Partnership for Good Governance

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OPINION

ON THE DRAFT LAW: HATE CRIMES AND HOLOCAUST DENIAL – AMENDING AND SUPPLEMENTING CERTAIN ACTS

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The views expressed in this report are those of the author and do not necessarily reflect those of the Council of Europe. This report has been prepared as a result of an independent assessment by the consultant engaged under the Project „Supporting national efforts for prevention and combating discrimination in Moldova"

Contents

Executive Summary

This Opinion examines the compliance of the draft Law of the Republic of Moldova: Hate Crimes and Holocaust denial – amending and supplementing certain acts. It first reviews the European standards relating to hate crime and Holocaust denial. The Opinion then turns to an examination of the amendments that would be made through the adoption of the Draft Law and it concludes with an overall assessment of their compatibility with European standards. The amendments that would be effected by the Draft Law are generally compatible with European standards relating to the application of criminal sanctions to the use of hate speech and to the imposition of greater penalties on offences that can be characterised as hate crime. However, there is a need to delete the perception test for motivation from the proposed Article 134[14] of the Criminal Code and the proposed Article 46[2] of the Contravention Code, as well as caution in the actual application of the offence of propaganda of genocide or crimes of humanity in the proposed Article 135[2].

A. Introduction

1. This Opinion is concerned with the draft Law of the Republic of Moldova: Hate Crimes and Holocaust denial – amending and supplementing certain acts ("the Draft Law"). The Draft Law embodies amendments to be made to provisions in the Criminal Code of the Republic of Moldova and the Contravention Code of the Republic of Moldova (hereafter referred to respectively as "the Criminal Code" and "the Contravention Code").

2. The Opinion reviews the compliance with European standards of the amended versions provisions in the two Codes that would be effected by the adoption of the Draft Law.

3. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised, as are any other conclusions.*

4. The Opinion first reviews the European standards relating to hate crime and Holocaust denial. It then turns to an examination of the amendments that would be made through the adoption of the Draft Law and concludes with an overall assessment of their compatibility with European standards.

5. This Opinion has been based on an unofficial English translation of the Draft Law and has been prepared by Jeremy McBride[1] under the auspices the European Union and Council of Europe Joint Project on supporting national efforts in prevention and combating discrimination in Moldova as part of the programme Partnership for Good Governance.

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B. European standards

6. The amendments proposed in the Draft Law are concerned with conduct that can come within what is generally understood to constitute "hate speech" and "hate crime". These two concepts, although overlapping to a certain extent, are not identical. Moreover, the way in which they are actually defined in European standards is still evolving, with some important differences between the scope of "hard" and "soft" law. Furthermore, there are also differences between the particular responses which these standards require where the particular forms of conduct treated by them as either hate speech or hard crime occurs. This is especially so as regards whether the use of criminal sanctions is considered necessary or at least permissible.

7. There is no treaty provision specifically referring to either hate speech or hate crime but there are three international treaties[2] and three European ones[3] which contain provisions that deal with certain aspects of the conduct that can be regarded as falling within these two concepts. In addition, other aspects of such conduct are also addressed by the European Union's Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law ("the Framework Decision")[4] and a number of soft law instruments[5].

[2] Namely, the Convention on the Prevention and Punishment of the Crime of Genocide (under Article II the following acts are punishable: … (c) Direct and public incitement to commit genocide"; Article III. Furthermore Article II provides that "genocide" means "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group"); the International Covenant on Civil and Political Rights (Article 20(2) provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law") and the International Convention on the Elimination of All Forms of Racial Discrimination (Article 4 provides that "States Parties …(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof").

[3] Namely, the European Convention on Transfrontier Television (Article 7(1) requires that programme services shall not be likely to incite to racial hatred), the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (each Party to this is required by Articles 3-7 to adopt such legislative and other measures as may be necessary to establish as criminal offences the **d**issemination of racist and xenophobic material through computer systems, racist and xenophobic motivated threats, racist and xenophobic motivated insults, the denial, gross minimisation, approval or justification of genocide or crimes against humanity and the aiding and abetting of such conduct**)** and the Council of Europe Convention on preventing and combating violence against women and domestic violence (this refers to forms of violence against women that can also be manifestations of online/offline sexist hate speech: stalking (Article 34) and sexual harassment (Article 40) and requires that Parties take the necessary legislative or other measures).

