efforts, the Commission's initiative at least offers a new potential pathway towards what has yet to be achieved for decades: namely, to address hate crimes efficiently and harmoniously at a European-institutional level. And in that, some promise can certainly be found.

Conclusion

From “Hate” to “Harmony”?

Hate-motivated crime is nothing new in Europe, nor in the rest of the world. What happened to Michael Menson in the streets of London in 1997, despite the attack’s almost unimaginable cruelty, had been seen before and, sadly, since. Even so, when his case entered the chambers of the ECtHR, Michael’s fate became intertwined with what would become a new discourse of “hate crimes” as, explicitly, a European-level problem in need of European-level responses. Hence, over the last several decades, hate-motivated crimes have changed from being engulfed in a more general frame of “crime” to an explicated category of “hate crime”, now broadly accepted to be associated with special challenges, special harms, and special legislative needs (Bleich, 2007, p. 149). Upon learning that the ECtHR in fact rejected Michael’s case, it is easy to be left with ambiguous feelings. On the one hand, the Court thus established a quite clear human rights-based duty of states to ensure that hate crimes are, in reasonable ways, addressed. However, the rejection of Michael’s case itself left many disappointed or perhaps puzzled. Because if setting a man on fire, just because he has a particular skin color, cannot amount to a violation of human rights, then something has been overlooked, right? Well, as this exploration has uncovered, this depends on the link that we draw, and can draw, between human rights and hate crimes; when and how hate crimes can also be legitimately addressed as human rights violations, and when they are, rather, human rights issues.

In a way, the ambivalence probed by Michael’s case was a premonition of what was to come. Namely that, within the pan-European human rights framework, hate crimes have been subject to increasing recognition as a genuine human rights issue, yet the impact of this has not always manifested itself in the ways that many had hoped or expected – not least when it comes to the realities endured by those subjected to hate crime “out there”, in the streets, at home, in court, or at the police station (Chakraborti, 2015, p. 13). Decades later, “hate crimes” thus continue to pose a substantial problem in Europe. For instance, in its latest report from 2019, ODIHR recorded a record-high number of 4,621 hate crime victimizations in the mainly European OSCE member states (ODIHR, 2019). Likely, there have been many more, as we know that the majority of European hate crimes slip into a variety of notorious “gaps”: never reported, never investigated, never prosecuted, and never counted. As hate crime numbers continue to rise, and new waves of illiberalism, populism, and online hate have washed over

the European continent, it seems that the hate crime discourse is only getting stronger – and more relevant - in Europe (Peršak, 2022, pp. 92-96; Bąkowski, 2022, p. 1; Whine, 2016, p. 216). As the European Commission has put it, "hate" has thus moved into the mainstream in Europe (The European Commission, 2021, p. 1). In recognition of this and tailing the idea that "hate has no place in Europe" (The European Commission, 2021), this exploration has shown how the European intergovernmental institutions have increasingly engaged themselves in the difficult fight against "hate". They have done so in a variety of ways, and expressively often against the backdrop of the European human rights framework and sometimes in human rights terms. CoE has played an important adjudicational role insomuch that it was this institution's independent legal body, the ECtHR, that made the pivotal contribution of establishing the duty of states to "unmask" hateful motives which have since been inferred by most other European institutions and bodies to defend the addressing of hate crimes as, specifically, a human rights matter. The EU has taken on an increasingly ambitious legislative role, implementing specified legally binding standards on, at least, some forms of hate crime, addressing the need for additional support of hate crime victims, and most recently, paved the way for a joint European criminalization of hate crimes. Finally, the OSCE has neither been able to generate momentous caselaw nor issue binding legislation, but it has nonetheless contributed with extensive advice and support and allowed for new means of European collaboration in the context of defining, counting, and tackling hate crimes.

