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**Amnesty International submission to the European Commission and the  
Council of the European Union on the Framework Decision on racism  
and xenophobia (Council Framework Decision 2008/913/JHA)**

Ref: IOR 52/001/2013

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Amnesty International takes the opportunity provided by the review of the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (hereafter the Framework Decision) to submit considerations on its effectiveness in tackling hate crimes.

Amnesty International's work on hate crimes as well as research undertaken by other organizations, including the Fundamental Rights Agency of the European Union (FRA), has provided evidence of the pervasive occurrence in Europe of hate crimes motivated by race, ethnicity, religion or belief or other protected characteristics such as sexual orientation and gender identity.

The 2009 European Union Minorities and Discrimination Survey found that ethnic minorities are often victims of racially motivated crimes in Europe. For instance, almost one in five Roma or sub-Saharan Africans who were victims of a crime in the five years before the survey perceived it as being racially motivated.<sup>1</sup> Similarly, the recently published EU-wide "LGBT survey" by the Fundamental Rights Agency found that LGBTI individuals are highly vulnerable to violence, with one in four of those surveyed having experienced violence or the threat of violence in the last five years ahead of the survey.<sup>2</sup>

Hate crimes require a comprehensive response, including legislation and other policy measures to ensure competent authorities do the utmost to prevent hate crimes, that hate motives are duly taken into account from the outset of investigations, and that authorities firmly condemn any acts of violence that are allegedly motivated by hatred.

The Framework Decision has proved to be ineffective in tackling hate motivated violence. As further detailed in this submission, Amnesty International has documented many instances where the alleged hate motive associated with a crime remained covered during the investigation and prosecution phases, or where authorities, including the police, have not always used the powers at their disposal to prevent hate-motivated violence against individuals or communities<sup>3</sup>. Furthermore, in some instances, government representatives and political party leaders have regrettably not only failed to strongly condemn such violence but also expressed discriminatory views against members of ethnic and religious minorities or Lesbian, Gays, Bisexuals, Trans and Intersex (LGBTI) individuals.

More specifically, the Framework Decision has failed to ensure that:

- Member states comprehensively prohibit racist hate crimes and that investigative authorities use all their powers to uncover and acknowledge any alleged racist motive (section A of this submission);
- Member states adequately tackle all forms of hate crimes other than those perpetrated with a racist or xenophobic motive (section B).
- Member states adequately protect the right to freedom of expression when considering potential punishment of opinions on historical facts. (Section C).

## **THE OBLIGATION TO COMBAT HATE CRIMES**

### **International and regional standards**

Hate crimes are criminal offences against persons or property, where the victim, premises or target of the offence are selected because of their real or perceived connection to or membership of a group defined by a protected characteristic such as race, ethnicity, religion or belief, sex, sexual orientation or gender identity.

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<sup>1</sup> European Union Agency for Fundamental Rights, "European Union Minorities and Discrimination Survey-Main Results Report", 2009, page. 63.

<sup>2</sup> European Union Agency for Fundamental Rights Agency, "European Union lesbian, gay, bisexual and transgender survey-Results at a glance", 2013, chapter 2.5

<sup>3</sup> For more information see: Amnesty International's submission to the European Union on the implementation of equality directives, "Discriminatory police practices", page 12, Index number: IOR 61/002/2013.

Hate crimes constitute a form of discrimination<sup>4</sup> precisely because the target is chosen by the perpetrator on the basis of identity-related characteristics, such as race or sexual orientation, that constitute protected grounds of discrimination under international human rights law.