[4] Under Article 1 of which "Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin; (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material; (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a

8. Moreover, the European Convention on Human Rights ("the European Convention"), although not having any provisions explicitly concerned with either concept, is particularly relevant to any measures taken to deal with conduct covered by the two concepts.

9. This is because of its provisions regarding the right to respect for private life, the right to freedom of expression, the prohibition of discrimination and the prohibition on abuse of rights in Articles 8, 10, 14 and 17, which the European Court of Human Rights ("the European Court") has found to require or permit the prohibition of certain conduct that amounts to either hate speech or hate crime.

10. In the current state of the evolution of European standards, it is not surprising that there is no universally agreed definition of what constitutes either hate speech or hate crime. However, some of essential elements of these two concepts are clear.

11. Thus, hate speech is concerned with forms of expression that promote or incite some or all of the following, namely, the denigration, hatred or vilification of a person or group of persons by reference to their personal characteristics. The denial of the Holocaust and the glorification of Nazi ideology are invariably seen as particular manifestations of such forms of expression.

12. Hate crime, on the other hand, is concerned with any criminal act that is motivated by bias or prejudice towards a particular group of people, i.e., by preconceived negative opinions, stereotypical assumptions, intolerance or hatred directed to a group sharing a particular characteristic. As a consequence, it necessitates not only that the conduct in question already be a "regular" criminal offence but also that it took place by reason of such bias or prejudice.

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member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group; (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group". In addition there is a requirement also to make the instigation, aiding and abetting of such conduct punishable (Article 2) and for any other offences to "take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties" (Article 4). In addition, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services requires Member States to ensure that such services provided by media services providers do not contain any incitement to hatred based on race, sex, religion or nationality.

[5] Notably, the recommendations of the European Commission against Racism and Intolerance and in particular ECRI General Policy Recommendation No. 15 On Combating Hate Speech ("ECRI GPR No. 15")(available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GeneralThemes_en.asp).

13. The characteristics underpinning the use of hate speech and the commission of hate crime will be ones such as race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity and sexual orientation. However, although some standards are not limited to these characteristics[6], others are only applicable where just some of them are involved.

14. In addition, it is generally a feature of European standards for there to be a requirement that the relevant conduct be intentional where it attracts criminal liability. A significant exception in this regard is ECRI GPR No.15. This provides that hate speech can also be regarded as having been used where the acts of violence, intimidation, hostility or discrimination can reasonably be expected to be the effect of using the form of expression concerned and so such use would be reckless. However, the approach seen in ECRI GPR No. 15 is consistent with a number of rulings of the European Court that have upheld the compatibility with Article 10 of the European Convention of the imposition of criminal sanctions for remarks made where those making them should have been appreciated that these were likely to exacerbate an already explosive situation[7].

15. When considering the compatibility with the European Convention of about the imposition of criminal sanctions and other restrictions on certain statements that might be regarded as hate speech, the European Court (as well as the former European Commission of Human Rights) has either regarded the remarks in question as entirely outwith the protection afforded by the right to freedom of expression under Article 10 – relying on the prohibition in Article 17 on acts and activity aimed at the destruction of any of the rights and freedoms in the European Convention - or it has sought to judge whether the measures concerned were a restriction on the exercise of that freedom that could be regarded as serving a legitimate aim - such as for the protection of the rights of others - and as being necessary in a democratic society.

16. The first approach can be seen with regard to vehement attacks on a particular ethnic or religious group[8], antisemitic statements[9], the spreading of racially discriminatory statements[10] and Holocaust denial[11].

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[6] Notably ECRI GPR No. 15.

[7] See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Sürek v. Turkey (No. 1)* [GC], no. 26682/95, 8 July 1999.

[8] See, e.g., *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007 and *Norwood v. United Kingdom* (dec.), no. 23131/03, 16 November 2004.

[9] See, e.g., *W P v. Poland* (dec.), no. 42264/98, 2 September 2004 and *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015.

[10] See, e.g., *Glimmerveen and Hagenbeek v Netherlands* (dec.), no 8438/78, 11 October 1979. See also *Jersild v. Denmark* [GC], no. 15890/89, 23 September 1994, at para. 35.