Despite these efforts, there is no way around the discouraging fact that European states continue to sing with disjointed voices as they address hate crimes in disparate and often inefficient ways. In particular, we have seen how the elusiveness of the hate crime concept stubbornly persist when European states are to encircle such crimes within their domestic criminal justice systems. The notion of disharmony has, however, not only extended to the individual states' approaches but also to the institutions themselves as they have recurringly been accused of adopting "piecemeal" approaches, ultimately unable to chant in with one another in any consistent way, and surely unable to entice their participating states to sing in one voice. Hence, while states hold on to their own approaches, the hate crime concept and its manifestations conversely seem to effortlessly cross borders in post-Schengen Europe (Whine, 2016, p. 216). Paradoxically, the gaps that hate crimes tend to slip into are also often present on all sides of the border, including gaps in knowledge due to lack of data and, especially, lack of comparable data, implementation and justice gaps due to lack of holistic or adequately resourced investigation and prosecution practices, and counting gaps as most states fail to record hate crimes and fail to encourage victims to report (Whine, 2015, pp. 99-102). Sometimes the gaps that hate crimes

slip into are unavoidable - or at least we have yet to come up with sustainable answers as to how to fill them in. In other cases, however, failures may testify to, in Garland's words, "a lack of genuine commitment on the part of some states and agencies" (Garland, 2012, p. 10). In any case, as much as the European institutions have tried to chime in on how hate crimes are to be addressed, and how they can be addressed in a harmonious way, what remains are stark variations in the legal hate crime protection across Europe, and the enduring absence of a uniform European approach, including a common definition or terminology that could potentially even out the noticeable disharmony (Peršak, 2022, p. 100). And, in fact, this paper could conclude here. With the same conclusion that has been made by many before it: that European institutions have largely failed, or at least must do more, to formulate a truly uniform European approach to hate crime, implying particularly the establishment of an effective joint definition across European states and, ideally, across the institutions themselves, more coordination among European bodies and agencies, an enhanced collaboration strategy to bring together relevant stakeholders, and a more efficient data collection framework.

However, I believe that there is also another significant conclusion to be made on the basis of what has been unearthed during this exploration: that perhaps we need to realign our expectations to how hate crimes can be addressed in human rights terms in the first place and, specifically, within the pan-European human rights framework. Namely, I have argued that addressing hate crimes beyond the punitive bias is a challenge that extends beyond the (in)efficacy of the European institutional approaches. Although criminal justice approaches are not, sui generis, contradictive to human rights approaches, the European reiteration of the hate crime discourse as a human rights discourse has perhaps sometimes served to instigate slightly unrealistic public expectations to how the human rights framework can in fact address hate crimes as human rights violations beyond the restricted unmasking duty established by the ECtHR. Hence, even if the European system is likely the most well-functioning human rights framework in the world (Neumeyer, 2005, p. 938), and even if some European institutional bodies have often themselves promoted the idea that hate crimes always constitute "a serious breach of human rights" (ODIHR in Brudholm, 2015, p. 83), the conclusion that the system has "failed" to address hate crimes is, in my view, ill-conceived if the genuine legal limitations of how human rights *can* combat hate crime are not justly observed. In other words, we cannot always take the link between hate crimes and human rights for granted, even if the link routinely seems intuitively obvious. Namely, the addressing of hate crimes as human rights violations may indeed be helpful in human rights policy and promotion contexts but, as Michael's story showed, a source of perpetual disappointment if we take it for granted in adjudicational human rights contexts. In my view, this does

not mean that human rights are thereby a futile tool to address hate crimes. It simply means that human rights can do different things in different contexts, including when the goal is to tackle hate crimes. In the pursuit of taking both "hate crimes" and "human rights" seriously, I have therefore suggested that alternative human rights-oriented strategies can be explored by the European institutions insofar the objective is to address hate crimes specifically through human rights beyond punitive measures. However, I have also proposed that if the foremost objective is to achieve harmony, then perhaps a clearly criminalization-oriented approach is the most promising strategy going forward. Definitely, we should not neglect the human rights aspect of hate crimes. I merely advocate a less taken-for-granted conflation of the idea that hate crimes are to be addressed internationally with the idea that this is necessarily and always done through explicit human rights terms.

Admittedly, achieving European "harmony" in the context of the elusive "hate" will never be an easy task. This is not made less challenging by the reality that the hate crime discourse itself moves in many different directions and extends beyond the confines of law, the confines of states, and the confines of specific strategies (Mason, 2015, p. 67). Human rights can play one part in enclosing this ever-moving discourse. Criminal justice another. Moreover, states will have to play a part, and so will international organizations and bodies. But no matter what components we add, after decades of perceived "failed" approaches to hate crime, perhaps it is time that we more thoroughly accept that encircling, approaching, and addressing hate crime is, inescapably, a work in progress. Because the truth is, as Brax alludes to, that despite the consolidation of the hate crime discourse, despite the spread of hate crime legislation, and despite internationalization, there are still many fundamental questions to be asked about "hate crime" (Brax, 2016, p. 49). Namely, we need to further scrutinize the impacts of international-level approaches to hate crime, as these have not always been subjected to sufficient level of scrutiny (Schweppe & Walters, 2015, p. 5), or they have just been rejected as "piecemeal" or "failed" when they clash with our intuitions. By elucidating the three primary European institutional responses to "hate crime" and potential new ways forward, this paper has therefore tried to make a small contribution to the massive task of contributing with partial answers to a question posed by Schweppe & Walters, namely "how we as a global society can better address hate-based conflicts" (Schweppe & Walters, 2016, p. 4). And in particular, it has tried to encourage a critical discussion of how we may address hate crimes internationally and in the context of human rights.