States have an obligation to exercise due diligence to protect everyone against hate crimes. Because hate crimes are also acts of discrimination, states' responses should form part of broader policies aimed at eliminating discrimination and promoting equality. Such policies should include public acknowledgement and condemnation by authorities and political leaders. This is essential to combat discrimination and the destructive message that such crimes send to individuals, groups and society and to build confidence within targeted communities in the ability and willingness of the state to protect their rights. Furthermore, when an alleged hate crime occurs, states should respond not only by pursuing suspected perpetrators, but by ensuring that the discriminatory motive underlying such a crime is unearthed by the police during the investigation and taken into account by prosecuting authorities, if the results of the investigation warrant doing so.<sup>5</sup>

The European Court of Human Rights have found in several instances that the authorities' failure to thoroughly investigate the alleged racist motive associated with a crime violated the European Convention for the Protection of Human Rights and Fundamental Freedoms, specifically the equal enjoyment of several rights set out by the Convention including the right to life (Article 2) and the right to be free from inhuman and degrading treatment (Article 3). The Court highlighted that *"when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention"*.<sup>6</sup>

To that purpose, states should introduce comprehensive laws that prohibit all forms of hate crimes<sup>7</sup>, and policies and practices aimed at ensuring the effective implementation of such laws and at providing guidance to investigative and judicial authorities on how to deal with hate crimes.<sup>8</sup> Unearthing the discriminatory motive is essential because this is what sets hate crimes apart from other common crimes. Ensuring that states continuously condemn the motives of such acts is crucial to demonstrating the willingness of the state to protect targeted minority groups on the basis of equality.

Human rights standards require states to do the utmost to unveil any alleged hate motive associated with a crime while remaining silent on whether such crimes should be punished with a harsher penalty. Amnesty International does not therefore take position in that respect. In any case the general principle of proportionality between the offence and the penalty should be applied.

## EU Law

The EU competence to combat discrimination is well established in the Treaties. In particular, Article 19 of the Treaty on the Functioning of the European Union (TFEU) provides the legal basis for the Council of the European Union to adopt measures aimed at combating discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 21 of the Charter of Fundamental Rights of the European Union, legally binding since 2009 for EU institutions and bodies and member states when implementing EU law, prohibits discrimination based on an open-ended list of grounds.

On the basis of Article 19 TFEU, the EU has adopted secondary legislation aimed at combating discrimination. Several directives are in fact already part of the EU *acquis* including the Race Equality

<sup>4</sup> Discrimination is « any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. ». Human Rights Committee, General Comment no. 18 : non-discrimination, para. 7.

<sup>5</sup> See the case-law of the European Court of Human Rights : *Nachova and Others v Bulgaria*, Applications nos. 43577/98 and 43579/98, 6 July 2005, *Stoica v Romania*, Application no.42722/02, 4 March 2008, *Šečić v Croatia*, Application no. 40116/02, 31 May 2007.

<sup>6</sup> *Stoica v. Romania*, para. 119.

<sup>7</sup> For instance Article 2 (1d) of the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) states that « Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization».

<sup>8</sup> See for example the European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, paragraphs 11-14.

Directive (43/2000), the Framework Employment Directive (78/2000), and the Gender Directives (Good and Services, 2004/113 and Employment 2006/54)<sup>9</sup>. Such directives set out a common definition of discrimination, including direct and indirect discrimination and harassment, and foresee the reversal of the burden of proof and identify instances where a difference of treatment on the basis of one of the protected characteristics does not constitute discrimination.

Combating racism and xenophobia is an explicit objective for EU policies in the areas of freedom, security and justice. Article 67.3 TFEU<sup>10</sup> indeed establishes that “the Union shall endeavour to ensure a high degree of security through measures to prevent and combat crime, racism and xenophobia (...)”. Furthermore, EU competences in the area of judicial cooperation in criminal matters include the possibility to adopt minimum rules aimed at tackling some forms of crimes<sup>11</sup>, or in other domains such as the rights of victims of crime.<sup>12</sup>

**Irrespective of the fact that they require a response which has to be partially grounded in criminal law, hate crimes constitute a form of discrimination. The EU response to hate crimes should stem from its competences to combat discrimination and be coherent with and integrated within its policies aimed at that purpose. Adopting enhanced measures to combat all forms of hate crimes is essential for EU anti-discrimination policies to be effective.**<sup>13</sup>

#### **A. The impact of the Framework Decision in combating racist and xenophobic hate crimes**

Article 4 of the Framework Decision establishes 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” for other crimes than those defined by its Articles 1 and 2.