[11] See, e.g., *Honsik v. Austria* (dec.), no. 25062/94, 18 October 1995, *Marais v. France*) (dec.), no. 31159/96, 24 June 1996, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, at para. 47, *Garaudy v. France* (dec.), no. 65831/01, 24 June 2003, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005 and *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015.

17. However, it should be noted that the European Court has also found that there was no general international obligation to prohibit genocide denial as such and that a criminal conviction for such denial would not justified in the absence of a call for hatred or intolerance, a context of heightened tensions or special historical overtones or a significant impact on the dignity of the community concerned[12].

18. The second approach to the assessment of restrictions on expression has been followed in cases involving statements alleged to stir up or justify violence, hatred or intolerance. In respect of such cases, particular account has been taken of factors such as a tense political or social background, a direct or indirect call for violence or as a justification of violence, hatred or intolerance (particularly where there are sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups), the manner in which the statements were made and their capacity – direct or indirect – to lead to harmful consequences. It has emphasised that inciting to hatred does not necessarily entail a call for an act of violence or the commission of other criminal acts. It thus considers that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating such speech in the face of freedom of expression exercised in an irresponsible manner[13]. In all of the cases based on this approach, the European Court has always been concerned about the interplay between the various factors rather than any one of them taken in isolation[14].

19. However, a material consideration for the European Court in determining all cases involving the imposition of restrictions on expression will be whether or not the measures concerned were disproportionate, particularly as regards any criminal penalty applied and – where that has occurred - whether or not civil or other remedies might have been a sufficient alternative response.

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[12] See *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, at para. 280. Article 6(1) of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems requires Parties to "adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party".

[13] See, e.g., *Feret v. Belgium*, no. 15615/07, 16 July 2009 and *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

[14] See, e.g., *Incal v. Turkey* [GC],, no. 22678/93, 9 June 1998, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, *Karataş v. Turkey* [GC], no. 23168/94, 8 July 1999, *Erdoğdu and İnce v. Turkey* [GC], no. 25067/94, 8 July 1999, *Willem v. France*, no. 10883/05, 16 July 2009, *Dink v. Turkey*, no. 2668/07, 14 September 2010 and *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015.

20. In addition, the European Court has recognised that there is a positive obligation for member States to protect those targeted by the use of hate speech from any violence or other interferences with their rights which such use may actually incite others to attempt[15]. Furthermore, it has accepted that a racial or homophobic motive for violence involving a violation of the right to life or of the prohibition on ill-treatment will not only be a violation of Articles 2 or 3 but also of those provisions taken together with the prohibition on discrimination in Article 14 and thus an aggravating factor in the violation concerned[16].

21. In addition, the European Court has taken the view that discriminatory conduct is capable of amounting to a violation of the prohibition on inhuman and degrading treatment under Article 3 and that such conduct could be regarded as ensuing from passivity – including the failure to enforce criminal provisions effectively – in the face of interferences with rights and freedoms under the European Convention[17].

22. Moreover, the European Court has also accepted that a failure to provide redress for insulting expression, notably in the form of negative stereotyping, that is directed to a particular group of persons could entail a violation of the positive obligation under Article 8 to secure effective respect for the right to private life of a member of that group on account of this expression amounting to an attack on his or her identity[18].

23. Apart from Holocaust denial, the relevant case law of the European Court has focused primarily on conduct involving attacks on ethnic, racial and religious groups and this might be considered to echo other standards that only refer to such characteristics as a basis for taking action against hate speech or hate crime.

24. However, the European Court has also upheld the imposition of restrictions on leaflets that were disparaging or insulting to homosexuals[19]. Furthermore, the prohibition on discrimination in Article 14 of the European Convention is open-ended rather than limited and, as the Council of Europe Convention on preventing and combating violence against women and domestic violence and ECRI GPR No. 15 - in which the focus is on hate speech on grounds of "race"[20], colour, language, religion, nationality, national or ethnic origin, gender

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[15] *See, e.g., Ouranio Toxo and Others v. Greece, no. 74989/01, 20 October 2005, Begheluri and Others v. Georgia*, no. 28490/02, 7 October 2014, *Karaahmed v. Bulgaria*, no. 30587/13, 24 February 2015 and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.