In many ways, this paper has confirmed what decades of hate crime scholarship has already testified to: That any attempt at finding answers to the complex issue that "hate crime" poses is a strenuous

journey to embark upon; A winding road of contradictory bumps and unforeseeable pitfalls that should be trodden with cautious and humble steps. And as evidenced by the disparity and gaps associated with hate crime legislation all around the world, finding *right* answers is an endeavor that cannot be exhaustively, not even remotely, fulfilled within this format. Hence, the objective of this paper has plainly not been to produce the golden calf of a definitive human rights-based approach to hate crimes in Europe. Rather, this paper forms a preliminary exploration attempting to, very foundationally, account for an observably growing need to scrutinize hate crimes as an evolving, distinctive, and fairly elusive human rights issue; an issue that may be encircled, approached, and addressed from a number of different angles with very different implications to follow. Therefore, it is pivotal that we attain a certain level of precision when considering the multifaceted opus of hate crime approaches, e.g. ensuring that we distinguish hate crimes from hate speech, international-institutional approaches from domestic approaches, legislation from policy, and human rights-based approaches from criminal justice-based approaches. Simultaneously however, to adequately capture the intricate nature of this field, we are affronted with crucial links and overlaps between these different categories, illuminating and continuously shaping the conundrum of "hate crime" that most approaches have yet to fully capture – whether in Europe or beyond. While efforts of encircling, approaching, and addressing hate crimes have yielded considerable progress, many challenges simultaneously remain. Inevitably then, we have still much ground to cover before "hate" may one day become "harmony".

References

Literature

Acosta-López, J.I. and Duque-Vallejo, A.M. (2008). Declaración Universal de Derechos Humanos, ¿Norma de Ius Cogens?. *International Law*, 12(1): 13-34.

Alkiviadou, N. (2022). The legality and Practicality of Punishing Bias—A Socio-Legal Appraisal. *International Journal of the Semiotics of Law*, 35(1): 2013-2025. https://doi.org/10.1007/s11196-022-09900-x.

Axelson, R. (2016). State-sponsored Hatred and Persecution on the Grounds of Sexual Orientation: The Role of International Criminal Law. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 277–293). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0018.

Bąkowski, P. (2022). *Combating Hate Speech and Hate Crime in the EU*. European Parliamentary Research Service.

Bassiouni, C. (1993). Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions. *Duke Journal of Comparative & International Law*, 3(1): 235-298.

Blázques, N. (1982). *Dignidad de la Persona y Derechos Humano*s. Instituto Pontificio de Filosofía Press.

Benoît-Rohmer, F. (2017). Lessons from the Recent Case Law of the EU Court of Justice on the Principle of Non-discrimination. In L. Rossi and F. Casolari (Eds.) *The Principle of Equality in EU Law* (pp. 151-166). Springer. https://doi.org/10.1007/978-3-319-66137-7_5.

Bleich, E. (2007). Hate Crime Policy in Western Europe – Responding to Racist Violence in Britain, Germany, and France. *American Behavioral Scientist*, 51(2): 149-165. https://doi.org/10.1177/0002764207306047.

Brax, D. (2016). Hate Crime Concepts and their Moral Foundations: A Universal Framework? In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 49-64). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0004.

Brudholm, T. (2015). Hate Crimes and Human Rights Violations. *Journal of Applied Philosophy*, 32(1): 82-97. https://doi.org/10.1111/japp.12079.

Brudholm, T. (2016). Conceptualizing Hatred Globally: Is Hate Crime a Human Rights Violation? In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 31-48). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0003.