The transposition of this article at the national level has not always resulted in the prohibition of all types of racist hate crimes (i). Furthermore, such provision, focusing on the penalty applicable to hate crimes, has not been implemented in a way consistent with the requirements under international and regional human rights law in terms of the authorities’ duty to use all their powers to unveil any alleged racist motive associated with a crime (ii).

##### **i) Lack of comprehensive prohibition of racist hate crimes**

Any act that constitutes a criminal offence under domestic jurisdiction can potentially amount to a racist hate crime if the target is chosen by the perpetrator on the basis of its real or perceived race or ethnicity or its association with a specific ethnic group.

EU member states follow different approaches to address racist hate crimes in their laws, policies and practices. Some have included offences perpetrated with a racist motive as stand-alone offences in their criminal law (for example Bulgaria, Hungary and Poland). Others have introduced provisions to ensure that the perpetration of any, or some, common crimes on grounds of hatred is an aggravating circumstance, which may result in a penalty enhancement in the phase of the determination of the sentence (for example Belgium, Denmark, Finland, France, Greece, Latvia, Portugal Romania, Spain, Sweden). Other countries have adopted a mixed approach (for example the Czech Republic, Italy, Lithuania, Slovakia). Amnesty International does not take a position on whether one of the above-mentioned approaches is more effective

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<sup>9</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>10</sup> Ex Article 61 TEC and ex Article 29 TEU, which served as a legal basis for the adoption of the Framework Decision.

<sup>11</sup> Article 83.1 TFEU.

<sup>12</sup> Article 82.2 TFEU. On this basis the EU adopted Directive 2012/29/EU of the European Parliament and 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. Recitals 56, 57, Article 22.3 of this Directive recognizes that victims of hate crimes may need special protection measures because of the high risk of repeat victimization.

<sup>13</sup> Article 83.2 TFEU establishes that “If 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 harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76”.

than the others in tackling hate crimes. In practice flawed responses to hate crimes have been found in countries that have adopted each one of the three approaches.

Existing research has highlighted that in practice several different types of crimes can be perpetrated with a hate motive including murder, attempted murder or physical attacks leading or not to bodily injuries. Although criminal law differs across the EU, it is crucial that EU standards on hate crimes reflect a common understanding that all acts constituting a criminal offence can be perpetrated with a hate motive. This is a pre-requisite to ensure that the investigation actually unmasks any potential hate motive associated with a crime. Currently, laws in some EU countries do not comprehensively prohibit all forms of racist hate crimes.

For instance Articles 162, 163 and 165 of the Criminal Code of **Bulgaria** define violence and group violence against a person or a property perpetrated on grounds including race, religion and nationality as stand alone criminal offences. No provision explicitly establishes that the hate motive associated with other crimes is an aggravating circumstance. Articles 116.2 and 131.12 establish penalty enhancements for murder and bodily injuries perpetrated with “hooligan motives”. “Hooliganism” is defined by Article 325 as comprising indecent acts, grossly violating the public order and expressing open disrespect for society. The Criminal Code does not however provide an explicit legal basis for taking into account the hate motive if associated with murder or inflicting bodily injuries or for considering such a motive whenever it is allegedly associated with other acts that constitute offences under Bulgarian legislation, such as for instance rape (Article 152 of the Criminal Code).<sup>14</sup>

In **Hungary**, Article 216 of the Criminal Code defines violence against a member of a community defined by a protected characteristic as a stand-alone offence.<sup>15</sup> However, it does not provide any other specific legal basis to ensure that any alleged hate motive associated with other criminal offences is thoroughly investigated and taken into account in the prosecution phase and in the trial of suspects.

In instances where other crimes, for example homicide (Art 160) or inflicting bodily injuries (Article 164), are perpetrated because of a “bias motivation”, the penalties are enhanced if compared to those foreseen for the same crimes when they are not committed because of a bias motivation. However, the Criminal Code does not explicitly establish what constitutes a “bias motivation”, whose interpretation is left to judges.