[16] See, e.g., *Nachova v. Bulgaria* [GC], no. 43577/98, 6 July 2005, *Stoica v. Romania*, no. 42722/02, 4 March 2008 and *M C and A C v. Romania*, no. 12060/12, 12 April 2016.

[17] See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009.

[18] *Aksu v. Turkey* [GC], no. 4149/04, 15 March 2012. See also *Church of Scientology v. Sweden* (dec.), no. 8282/78, 14 July 1980.

[19] In *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

[20] GPR No. 15 states that: "Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term "race" in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation".

identity or sexual orientation - make clear there is a need for a firm response to conduct founded on discriminatory attitudes other than those referred to in treaty provisions and the Framework Decision[21].

25. In addition to its case law relating to hate speech and hate crime, the specific prohibition in Article 7 of the European Convention on no punishment without law is also a relevant standard to be observed where any criminal liability is being imposed.

26. The essential scope of this prohibition has been recently summarised by the Grand Chamber of the European Court in the case of *Vasiliauskas v. Lithuania*[22], which concerned a conviction for genocide. In its judgment, the European Court stated that

> 154. … Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from these principles that an offence must be clearly defined in the law, be it national or international. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see Korbely v. Hungary [GC], no. 9174/02, § 70, ECHR 2008; Kononov, cited above, §§ 185 and 196; Del Río Prada, cited above, § 91).
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> 155. The Court reiterates that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see S.W. v. the United Kingdom, 22 November 1995, § 36, Series A no. 335-B; C.R. v. the United Kingdom, 22 November 1995, § 34, Series A no. 335-C; Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; K.-H.W. v. Germany, cited above, § 45; Jorgic v. Germany, no. 74613/01, § 101, ECHR 2007-III; and Kononov, cited above, § 185).
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> 156. In the Jorgic case, there were two possible interpretations of the term 'to destroy' in the definition of the crime of genocide and the Court examined the compatibility of the applicant's conviction, on the basis of the wider interpretation (destruction of a distinct social unit as opposed to physical destruction), with Article 7 of the Convention. It stated

[21] See the last recital and paragraph 6 of the Explanatory Memorandum.
[22] No. 35343/05, 20 October 2015.

that an interpretation of the scope of the offence which was consistent with the essence of that offence "must, as a rule, be considered as foreseeable", although, exceptionally, an applicant could rely on a particular interpretation of the provision being taken by the domestic courts in the special circumstances of the case. The Court went on to examine whether there were special circumstances warranting the conclusion that the applicant, if necessary with legal advice, could have relied on a narrower interpretation of the scope of the crime of genocide by the domestic courts. The Court found that, whilst various authorities (international organisations, national and international courts as well as scholars and writers) had favoured both the wider and the narrower interpretations of the crime of genocide at the time of the impugned acts, Mr Jorgic, if need be with the assistance of a lawyer, could reasonably have foreseen the adoption in his case of the wider interpretation and, therefore, that he risked being charged with and convicted of genocide (cited above, §§ 108-114).

160. The Court also reiterates that, in principle, it is not its task to substitute itself for the domestic jurisdictions. Its duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Given the subsidiary nature of the Convention system, it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see Streletz, Kessler and Krenz, cited above, § 49, and Jorgic, cited above, § 102) and unless that domestic assessment is manifestly arbitrary (see Kononov, cited above, § 189) …

161. That being so, the Court nevertheless reiterates that its powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the Lithuanian courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of its purpose (see Kononov, cited above, § 198).

162. In sum, the Court's function under Article 7 § 1 is to assess whether there was a sufficiently clear legal basis, having regard to the applicable law in 1953, for the applicant's conviction (see Kononov, cited above, § 199). In particular, the Court will examine whether the applicant's conviction for genocide was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the operation of 2 January 1953 during which the two partisans, J.A. and A.A., were killed (see paragraph 25 above, also see Jorgic, cited above, § 103).

27. It is thus important to ensure that the formulation of any offence not only satisfies the requirements of accessibility and foreseeability but also does not include any element which might encourage the assessment of any impugned conduct by reference to an interpretation that would not be reasonably applicable at the time it took place.