Brudholm, T. (2018). Hatred Beyond Bigotry. In T. Brudholm & B. S. Johansen (Eds.), *Hate, Politics, Law – Critical Perspectives on Combating Hate* (pp. 53-75). Oxford University Press. https://doi.org/10.1093/oso/9780190465544.003.0004.

Chakraborti, N. (2015). Mind the Gap! Making Stronger Connections Between Hate Crime Policy and Scholarship. *Criminal Justice Policy Review*, 27(1): 577-589. https://doi.org/10.1177/088740341559964.

Csonka, P. & Landwehr, O. (2019). 10 Years after Lisbon - How "Lisbonised" Is the Substantive Criminal Law in the EU? *The European Criminal Law Associations' Forum (EUCRIM*), 4(1): 261-266.

De Schutter, O. (2010). L'Europe des Droits de l'homme: Un Concerto a Plusieurs Mains. In E. Bribosia, L. Scheeck and A. Ubeda de Torres (Eds.), *L'Europe des Cours – Loyautés et Résistances* (pp. 259-281). Bruylant.

De Witte, B. (2019). The European Union in the Integrational System of Human Rights Protection – Solo Singer or Voice in the Choir? In E. Bribosia and I. Rorive (Eds.), *Human Rights Tectonics: A Global Perspective on Integration and Fragmentation* (pp. 225-241). Intersentia.

Dixon, B. & Gadd, D. (2006). Getting the Message? 'New' Labour and the criminalization of 'hate'. *Criminology & Criminal Justice*, 6(3): 309-328. https://doi.org/10.1177/1748895806065532.

Garland, J. (2012). Divided By a Common Concept? Assessing the Implications of Different Conceptualisations of Hate Crime in the European Union. *European Journal of Criminology*, 9(1): 38–51. https://doi.org/10.1177/1477370811421645.

Garland, J. & Funnell, C. (2016). Defining Hate Crime Internationally: Issues and Conundrums. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 15-30). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0002.

Gunthel, N. (2023a). Gendering Hatred – Adding 'gender' to the hate crime equation? *Women, Gender and Research*, 34(2): 27–42. https://doi.org/10.7146/kkf.v34i1.132020.

Gunthel, N. (2023b). Unveiling Hatred - Delineating Hate Crime Vulnerability of Veiled Women as a Human Rights Issue. *Scandinavian Journal of Islamic Studies*, 17(1): 35–53. https://doi.org/10.7146/tifo.v17i1.137338.

Hall, Nathan. (2005). *Hate Crime*. Routledge.

Haynes, A., Schweppe, J. and Walters, J.A. (2018). *Life Cycle of a Hate Crime – Comparative Report*. ICCL.

Hilal-Harvald, M. (2019). The Multilocal Genesis and Migration of the European Face Veil Bans. *Heidelberg Journal of International Law*, (79): 121-153.

Hurd, H. (2001). Why Liberals Should Hate "Hate Crime Legislation". *Law and Philosophy*, 20(2): 215-232.

Iganski, P. (2001). Hate Crimes Hurt More. *American Behavioral Scientist*, 45(4): 626–638. https://doi.org/10.1177/00027642010450040.

Iganski, P. & Sweiry A., (2016). How 'Hate' Hurts Globally. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 96-108). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0007.

Jacobs, J. and Potter, K. (1998). *Hate Crimes: Criminal Law and Identity Politics*. Oxford University Press.

Johansen, B. (2016). Hate as a Political Outcast. *Ethnologia Europaea: Journal of European Ethnology*, 45(2): 69-84.

Lawrence, F. (1999). *Punishing Hate: Bias Crimes under American Law*. Harvard University Press.

Lawrence, F. (2003). Enforcing Bias-Crime Laws without Bias: Evaluating the Disproportionate-Enforcement Critique. *Law and Contemporary Problems*, 66(3): 49-69. http://dx.doi.org/10.2139/ssrn.412360.

Levin, J. & McDevitt, J. (2020). Hate Crimes in Transition. In R.J. Sternberg (Ed.), *Perspectives on hate: How it originates, develops, manifests, and spreads* (pp. 179-201). American Psychological Association. https://doi.org/10.1037/0000180-009.

Mačkić, J. (2016). The European Court of Human Rights and Discriminatory Violence Complaints. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 233-246). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0015.

Mason-Bish, H. (2015). Beyond the Silo - Rethinking hate crime and intersectionality. In N. Hall, A. Corb, P. Giannasi and J.G.D. Grieve (Eds.), *The Routledge International Handbook on Hate Crime* (pp. 24-33). Routledge.