Amnesty International raised several concerns regarding Hungary’s response to racist hate crimes, including after the adoption of a new Criminal Code, which entered into force on 1 July 2013. In particular, the adoption of the new Code was not accompanied by additional measures aimed at ensuring the effective implementation of the provisions on hate crimes. Such measures should include binding guidelines for the police and judicial authorities aimed at ensuring that they do the utmost to unearth any alleged hate motive associated with a crime, including in cases where such a motive is not reported by the victims.

Amnesty International’s research on hate crimes perpetrated against Roma in Hungary has highlighted that legislative gaps, lack of specific guidelines on hate crimes, lack of training and, in some instances, prejudice within the police are resulting in failures to thoroughly investigate the alleged racist motivation associated with common crimes.<sup>16</sup> Furthermore, Amnesty International has documented several instances where the police failed to protect Romani individuals and communities from threats and violence from extremist and paramilitary groups.<sup>17</sup>

Hungary’s response to racist hate crimes was also criticised by human rights treaty bodies such as the Human Rights Committee<sup>18</sup> and other human rights bodies including the European Commission against Racism and Intolerance (ECRI).<sup>19</sup>

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<sup>14</sup> Since 2010, the Ministry of Justice has set up two working groups tasked to draft a revised Criminal Code. According to the latest version of the draft proposal seen by Amnesty International, some crimes, including murder (article 108 of the Draft) and bodily injuries (Article 123), but not all crimes, are associated with penalty enhancement if perpetrated on the basis of one of such “protected characteristics”. Violence perpetrated against an individual or property, incitement to violence or to discrimination or to commit a crime against a person on the basis of a “protected characteristic” are established as specific offences in the current draft (Articles 193-195).

<sup>15</sup> A new Criminal Code entered into force on 1 July 2013. Sexual orientation, gender identity and disability were added as explicitly mentioned grounds in Article 216 alongside nationality, race, ethnic origin and religion.

<sup>16</sup> Amnesty International’s report, “Violent attacks against Roma in Hungary. Time to investigate the racial motivation”, Index EUR 27/001/2010. Amnesty International’s public statement, “New Hungarian Criminal code: a missed opportunity to do more on hate crimes”, Index 27/003/2012.

<sup>17</sup> Ibid. 3.

<sup>18</sup> CCPR 2010 The State party should adopt specific measures to raise awareness in order to promote tolerance and diversity in society and ensure that judges, magistrates, prosecutors and all law enforcement officials are trained to be able to detect hate and racially motivated crimes.

## ii) Failure to investigate racist crimes

Unmasking any alleged hate motive associated with a crime requires a whole set of actions and measures to be put in place by law enforcement and judicial authorities. Although investigative practices may differ from country to country, these may include collecting thorough crime reports, promptly securing evidence and identifying witnesses who could clarify the circumstances under which the crime was perpetrated, getting information from victims on the specific language used by the offenders against them, analysing whether such language contained any explicit or implicit hate bias, and collecting specific evidence concerning the potential perpetrators' association with formal or informal groups that advocate hatred against minority groups.

Establishing that the racist motive should be considered as an aggravating circumstance, or otherwise taken into account in the determination of the penalties, which is the approach followed by **Article 4** of the Framework Decision, does not automatically ensure in practice that authorities take all the necessary steps to unveil any alleged racist motive associated with a crime, which is a requirement under international and European human rights law.

For example although **Greece** amended its Criminal Code in 2008 by establishing that any racist motive associated with a crime constitutes an aggravating circumstance, Article 79.3 has not, in practice, ensured that hate crimes are adequately addressed by the police before they are brought to Court.<sup>20</sup>

Research undertaken by Amnesty International as well as by other organisations shows that institutionalised prejudice, fear of further victimisation and lack of expertise constitute major obstacles for addressing hate crimes. The Racist Violent Recording Network has documented many instances where victims were faced with unwillingness or deterrence by the police when reporting alleged hate crimes.<sup>21</sup> In other instances, victims complained that although the police was present while the attack against them was taking place, they did not intervene or intervened only after the perpetrators had left the scene.<sup>22</sup>