28. Thus, European standards clearly admit the possibility of criminal sanctions being imposed in respect of conduct that amounts both to hate speech and hate crime and indeed there are

instances where the imposition of such sanctions is undoubtedly required. However, there are also a number of requirements to be observed where any such liability is adopted and subsequently applied. It also remains the case that there is no universal approach as to the scope of liability that is considered appropriate and there will, therefore, be some margin of appreciation left to States as to the approach that can be taken.

C. The Draft Law

Introduction

29. The nature of the amendments that would be effected by the Draft Law are effectively tenfold in character.

30. Firstly, a definition for the phrases "by reasons of prejudice, contempt or hatred" and "by reasons of bias, disdain or hate" would be introduced by the addition of new Articles 134^{14} and 46^{2} to respectively the Criminal Code and the Contraventions Code.

31. Secondly, the words "social, ethnic, racial or religious hatred" would be replaced by "prejudice, contempt or hatred" in various provisions of the Criminal Code. This would apply to one of the aggravating factors listed in connection with certain offences, namely, that in Articles 145.2(1), 151.2(i), 152.2(j) and 197.2.

32. Thirdly, an additional aggravating factor would be added to those already listed in respect of certain existing offences in the Criminal Code, namely, where the offence is committed for reasons of "prejudice, contempt or hatred". This would apply in respect of the offences in Articles 158.3, 160, 164.2, 166.2, 166^{1}.2 and 4, 171.2, 172.2, 184.2, 187.2, 188.2, 206.2, 222.2(b) and 287.2.

33. Fourthly, an aggravating factor would be introduced for the first time in respect of certain existing offences in the Criminal Code, attracting thereby liability to an enhanced penalty. This would apply in respect of the offences in Articles 155, 162, 163, 173, 193 and 282.

34. Fifthly, the words "form of sexual violence" would be replaced by "violent action of a sexual nature" in Article 135^{1} of the Criminal Code.

35. Sixthly, a new offence of propaganda of genocide or crimes against humanity would be introduced by Article 135^{2}.

36. Seventhly, another new offence of intentional actions aimed at incitement to hatred, discrimination or division would replace the existing one of deliberate actions aimed at inciting national, racial or religious hostility or discord in Article 346 of the Criminal Code.

37. Eighthly, a provision on general dispositions would be introduced into the Contravention Code as Article 46^1, together with the definition of the term "reasons of bias, disdain or hate" in a new Article 46^2.

38. Ninthly, an additional aggravating circumstance for the purpose of sentencing would be added to those already listed in Article 43.1 of the Contravention Code, namely, where the offence is committed for reasons of "bias, disdain or hate".

39. Finally, an aggravating circumstance would be introduced for the first time in respect of certain existing offences in the Contravention Code, attracting thereby liability to an enhanced penalty. This would apply in respect of the offences in Articles 69, 70, 75, 78, 104 and 354.

The definition

40. The introduction of a new Article 134^1 would provide a definition for the phrase "reasons of prejudice, contempt or hatred".

41. The reference to "reasons" can be understood to be a motivation for an act or omission and is itself unproblematic, although the elaboration of the definition does pose a problem.

42. The three terms on which the reasons are based embody all of the elements involved in the motivation for hate crime. It is not significant that they only comprise an aspect of what is involved in hate speech – the elements of vilification and denigration, in particular, are absent – since the purpose of the provision is to define rather than to constitute an offence.

43. The definition itself is comprised of two elements, namely, what is meant by the notion of "reasons of" in connection with the three terms prejudice, contempt or hatred" and the particular factors on which these are based.

44. The latter comprise a list of personal characteristics which include all those found in the prohibition on discrimination in Article 14 of the European Convention, as well as others, notably, "gender", "gender identity", "genetic features" and "sexual orientation".

45. This is not problematic as the elaboration of the grounds of discrimination in this and other such instruments is generally illustrative rather than exhaustive. Furthermore, "sexual orientation" has been recognised by the European Court as a prohibited ground of discrimination and, as has been seen[23], the ECRI GPR No. 15 has underlined that grounds

[23] See para. 24 above.

other than ones traditionally recognised may need protection from hate speech or hate crime.