Mason, G. and Dyer, A. (2013). A Negation of Australia's Fundamental Values': Sentencing Prejudice-Motivated Crime. Melbourne University Law Review 36(3): 871-914.

Mason, G. (2015). Legislating Against Hate. In N. Hall, A. Corb, P. Giannasi and J.G.D. Grieve (Eds.), *The Routledge International Handbook on Hate Crime* (pp. 59-68). Routledge.

Mason, G., Maher, J., McCulloch, J., Pickering, S., Wickes R. and McKay, C. (2017). Policing Hate Crime – Understanding Communities and Prejudice. Routledge. https://doi.org/10.4324/9781315696508.

Micus, A. (2015). The Inter-American Human Rights System as a Safeguard for Justice in National Transitions. Brill.

Morgan, J. (2002). US hate crime legislation: a legal model to avoid in Australia. *Journal of Sociology*, 38(1): 25-48. https://doi.org/10.1177/144078302128756462.

Neumeyer, E. (2005). Do International Human Rights Treaties Improve Respect for Human Rights? *Journal of Conflict Resolution*, 49(6): 925–953. https://doi.org/10.1177/0022002705281667.

Özdan, S. (2022). *The Human Rights Challenge to Immunity in International Law*. Palgrave MacMillan.

Perry, B. and Alvi, S. 2012. “We are All Vulnerable”: The In Terrorem Effects of Hate Crimes. *International Review of Victimology*, 18(1), 57-71. https://doi.org/10.1177/0269758011422475.

Perry, B. 2001. *In the Name of Hate: Understanding Hate Crimes*. New York: Routledge. Perry, 2003

Perry, B. (2009). Counting – and Countering – Hate Crime in Europe. *European Journal of Crime, Criminal Law and Criminal Justice*, 18(1): 349–367. https://doi.org/10.1163/157181710X12816005399195

Perry, J. (2014). Evidencing the case for hate crime. In N. Chakraborti & J. Garland (Eds.), *Responding to hate crime: The case for connecting policy and research* (pp. 71-83). The Policy Press.

Perry, B. and Olsson, P. 2009. Hate Crime as a Human Rights Violation. In B. Perry, B. and P. Iganski (Eds.) Hate crimes. Vol. 2: The Consequences of Hate Crime (pp. 175-191). Praeger.

Peršak, N. (2019). Beyond public punitiveness: The role of emotions in criminal law policy. International Journal of Law, Crime and Justice, 57(1): 47-58. https://doi.org/10.1016/j.ijlcj.2019.02.001.

Peršak, N. (2022). Criminalising hate crime and hate speech at EU level: Extending the list of Eurocrimes under Article 83(1) TFEU. *Criminal Law Forum*, (33): 85–119. https://doi.org/10.1007/s10609-022-09440-w.

Peters, A. (2018). Corruption as a Violation of International Human Rights. *European Journal of International Law*, 29(4): 1251–1287. https://doi.org/10.1093/ejil/chy070.

Rempel, J. and Sutherland, S. 2020. Hate: Theory and Implications for Intimate Relationships. In Aumer, K. (Ed.), *The Psychology of Love and Hate in Intimate Relationships* (pp. 105-129). Springer.

Reynders, D. (2019). Guest Editorial. *The European Criminal Law Associations’ Forum (EUCRIM*), (4): 225.

Roter, P. (2014). Minority Rights in the Context of the EU Enlargement: A Decade Later. *Journal of Ethnic Studies*, 73(1): 5-27.

Schweppe, J. and Walters, M.A. (2016). *The Globalization of Hate: Internationalizing Hate Crime?*. Oxford University Press.

Shue, H. (2008[1980]). Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy. Princeton University Press.

Van der Aa, S., Hofman, R. and Claessen, J. (2021). A Comparative Perspective on the Protection of Hate Crime Victims in the European Union. *Erasmus Law Review*, 14(3): 170-180.

Walters, M.A. (2016). Challenging Orthodoxy: Towards a Restorative Approach to Combating the Globalization of Hate. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 294-313). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0019.

Walters, Mark. (2018). Repairing the harms of hate crime. See https://www.unafei.or.jp/publications/pdf/RS_No108/No108_10_VE_Walters.pdf

Walters, M.A. and Hoyle, C. (2010). Healing harms and engendering tolerance: The promise of restorative justice for hate crime. In N. Chakraborti, (Ed.), *Hate Crime: Concepts, policy, future directions*. Willan Publishing.