Article 79.3 is ineffective in tackling hate crimes because it is relevant only for courts in the determination of the penalty. In practice this provision is applied by neither the police nor prosecutors in the investigation and prosecutions phases. The special prosecutor dealing with hate crimes in the region of Athens, Mr. Ornerakis, explained to Amnesty International's delegates that article 79.3 can only be applied by judges in the determination of the sentence after the trial and cannot be used by prosecutors to unearth any alleged racist motive associated with a crime during the criminal investigation.<sup>23</sup>

Cases of alleged hate crimes do not reach courts because of flaws in investigation practices, which often result in the hate motive being ignored, and of prejudice within or inaction by the police which make victims unwilling to report such cases. In particular, migrants in irregular situation, the group most targeted by hate motivated violence, do not report these attacks for fear of being detained or further victimised.<sup>24</sup>

The mandate of a special prosecutor dealing with hate crimes in the region of Athens was established in November 2012. Special police directorates and units tasked to tackle hate crimes have been recently established on the basis of a Presidential Decree adopted in December 2012.<sup>25</sup> These are certainly positive steps but their effectiveness remains to be assessed. In addition, further measures, including further binding guidelines for all investigative and prosecuting authorities, implementation of the existing ones (Circular No 7100/4/2 on the obligation of the police to investigate the racist motive), and provisions aimed at protecting victims and witnesses from arrest and deportation during the investigation and eventual prosecution of

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<sup>19</sup> Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI Report on Hungary (Fourth Monitoring Cycle)*, Adopted on 20 June 2008, 24 February 2009, CRI(2009)3.

<sup>20</sup> Article 79 para. 3 was amended in 2013 by Law 4139/2013. Gender identity was included among the explicitly protected grounds. Furthermore, the law established that the sentence for a hate crime cannot be subject to suspension.

<sup>21</sup> 2012 Annual Report of the Racist Violence Recording Network, at <http://www.unhcr.gr/1againstracism/en/2012-annual-report-of-the-racist-violence-recording-network/>.

<sup>22</sup> See *Police Violence in Greece: Not Just 'Isolated Incidents'*, AI Index: EUR 25/005/2012, pp. 20; Greek Ombudsman's Special Report, *The phenomenon of racist violence and how is being dealt with in Greece*, September 2013, p. 11.

<sup>23</sup> Meeting with Mr. Ornerakis, 2 April 2013.

<sup>24</sup> According to the data collected by the Network in 2012, in 79 out of 154 cases migrants in irregular situation were targeted with allegedly hate motivated violence.

<sup>25</sup> The Presidential Decree was signed on 12 December 2012. It restricts the scope of the special directorates and units to tackle hate crimes perpetrated on grounds of race although article 79.3 explicitly include also other grounds.

suspects, are needed in order to ensure that the utmost is done to unearth any alleged hate motive associated with a crime.<sup>26</sup>

## **B. Hate crimes perpetrated on other grounds**

Amnesty International is concerned that hate crimes perpetrated on grounds of discrimination other than race or ethnic origin are addressed neither by the domestic legislation in many EU member states nor by EU law.

Age, disability, religion or belief, sex, sexual orientation and gender identity are, among others, recognized protected grounds of discrimination under international and European human rights law. Authorities have the obligation to ensure that hate crimes perpetrated on those grounds are prohibited.

Sexual orientation, for instance, is in the list of discriminatory grounds included in article 19 TEU and article 21 of the CFR. Moreover, Directive 2000/78 explicitly prohibits discrimination on grounds of sexual orientation in the area of employment and occupation.