46. The explanation given for "reasons of" is that they involve "The reasoning of the perpetrator due to his hostile attitude generated from reasons, whether real or perceived as real" deriving from the listed personal characteristics "against the victim or to persons who provide support or associated with them".

47. There is nothing problematic in reasoning being based on a hostile attitude to an individual or group of persons by reasons of their personal characteristics. Indeed, that is the essence of what measures against hate speech or hate crime should be directed. Furthermore, the broadening of the definition to cover those who are associated with the individual or the group of persons even though they do not share the relevant personal characteristics. This is because there is still a connection based on those personal characteristics. Moreover, the concept of "associated with them" is something that can be objectively established and it should be readily apparent to the perpetrator who might be covered by it, thus satisfying the foreseeability criterion in Article 7 of the European Convention.

48. However, the notion that the reasons can be "real or perceived as real" does seem problematic.

49. This is because the alternative to "real" of "perceived as real" introduces an element of subjectivity into the reasons without any indication as to what, if any, grounds might be required for such a perception to be regarded as valid. Moreover, it is not clear who should have the required perception as to the reality of the reasons; is it the victim or group of persons or those associated with them or an outsider such as the judge? It is also a significant.

50. Although there can be good reasons for measures to be taken against perceived as opposed to actual prejudice (including the need to investigate when there is a perception of prejudice in order to determine whether there was actual prejudice), it is not an appropriate basis for the imposition of criminal liability on anyone since it is not possible for the alleged perpetrator to anticipate that his or her act or omission might entail liability.

51. Certainly, the present formulation cannot be regarded as satisfying the requirement of foreseeability under Article 7 of the European Convention. Furthermore, the need for actual motivation rather than a perceived one is the approach seen in European standards for hate crime. Moreover, while ECRI GPR No. 15 does not insist on the existence of intent for the imposition of criminal liability for hate speech, it does require that any consequences of an expression to be reasonably expected. Such a test could not be satisfied where the criterion for prejudice is merely one of perception.

52. The requirement of an actual reasons does not preclude the possibility of inferring its existence from all the relevant evidence but that is not the same as allowing this to be determined by a particular person's perception as to their existence.

53. *The phrase "or perceived as real" should thus be deleted from the proposed amendment*.

Replacing the words "social, ethnic, racial or religious hatred

54. The proposal to replace the above terms by "prejudice, contempt or hatred" in Articles 145.2(1), 151.2(i),152.2(j) and 197.2 of the Criminal Code would result in an extension in one of the aggravating factors that can result in a higher sentence for the offences concerned.

55. This is not problematic in itself as it merely extends the characteristics for what already constitutes a hate crime. As has already been noted[24] there is nothing objectionable in such a step based on the characteristics concerned.

56. The only difficulty relates to the "or perceived as real" element in the definition that would be applicable to the words being substituted for the existing ones.

57. *There would thus be no problem with the proposed amendment so long as the definition in the proposed Article 134[1] is modified by the deletion of the phrase "or perceived as real".*

An additional aggravating factor for certain offences in the Criminal Code

58. The Draft Law would add the commission of the offence for "reasons of prejudice, contempt or hatred" to the list of aggravating factors in Articles 158.3, 160, 164.2, 166.2, 166[1].2 and 4, 171.2, 172.2, 184.2, 187.2, 188.2, 206.2, 222.2(b) and 287 but would not affect the penalty applicable where such factors are present.

59. This is not problematic in itself as it merely extends the list of offences that might be legitimately regarded as hate crimes to compelling a person to remove organs or tissues, illegal performance of surgical sterilization, kidnapping, deprivation of liberty, torture, inhuman or degrading treatment, rape, violent actions of a sexual character, violation of the right to freedom of assembly, robbery, burglary, trafficking in children, profanation of graves and hooliganism.

60. Furthermore, as has already been noted, there is nothing objectionable in such a step based on the characteristics concerned.

[24] See para. 45 above.

61. The only difficulty relates to the "or perceived as real" element in the definition of "reasons of prejudice, contempt or hatred" that would be applicable to the new offences.