Walters, M.A. & Hoyle, (2011). Exploring the everyday world of hate victimization through community mediation. *International Review of Victimology*, 18(1): 7–24. https://doi.org/10.1177/02697580114224.

Walters, M., Owusu-Bempah, A. and Wiedlitzka, S. (2018). Hate Crime and the 'Justice Gap': The Case for Law Reform. *Criminal Law Review*, 12(1): 961-986.

Whine, M. (2016). National Monitoring of Hate Crime in Europe: The Case for a European Level Policy. In J. Schweppe & M.A. Walters (Eds.), *The Globalization of Hate: Internationalizing Hate Crime?* (pp. 213–232). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198785668.003.0014.

Whine, M. (2015). Hate Crime in Europe. In N. Hall, A. Corb, P. Giannasi and J.G.D. Grieve (Eds.), *The Routledge International Handbook on Hate Crime* (pp. 95-104). Routledge.

Zehr, H. (1990). *Changing Lenses: A New Focus for Crime and Justice*. Herald Press.

Cited caselaw

Alex Menson and Others v. United Kingdom, Application no. 47916/99. ECtHR, 6 May 2003.

Angelova and Iliev v. Bulgaria, Application no. 55523/00. ECtHR, 26 July 2007.

Anguelova v. Bulgaria, Application no. 38361/97. ECtHR, 13 June 2002.

Balázs v. Hungary, Application no. 15529/12. ECtHR, 20 October 2015.

Carabulea v. Romania, Application no. 45661/99. ECtHR, 13 July 2010.

Güleç v. Turkey, Application no. 21593/93. ECtHR, 27 July 1998.

Identoba and Others v. Georgia, Application no. 73235/12. ECtHR, 12 May 2015.

İlhan v. Turkey, Application no. 22277/93. ECtHR, 27 June 2000.

Karaahmed v. Bulgaria, Application no. 30587/13. ECtHR, 24 February 2015.

Lakatošová and Lakatoš v. Slovakia, Application no. 655/16. ECtHR, 10 November 2016.

McCann and Others v. United Kingdom, Application no. 18984/91. ECtHR, 27 September 1995.

Milanović v Serbia, Application no. 44614/07. ECtHR, 14 December 2010.

Nachova and Others v. Bulgaria, Applications nos. 43577/98 and 43579/98. ECtHR, 6 July 2005.

Škorjaneć v. Croatia, Application no. 25536/14. ECtHR, 28 March 2017.

Stoica v. Romania, Application no. 42722/02. ECtHR, 4 March 2008.

Cited legal sources

The Council of Europe. (1950). The European Convention on Human Rights (as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16).

The European Commission against Racism and Intolerance. (1996). ECRI General Policy Recommendation No. 1 on combating racism, xenophobia, antisemitism and intolerance (CRI(96)43).

The European Commission against Racism and Intolerance. (1998). ECRI General Policy Recommendation No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (CRI(98)30).

The European Commission against Racism and Intolerance. (2007). ECRI General Policy Recommendation No. 11 on combating racism and racial discrimination in policing (CRI(2007)39).

The European Commission against Racism and Intolerance. (2017[2002]). ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination (CRI(2003)8 REV).

The European Court of Justice. (2014). Opinion of 18 December 2014, *Case Opinion 2/13*, ECLI:EU:C:2014:2454.

The European Union. (2000). The European Charter of Fundamental Rights (2000/C364/01).

The European Union. (2008). Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/JHA).

The European Union. (2012). Consolidated Version of the Treaty on the European Union (C326/13).

The European Union. (2012). Consolidated Version of the Treaty on the Functioning of the European Union (C 326/47).

The European Union. (2012). Directive 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 (2012/29/EU).

The European Union. (2022). Council Regulation amending Regulation (EC) No. 168/2007 establishing a European Union Agency for Fundamental Rights (555/2022).

The Organization for Security and Co-operation in Europe. (1975). Conference on Security and Co-operation in Europe Final Act – Helsinki 1975.

The Organization for Security and Co-operation in Europe. (1990). Final Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

The Organization for Security and Co-operation in Europe. (2003). Final Document of the Eleventh Meeting of the Ministerial Council 1 and 2 December 2003 – Maastricht 2003.