Although gender identity is not a ground explicitly mentioned in those legal instruments it is a protected ground of discrimination under international human rights law. Over the years, the UN expert bodies mandated to oversee the implementation of human rights treaties have clarified that treaty provisions prohibiting discrimination implicitly proscribe discrimination on the basis of age, marital status, health and disability, as well as sexual orientation and gender identity. In fact, these bodies have repeatedly noted in their authoritative comments on the treaties that, where treaties prohibit discrimination based on any 'other status', this includes sexual orientation and gender identity, and similarly, that treaty provisions proscribing discrimination based on 'sex' imply the prohibition of discrimination based on sexual orientation and gender identity.<sup>27</sup>

The United Nations Committee on Economic, Social and Cultural Rights has for instance established in its General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights that "[...] gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace".<sup>28</sup> The European Court of Justice has also established in its case law<sup>29</sup> that discrimination against those who intend to undergo, are undergoing or have undergone gender reassignment may amount to discrimination on grounds of sex, which is prohibited by EU law.<sup>30</sup>

Many EU member states have failed to adopt provisions that explicitly address hate crimes on grounds of sexual orientation and gender identity although existing data indicates that homophobic and transphobic violence often occurs in Europe.<sup>31</sup> Human rights treaty bodies have recommended states to undertake further

<sup>26</sup> Following the killing of Pavlos Fyssas, a musician and anti-fascist activist by a member of Golden Dawn, Greek authorities arrested and charged the leader of Golden Dawn, some MPs and several members of Golden Dawn and two police officers for forming a criminal organization (Article 187 of the Greek Criminal Code). In his findings regarding the charges brought against the leader, MPs and several members of Golden Dawn, the prosecutor of the Supreme Court stated «...it has to be noted that in certain cases whose number could be higher, members of the Greek police assisted or in the best case tolerated members of the organization (Golden Dawn) who were committing criminal offences, an element that has to be investigated more in depth », <http://www.tovima.gr/files/1/2013/09/29/porisma.pdf>

<sup>27</sup> See *Toonen v. Australia*, (CCPR/C/50/D/488/1992), UN Human Rights Committee, 4 April 1994, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>, *Young v. Australia*, (CCPR/C/78/D/941/2000), UN Human Rights Committee, para. 10.4; *X v. Colombia*, (CCPR/C/89/D/1361/2005), UN Human Rights Committee, para. 9; and Concluding Observations on Mexico (CCPR/C/MEX/CO/5), 17 May 2010, para. 21, and Uzbekistan (CCPR/C/UZB/CO/3), 7 April 2010, para. 22. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>, para. 32; UN Committee on the Rights of the Child (CRC), *General Comment No. 13: The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, available at: <http://www.unhcr.org/refworld/docid/4e6da4922.html>, paras. 60 and 72(g); Committee against Torture (CAT), *General Comment no. 2*, 24 January 2008, CAT/C/GC/2, para. 21; and Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 28 (CEDAW/C/GC/28)*, 19 October 2010, para. 18; UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 32, available at: <http://www.unhcr.org/refworld/docid/4a60961f2.html>.

<sup>28</sup> General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights, paragraph 32.

<sup>29</sup> CJEU, Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143, CJEU, Case C-117/01 K.B. v National Health Service Pensions Agency and Secretary of State for Health [2004] ECR I-541, CJEU, Case C-423/04 Sarah Margaret Richards v Secretary of State for Work and Pensions [2006] ECR I-3585..

<sup>30</sup> The United Nations High Commissioner for Human Rights pointed out in 2011 that sexual orientation and gender identity are protected grounds of discrimination and called on states to enact legislation tackling discrimination on those grounds and to thoroughly and promptly investigate alleged cases of violence, torture and other inhuman and degrading treatments perpetrated on those grounds. See: A/HRC/19/41, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights, 17 November 2011. Furthermore, the Committee of Ministers of the Council of Europe recommended its member states to: "ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them". It also called on them to "ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator". See: Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, recommendation 2.

<sup>31</sup> Ibid. 2.

steps to combat homophobic and transphobic hate crimes.<sup>32</sup> Amnesty International's research on these forms of hate crimes has concluded that legislative gaps as well as flaws in implementing existing legislation, policies and practices on hate crimes result in underreporting, partial investigation, insufficient support provided to victims and lack of comprehensive data collection mechanisms.<sup>33</sup>

### **C. The right to freedom of expression and the use of criminal law to punish opinions on historical facts**

The European Commission and the Council of the European Union should also take the opportunity of the review of the Framework Decision to strengthen protections for the right to freedom of expression. Doing so would help ensure that the Framework Decision is consistent with other international legal instruments and the growing international consensus on the impermissibility of laws criminalizing the expression of opinions regarding historical facts, which has solidified in the past five year period.

Major developments in international law and standards over the last five years relevant to this issue include the General Comment 34 of the UN Human Rights Committee, as well the Rabat Plan of Action on the prohibition of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence. The UN Committee on the Elimination of Racial Discrimination has also very recently produced a General Recommendation on the topic of racist hate speech.

These developments have underscored a growing consensus regarding several key points related to balancing the human right to freedom of expression with the struggle against hate speech. These include:

- i) a presumption against laws penalising the expression of opinions on historical events;
- ii) a presumption against the use of criminal punishment for unlawful expression, except in the most serious cases of advocacy of hatred that constitutes incitement to discrimination, hostility or violence;

#### **i) Presumption against laws penalising expressions of opinion on historical events**

While in specific instances, denial of, or other expressions of opinion on, historical events may amount to a coded form of advocacy of hatred that constitutes incitement to discrimination, hostility or violence, in many instances this will not be the case. Accordingly, laws which prohibit expressions of opinion on specific historical events or categories thereof risk being overbroad and prohibiting a great deal of protected expression. Articles 1(c) and 1(d) of the Framework Decision, by creating a presumption in favour of the criminal prohibition of such expression, are therefore problematic from the point of view of freedom of expression. The EU should therefore consider revising these provisions to set a requirement, in line with international law, of the prohibition of advocacy of hatred that constitutes incitement to discrimination, hostility or violence.

Such a revision would find support in important international legal developments which have taken place during the past five years. Notably, the UN Human Rights Committee produced a General Comment in 2011 on the right to freedom of opinion and expression which is critical of so-called "memory laws." The Committee states "Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20".<sup>34</sup>

In considering this question from the standpoint of the prohibition of racist hate speech, the UN Committee on the Elimination of Racial Discrimination (CERD) in its recent General Recommendation (2013) urges that

<sup>32</sup> In its 2010 Concluding observation on Poland, the Human Rights Committee highlighted that "The State party should ensure that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated. It should also: legally prohibit discrimination on the grounds of sexual orientation or gender identity; amend the Penal Code to define hate speech and hate crimes based on sexual orientation or gender identity among the categories of punishable offenses; and intensify awareness-raising activities aimed at the police force and wider public.". CCPR/C/POL/CO/6, 15 November 2010, paragraph 8

<sup>33</sup> Amnesty International, " Because of who I am : homophobia, transphobia and hate crimes in Europe", Index 01/014/2013.

<sup>34</sup> UN Human Rights Committee, General Comment 34 (2011), para. 49.

public denials or attempts to justify genocide or crimes against humanity should be offences only “provided that they clearly constitute incitement to racial violence or hatred”, and concludes – similarly to and citing the Human Rights Committee – that “the expression of opinions about historical facts’ should not be prohibited or punished.”<sup>35</sup>

As the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has argued, “historical events should be open to discussion...By demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are able to subjugate freedom of expression to official versions of events.”<sup>36</sup>

Restrictions on freedom of expression – even if limited to those in pursuit of a legitimate objective - may not lawfully go beyond what is necessary to achieve that legitimate objective. In its present form, by requiring the punishment of broad categories of expression, rather than only those instances in which such expression amounts to prohibited advocacy of hatred that constitutes incitement to discrimination, hostility or violence, the Framework Decision is at odds with several important international legal regimes.

## ii) A presumption against criminal punishment

Under international law, restrictions on expression “must be the least intrusive instrument amongst those which might achieve their protective function.”<sup>37</sup> This requirement of proportionality means that criminal sanctions – by nature the most severe type of restriction – are very often not the appropriate means by which to combat prohibited expression. The EU should ensure that the Framework Decision reflects the international requirement of reserving criminal punishment only for the most extreme forms of advocacy of hatred, and, if at all, as a last resort after less severe measures have been attended to.

Thus, while the International Covenant on Civil and Political Rights – to which EU states are parties – requires the *prohibition* of advocacy of hatred that constitutes discrimination, hostility and violence, “there is no requirement to criminalise such expression.”<sup>38</sup>

This conclusion has been strengthened in recent years by the Rabat Plan of Action, an outcome document produced after a series of regional expert workshops on the topic of balancing expression rights and the prohibition of advocacy of hatred, organized by the OHCHR and attended by governments and civil society. After studying the law and practice of countries in all regions of the world, the Rabat Plan of Action concludes that “criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations.”<sup>39</sup>

This is echoed in the General Recommendation of the CERD, who urge that “the criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than the criminal law.”<sup>40</sup>

In assessing whether it may be permissible to criminally punish advocacy of hatred, a key consideration is whether there is intentional incitement, as “negligence and recklessness are not sufficient.”<sup>41</sup> While **Article 1 of the Framework Decision** is clear that it applies only to intentional conduct, this could be further harmonised with international law by making explicit that this refers to a specific intent to bring about a result, not merely a general intent to commit the act, when done in a manner likely to bring about a prohibited result.

<sup>35</sup> UC Committee on the Elimination of Racial Discrimination, General Recommendation 35 (2013), para. 14.

<sup>36</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/67/357 (2012), para. 55.

<sup>37</sup> Human Rights Committee, General Comment 34, para. 34.

<sup>38</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/67/357 (2012), para. 47.

<sup>39</sup> Rabat Plan of Action, A/HRC/22/17/Add.4 (2013), para. 34.

<sup>40</sup> UC Committee on the Elimination of Racial Discrimination, General Recommendation 35 (2013), para. 12.

<sup>41</sup> Rabat Plan of Action, A/HRC/22/17/Add.4 (2013), para. 29(c); See also *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, For the UN Special Advisor on the Prevention of Genocide, by Toby Mendel, GT-DH-DEV A(2006)004, p. 45; *Jersild v. Denmark*, European Court of Human Rights, App. No. 15890/89 (1994); and Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred. Expert workshop on Europe (9-10 February 2011, Vienna), page 11.

In light of this, the Framework Decision's requirement of criminal prohibition and an insistence in **Article 3** on the possibility of imprisonment for crimes under this provision could be problematic, especially so if national laws do not require the intent to bring about a prohibited result. The Framework Decision may therefore allow restrictions on expression which fail the test of proportionality required by international law.

To conclude, Amnesty International considers that efforts to combat "hate speech" should reflect the principle that "all human rights are universal, indivisible and interdependent and interrelated."<sup>42</sup> By clearly situating robust protections for the right to freedom of expression alongside restrictions aimed at protecting the right to non-discrimination, both rights will be strengthened.

Because the right to freedom of expression is the "basis for the full enjoyment of a wide range of other human rights,"<sup>43</sup> restrictions – even those aimed at legitimate ends – which are unclear or too broad risk undermining all human rights.

### Conclusions and Recommendations

Amnesty International calls for the European Commission to highlight in its forthcoming report on the implementation of the Framework Decision that:

- A. Some member states have not prohibited all forms of racist hate crimes;
- B. Article 4 of the Framework Decision is not effective in ensuring that authorities do the utmost to unveil any alleged racist motive associated with a crime in the phases preceding the trial of suspects, particularly in the investigation;
- C. The restricted material scope of the Framework Decision is not in line with international and European standards on discrimination and is at odds with the need to tackle hate crimes perpetrated on grounds other than race;
- D. There should be a presumption against laws prohibiting expressions of opinion on historical events and against the use of criminal punishment for expression. These should only be used – if at all – for the most serious cases of intentional advocacy of hatred that constitutes incitement to discrimination, hostility or violence.

Amnesty International calls for the European Commission to propose a revised instrument that tackles these shortcomings and for the Council of the European Union to adopt such an instrument.

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<sup>42</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, para. 5.

<sup>43</sup> UN Human Rights Committee, General Comment 34, para. 4.