62. *There would thus be no problem with the proposed amendment to these provisions so long as the definition in the proposed Article 134[1] is modified by the deletion of the phrase "or perceived as real".*

An aggravating factor for certain offences in the Criminal Code

63. The Draft Law would introduce for the first time an aggravating factor into the offences in Articles 155, 162, 163, 173, 193 and 282, thereby rendering perpetrators liable to an enhanced penalty. This would apply in respect of the offences of threatening murder or severe bodily injury or damage to health, withholding help from a sick person, coercion to actions of a sexual character, trespassing and establishment of an illegal paramilitary unit or participation therein.

64. This is not problematic in itself as it merely extends the list of offences that might legitimately be regarded as hate crimes.

65. Furthermore, as has already been noted[25], there is nothing objectionable in such a step based on the characteristics concerned.

66. Moreover, the heavier penalties that these new offences would attract do not seem disproportionate given the motivation for their commission.

67. The only difficulty relates to the "or perceived as real" element in the definition of "reasons of prejudice, contempt or hatred" that would be applicable to the new offences.

68. *There would thus be no problem with the proposed amendments to these provisions so long as the definition in the proposed Article 134[1] is modified by the deletion of the phrase "or perceived as real".*

The replacement of the words "form of sexual violence"

69. The Draft Law would replace the words "form of sexual violence" by "violent action of a sexual nature" in the reference to rape and other sexual assaults or gender-related acts in paragraph 1(e) of Article 135[1] of the Criminal Code as part of its elaboration of what constitutes offences against humanity.

[25] See para. 45 above.

70. The replacement phrase is a more accurate rendition of the phrase used in Article 7 of the Statute of the International Criminal Court, which reflects the generally accepted definition of crimes against humanity.

71. The proposed amendment is thus not problematic.

The propaganda of genocide or crimes against humanity

72. The Draft Law would introduce by an entirely new Article 135^2 an offence of propaganda of genocide or crimes of humanity.

73. The formulation of the proposed offence essentially follows that in Article 6(1) of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems – which the Republic of Moldova has ratified – and Article 1(c) and (d) of the Framework Decision. It is also a formulation that is reflected in the definition of hate speech in ECRI GPR No. 15. However, it adds an important qualification not found in them in that it specifically excludes from the scope of the offence "the fact of scientific research", which recognises a legitimate exercise of the right to freedom of expression[26].

74. Furthermore, the term "genocide" has been considered to satisfy the foreseeability criterion for the purposes of Article 7 of the European Convention[27].

75. The formulation of the proposed offence does not, therefore, seem to be inconsistent with European standards.

76. Nonetheless, it should also be noted that the European Court found a violation of Article 10 of the European Convention where statements about the Armenian genocide led to a conviction for a similarly framed offence. In so finding, the European Court stated:

> 280. Taking into account all the elements analysed above – that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in

[26] Note the observation in the individual opinion of Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein in *Faurisson v. France*, Communication No.550/1993, Views of the UN Human Rights Committee, 8 November 1996 that there was "every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people".

[27] See *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, at paras. 137-140 and 283-289.

Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case[28].

77. *Such a ruling does not necessitate the abandonment or amendment of the proposed offence but it does call for caution in its application to particular circumstances in the Republic of Moldova as a particular use there may equally be found to be contrary to Article 10 of the European Convention*.

Intentional actions aimed at incitement to hatred, discrimination or division

78. The Draft Law would recast the existing offence in Article 346 of the Criminal Code of deliberate actions aimed at inciting national, racial or religious hostility or discord by one of intentional actions aimed at incitement to hatred, discrimination or division. However, the only real substantive change would be the widening of the elements of incitement and limitation of rights and the elimination of any reference to "the humiliation of national honour or dignity".

79. Thus, the incitement now goes beyond "national, racial or religious hostility or discord" and covers "hatred, violence or discrimination or the national, territorial, ethnic, racial or religious non-peaceful split". In addition, the concern with limitation of rights is restricted to this being based on "national, racial or religious affiliation" and extends to "race, colour, ethnicity, national or social origin, citizenship, sex, gender, genetic features, language, religion or belief, political opinions or of any other similar nature, birth or ancestry, disability, health condition, age, sexual orientation, gender identity or any other similar criteria".

80. The existing offence is consistent with the general approach in many European standards relating to hate speech. Its broadening by these proposed changes embodies a wider range of personal characteristics than even those in GPR No. 15 but none are obviously not matters for which some protection might be inappropriate[29].

81. Furthermore the only change to range of penalties involves a doubling in the possible fine and none of those prescribed could, in principle, be regarded as disproportionate.

82. *The proposed changes are thus not problematic*.

[28] *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, at para. 280.
[29] See paras. 24 and 45.

General dispositions in the Criminal Code

83. The Draft Law would introduce into the Contravention Code a provision on general dispositions as Article 46^{1} and provide, pursuant to this, a definition for the term "reasons of bias, disdain or hate" in a new Article 46^{2}.

84. *The introduction of a provision on general dispositions is entirely unproblematic*.

85. However, the definition of "reasons of bias, disdain or hate" is at least partly so.

86. The actual term seems no different in substance from that of "reasons of prejudice, contempt or hatred" in Article 134^{14} of the Criminal Code and the difference in words may thus be no more than a matter of translation. Even if that is not the case, the alternative words are themselves equally as unproblematic as those in Article 134^{14} of the Criminal Code[30].

87. The explanation for the term "reasons of bias, disdain or hate" is also in substance the same as that found for "reasons of prejudice, contempt or hatred" in Article 134^{14} of the Criminal Code. As a result the only problem that arises relates to the possibility of the reasons being "perceived as being real"[31].

88. *There is thus a need to delete the phrase "or perceived as being real" from the proposed amendment*.

An additional aggravating factor for certain offences in the Contravention Code

89. The Draft Law would extend the list in Article 43.1 of the Contravention Code of aggravating circumstances for the purposes of sentencing so as to cover cases in which the relevant offence is committed for reasons of "bias, disdain or hate". It would not affect the penalty applicable where of the listed circumstances are present.

90. As with the provisions relating to aggravating circumstances in the Criminal Code, the only difficulty relates to the "or perceived as being real" element in the definition[32].

91. *There would thus be no problem with the proposed amendment to these provisions so long as the definition in the proposed Article 46^{2} is modified by the deletion of the phrase "or perceived as real".*

An aggravating factor for certain offences in the Contravention Code

[30] See para. 42 above.
[31] See paras. 46-51 above.
[32] See paras. 46-51 above.

92. The Draft Law an aggravating circumstance would be introduced for the first time in respect of the offences in Articles 69, 70, 75, 78, 104 and 354 of the Contravention Code, attracting thereby liability to an enhanced penalty. This would apply in respect of offences relating to insults, defamation, disclosing confidential information, deliberate destruction or damage to someone's goods and disorderly conduct.

93. This is not problematic in itself as it merely extends the list of offences that might legitimately be regarded as hate crimes.

94. Furthermore, as has already been noted[33], there is nothing objectionable in such a step based on the characteristics concerned.

95. Moreover, the heavier penalties that these new offences would attract do not seem disproportionate given the motivation for their commission.

96. The only difficulty relates to the "or perceived as being real" element in the definition of "reasons of bias, disdain or hate" that would be applicable to the new offences[34].

97. *There would thus be no problem with the proposed amendments to these provisions so long as the definition in the proposed Article 46[2] is modified by the deletion of the phrase "or perceived as real".*

D. Conclusion

98. The amendments that would be effected by the Draft Law are generally compatible with European standards relating to the application of criminal sanctions to the use of hate speech and to the imposition of greater penalties on offences that can be characterised as hate crime.

99. The only problematic matter relates to the inclusion in the definition of the motivating factors – whether "reasons of prejudice, contempt or hatred" in the Criminal Code or "reasons of bias, disdain or hate" in the Contravention Code – of these reasons being ones that are "perceived" and not just "real".

100. The imposition of criminal liability purely on the basis of perceptions would not satisfy the foreseeability requirement under Article 7 of the European Convention and is not consistent with the need for actual motivation rather than a perceived one seen in European standards for hate crime.

[33] See para. 45 above.
[34] See paras. 46-51 above.

101. *The deletion of the perception test from the proposed Article 134[14] of the Criminal Code and the proposed Article 46[2] of the Contravention Code would thus bring the Draft Law into line with European standards.*

102. *In addition, there will be a need for caution in the actual application of the offence of propaganda of genocide or crimes of humanity in the proposed Article 135[2].*