The Organization for Security and Co-operation in Europe. (2006). Final Document of the Fourteenth Meeting of the Ministerial Council, Brussels, 4 and 5 December 2006 – Brussels.

The Organization for Security and Co-operation in Europe. (2009). Decision No. 9/09 on Combating Hate Crimes (MC.DEC/9/09).

The United Nations. (1948). The Universal Declaration of Human Rights.

The United Nations. (1966). The International Covenant on Civil and Political Rights.

The United Nations. (2001). The Rome Statute of the International Criminal Court.

The United Nations. (2002). Resolution on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

Other cited sources

EUCRIM. (2020). *Human Rights-Based Approach to Combat Transnational Crime*. https://eucrim.eu/articles/human-rights-based-approach-combat-transnational-crime/

Fair Trials. (2021). *Fair Trials urges European Commission to drop criminalization approach to hatred*.

O'Flaherty, M. (2019). *Fundamental rights-based policing*. https://fra.europa.eu/en/speech/2019/fundamental-rights-based-policing.

The Council of Europe. (2021). *Using a human right-based language in responding to hate speech: a challenge for equality bodies across Europe*. https://www.coe.int/en/web/inclusion-and-antidiscrimination/-/using-a-human-right-based-language-in-responding-to-hate-speech-a-challenge-for-equality-bodies-across-europe.

The Council of Europe. (2023a). *Values – Human rights, democracy, rule of law*. https://www.coe.int/en/web/about-us/values.

The Council of Europe. (2023b). *Who we Are*. https://www.coe.int/en/web/about-us/who-we-are.

The European Commission against Racism and Intolerance. (2023). *The European Commission against Racism and Intolerance (ECRI)*. https://www.coe.int/en/web/european-commission-against-racism-and-intolerance.

The European Commission against Racism and Intolerance. (2022). *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2022*.

The European Commission. (2014). *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* (COM(2014) 27 final).

The European Commission. (2019). *A EU High Level Group on combating racism, xenophobia and other forms of intolerance*. https://ec.europa.eu/newsroom/just/items/51025/en.

The European Commission. (2021). *Communication from the Commission to the European Parliament And the Council - A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime* (COM(2021) 777).

The European Monitoring Centre on Racism and Xenophobia. (2006). *Migrants' Experiences of Racism and Xenophobia in 12 EU Member States*.

The European Union. (2023). *Types of institutions and bodies*. https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en.

The European Union Agency for Fundamental Rights. (2009). *European Union Minorities and Discrimination Survey* (EU-MIDIS).

The European Union Agency for Fundamental Rights. (2012). *FRA survey of Jewish people's experiences and perceptions of antisemitism*.

The European Union Agency for Fundamental Rights. (2012). *Making hate crime visible in the European Union: Acknowledging victims' rights*.

The European Union Agency for Fundamental Rights. (2013). *EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey*.

The European Union Agency for Fundamental Rights. (2013). *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* (Opinion 02/13).

The European Union Agency for Fundamental Rights. (2014). *Violence against women: an EU-wide survey*.

The European Union Agency for Fundamental Rights. (2017). *Second European Union Minorities and Discrimination Survey* (EU-MIDIS II).

The European Union Agency for Fundamental Rights. (2023). *Who we are*. https://fra.europa.eu/en/about-fra/who-we-are.

The Organization for Security and Co-operation in Europe. (2014). *Hate Crime Data-Collection and Monitoring Mechanisms: A Practical Guide*.

The Organization for Security and Co-operation in Europe. (2023a). *What is the OSCE?*. https://www.osce.org/whatistheosce.

The Organization for Security and Co-operation in Europe. (2023b). *CSCE/OSCE Key Documents*. https://www.osce.org/resources/csce-osce-key-documents.

The Organization for Security and Co-operation in Europe. (2023c). *Hate Crime Data*. https://hatecrime.osce.org/hate-crime-data.

The United Nations Office on Drugs and Crime. (2023). *Human rights-based approach*. https://www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/human-rights-based-approach.html.

The United Nations Office of the High Commissioner on Human Rights. (2011). Human trafficking: A rights-based approach. https://www.ohchr.org/en/stories/2011/12/human-trafficking-rights-based-approach.

The United Nations. (2017). *Resource Book on the Use of Force and Firearms in Law Enforcement*. https://www.un-ilibrary.org/content/books/9789213630945s007-c003/read.

The United Nations. (2023). *Human rights-based Approach*. https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach.