



Operational Guideline
On Investigation and Prevention of Crimes
based on Sexual Orientation and Gender Identity

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and Gender Identity

Human Rights Education and Monitoring Center

EMC

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“Human Rights Education and Monitoring Center” (EMC)- is a non-governmental organization working on human rights issues, which aims to promote the protection of the rights of marginalized and discriminated groups, including rights of workers, homeless individuals, people with disabilities, religious minorities, LGBTQI persons, etc., through research, advocacy and strategic litigation. The organization also monitors the ongoing institutional reforms in Georgia and supports the improvement of legal protective mechanisms and strengthening of the legislative framework. EMC is not a traditional human rights organization, it represents an open platform for human rights activists, and aims to create alternative spaces, empower civic activists and support their inclusion in civic initiatives.

Since 2015, the organization systemically works on LGBTQI issues through documenting violations of their rights and advocacy on national and international level. By criticizing state policy and engaging in legislative initiatives, the organization tries to support the elimination of homophobia and transphobia in the country

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Paul was awarded an OBE in the 2014 New Years Honours list for services to policing, equality and human rights.

Glossary of Terms¹

Gay – a synonym of homosexual. The term is often used to cover only men, and refers to a man, who is emotionally and physically attracted to men.

Gender identity – a person's self-perceived gender. An individual may self-identify as a male or a female. In some cases, however, their self-perception is between the social constructs of masculinity and femininity, or even transcends them. Gender identity might or might not be in agreement with a person's assigned gender at birth. Given that gender identity is inherent, it is not visible to others. Gender identity is different from sexual orientation.

Gender (self) expression – an external manifestation of gender, which is mainly displayed by “masculine” or “feminine” dress, appearance, manners, speech, or other kind of behavior. Gender expression is not always an indicator of sexual orientation or gender identity.

Gender non-conformity and Gender variance – an individual's protest and resistance against established gender “norms” and “compatibilities”. Gender non-conformity might be expressed independently of compatibility between a person's gender at birth and gender identity.

Gender dysphoria – a diagnosis, which is applied by psychologists and psychiatrists to describe the stress, which some individuals undergo because of the difference between their gender assigned at birth and their self-perceived gender.

Lesbian – a woman who is emotionally and physically attracted to women.

LGBT – an abbreviation, which is used to denote gay, lesbian, bisexual, and transgender people.

Men who have Sex with Men (MSM) – the term corresponds more with sexual activity, than identity. It is used to describe the behavior of all men, who have sex with men, despite their sexual orientation or gender identity.

Sexual Orientation – an individual's stable physical, romantic, emotional and/or spiritual attraction to another person. It includes lesbian, gay, bisexual, and heterosexual orientation.

Cisgender – the term cisgender refers to a person, whose gender identity and gender self-expression correspond to their assigned biological gender at birth and social expectations related to their gender.

¹ ILGA Europe's Glossary of Terms was used as a source; see: <http://old.ilga-europe.org/home/publications/glossary>

Sex –combination of characteristics (anatomical, physiological, biochemical, genetic), which distinguish female and male organisms.

Transgender –an umbrella term, which refers to people, whose gender identity, expression, and behavior are different from typical characteristics of their biological gender. This term includes also transsexual, transvestite, transgender, cross-dresser, and gender non-conforming people. Transgender persons can have hetero, homo, or bisexual orientation.

Transgender man –a person who was assigned female gender at birth, but self-identifies as a man. Transgender men are also called FtM (Female-to-Male)

Transgender woman – a person who was assigned male gender at birth, but self-identifies as a woman. Transgender women are also called MtF (Male-to-Female)

Transsexual –a person whose gender identity is different from their assigned gender at birth. Often transsexual people desire to correct their body by hormonal or surgical intervention in order to match it with their own gender identity.

Cross-dresser – a person who occasionally wears the type of clothes, which are traditionally associated with people of another gender. Cross-dressers are often comfortable with their biological gender and might not want to change it. Cross-dressing is a form of gender self-expression and might not be connected with orientation or sexual behavior.

Homophobia/Transphobia –irrational fear and hate of lesbian, gay, bisexual, and transgender people, which is based on prejudice, and is similar to racism, xenophobia, anti-Semitism, and sexism.

Heterosexism – belief, that heterosexuality is superior (religiously, morally, socially, emotionally, etc.) to other sexualities; prejudice that all humans are heterosexual. Belief that all humans have to be heterosexual. As an institutional system of oppression, heterosexism negatively influences LGBT people, and also some heterosexual individuals, who do not correspond to traditional understanding of masculinity and femininity.

Heterosexual – having an emotional, romantic, and sexual attraction to a person of the opposite sex and gender.

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Introduction

In Georgia, in the recent years, the increase in crimes motivated by intolerance exposed a critical need for the government to work out an effective fighting strategy, and implement it in practice. Nonexistence of a united and goal-oriented plan and strategy against discriminatory crimes, along with the government's inaction, and in some cases, ineffective policies towards vulnerable groups, created climate of impunity in the society and helped indirect legitimization of wrongful acts.

Current situation requires prompt reaction from the state. Continuously increasing intolerant approach to minorities, especially to LGBT community, brings the state before challenge to create a systematic, effective and human rights-oriented policy on the level of police and prosecutorial authorities in a timely manner.

Until today the measures taken by state in terms of reacting to and prevention of hate crimes have not been effective. On the contrary, lack of awareness of political and social causes of hate crimes and institutional shortcomings contributed to creating an essentially weak police system aimed at responding to an incident incapable of general crime prevention, identification of such crimes and pursuing consistent policy.

Studying the scale, forms and dynamics of hate crime can prove to be difficult. This is a result of existing gaps in the process of collecting official information for in-depth analysis. Despite this, however, the analysis of hate crimes/incidents and the research carried out by different organizations makes it possible to identify specific aspects of hate crime dynamics.

To this day, even in well-known cases against the LGBT group, in which the motive of homo/bi/transphobia was obvious, the response of the state has been inadequate.

Such cases illustrated the need for a detailed operational guideline for the law enforcement authorities focused on investigation, prevention, punishment and reparation of victims.

The goal of this document is to create a prerequisite for precisely such a manual. It will essentially assist Georgian Ministry of Internal Affairs to draft an internal guidance document on investigation and prevention of hate crimes.

Through multidisciplinary approach, this document attempts to devise a unified approach for eliminating hate crime motivated by homo/bi/transphobia. On one hand, it includes definitions and analysis of the main concepts related to homo/bi/transphobic crimes – through examination

of socio-economic and cultural factors theorization of the reasons behind and the consequences of homophobic and transphobic violence; prerequisites for transformation of such attitudes into crimes; overview of the typologies of criminals. On the other hand, the document describes in detail the object of bias and subjective indicators. The document will review issues related to basic standards of victim protection/assistance and their treatment; Further, it will explain in detail the best practices of different states in terms of crime prevention, increasing reporting rates, building trust and enhancing communication with the community, and institutional setting (special unit/agency). In addition, the document will provide relevant recommendations directed at each activity.

The goal and objective of the document

The goal of the document is support the ministry in drafting a technical, operational guideline for effective investigation, prevention of crimes based on homo/bi/transphobia, punishment of perpetrators of such crimes and reparation of victims.

It works out the framework of effectively reacting to crime by functional division between patrol police, detectives, and procurator's office. This is achieved by creating a theoretical foundation in order to explain theories on the nature of crime, homophobia and transphobia, in addition to typology of perpetrators. In addition, on each specific case, it explains the method of motive identification and evidence collection.

The objective of the report is to confront the identified institutional gaps and practical challenges with systematic and goal-oriented mechanisms, which will be aimed at reducing the existing violent practices towards LGBT persons, and contributing to restoration of justice by state in each specific case.

Methodology

Methodology for preparation of this guideline is based on a special operational guideline on hate crimes by Office for Democratic Institutions and Human Rights (OSCE/ODIHR). The structure of Hate Crime Data Collection Guideline and its innovative methods of hate crime prevention devised by the United States Federal Bureau of Investigation (FBI) were also used.

The discussion of standards for investigation of hate crimes is essentially based on the standards determined by the European Court of Human Rights and domestic legislation. Preparation of concrete proposals in the document was guided by recommendations to the state issued by var-

ious international and domestic mechanisms. In addition to that, the document referred to relevant best practices of different states in terms of fighting hate crimes. While working on the document existing principles and approaches were tailored to local context and needs, critically important issues were outlined and mechanisms analyzed in detail.

The theoretical perspectives in the document are based on research and other theoretical material conducted in relation to hate crimes as part of gender studies, work in social sciences and criminology.

In view of the goals and scale of this document, several research instruments were used simultaneously, namely the interdisciplinary method, conditioned by the nature of research subject and objectives of the document.

Research Limitations

Despite its comprehensive nature, the document, does not fully cover and analyze existing issues in relation to investigating hate crimes.

Further, sociological and criminological research referred to in the document does not cover all theories of explaining crime as phenomenon and its critical analysis. Its main function is to provide information and increase awareness on the subject, rather than examination of its theoretical aspects.

Chapter 1

Obligation and International Standard of Fighting Hate Crime

According to International Human Rights law, the state takes the responsibility to honor, without distinction, the recognized rights and ensure relevant guarantees.² This includes taking appropriate legislative means, which may be necessary for realization of rights recognized by international instruments for human rights protection.³ The states are obliged not only to achieve formal equality, but to acknowledge structural inequalities and discrimination of minority groups and to implement systematic policy in this regard.

In keeping with the standards established by the United Nations in International Covenant on Civil and Political Rights, states have the positive obligation to provide protection to the rights enshrined in the covenant. This is possible to be achieved entirely when individuals are protected from violation of their conventional rights, not only by government agents, but also from private individuals. Allowing illegal activities by third parties or not responding to them in a proper way, absence of due diligence towards crime prevention, punishment, investigation, and reparation of harm, will result in the failure of the state to observe obligations set by the Covenant.⁴

The standard of due diligence implies the **obligation of the government to prevent and investigate crimes, punish criminals, and compensate the victims.**⁵ The European Court of Human Rights referred to this standard in its landmark decision *Opuz v. Turkey*. Here the court criticized the state for the lack of due diligence in preventing crime.⁶ The said standard is applied in 19th general recommendation of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁷ Istanbul Convention takes note of the standard of due diligence also. It underlines the obligation of states to take necessary legislative or other actions in order to prevent and investigate crimes committed by private individuals, punish criminals, and provide reparation for the victims.⁸

2 International Covenant on Civil and Political Rights, article 2.1

3 International Covenant on Civil and Political Rights, article 2.2

4 CCPR/C/21/Rev.1/Add. 1326 May 2004, Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, par. 8.

5 CEDAW, General Recommendation N19, Violence Against Women, 1992, par. 9

6 CASE OF OPUZ v. TURKEY (Application no. 33401/02), 9 June 2009, Par. 146; 149

7 CEDAW, General Recommendation N19, Violence Against Women, 1992, par. 9

8 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), 2011, article 5

The standard of due diligence represents a unity of efforts which need to be made by the state in order to fulfil its obligation to protect individual rights from violation⁹. A Special Rapporteur of the United Nations on Violence against Women notes that “a state might become an accomplice if it systematically fails to fulfil its obligation to protect the rights of citizens from violation by private individuals.”¹⁰

According to legal precedents of the Inter-American Court of Human Rights, “An illegal act which violates human rights and which is not originally caused by a State (for example, because it is the act of a private person or because the person responsible has not been identified yet) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”¹¹

The State has a duty to take reasonable steps in order to prevent human rights violations and use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victims’ adequate compensation.¹²

Fighting hate crimes without the due diligence standard is impossible. This is because it poses real danger to functionality of a democratic society and rule of law, aims at dividing society and is not compatible with fundamental principles of human dignity and equality, on which are based the universality of human rights.

According to the current definition by OSCE Office for Democratic Institutions and Human Rights, hate crimes represent “*any criminal offence, including offences against persons or property, where the victim, subject or target of the offence are selected because of their real or perceived link, belonging, affiliation, support, or membership to a [specific] group*”¹³.

Combating hate crimes and incidents is, in most cases, dependent on relevant national regulations, adequate measures and procedures¹⁴. A state proactively combats crime by condemning a discriminatory motive, reflecting it in legislation, and taking practical steps. This also simplifies collection of statistical data for the purpose of its further examination, and ensures visibility of the group¹⁵.

9 Crimes of hate, conspiracy of silence – Torture and ill-treatment based on sexual identity, Amnesty International Publications 2001, chapter 5.

10 UN Doc. E/CN.4/1996/53, par. 32.

11 Velazquez-Rodriguez v. Honduras, Judgment of 29 July 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, par. 172

12 Velazquez-Rodriguez, (ser. C) No. 4, Judgment of 29 July 1988, par. 174

13 OSCE/ODIHR annual report for 2006, p. 9. see: <http://www.osce.org/odihr/26759?download=true>

14 Combating discrimination on grounds of sexual orientation or gender identity, Council of Europe standards, 2011, p. 21, see: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBT_EN.pdf

15 *Ib.*, p.22

It the report of 2015 the United Nations High Commissioner for human rights has indicated that a state has an obligation to observe the standard of due diligence in relation to murders and other forms of violence against the LGBT community. The United Nations protection mechanisms demand that the states comply with this obligation by legislative or any other means to eradicate, investigate, and respond with appropriate punishment to those incidents of hate crimes or incitement to such crimes, which are directed against LGBT persons, in addition, states need to provide protection and assistance to victims, without any kind of distinction.¹⁶

The first element of due diligence in terms of eradicating homophobic and transphobic crimes is its prevention. This, first of all, obliges states to provide adequate and relevant legislative means in order to fight crimes effectively. The Council of Europe recommendation CM/Rec(2010)5 urges the states to examine their legislative and other measures, review them, collect and analyze corresponding data so that it is possible to monitor and respond to direct and indirect discrimination on the basis of SOGL.¹⁷

Taking legislative measures implies the existence of a discriminatory motive as an aggravating circumstance in the national criminal code. However, apart from formal provision of legislative framework, states are obliged to adequately implement and take corresponding steps to put it into practice.¹⁸ By underscoring the motive of a crime in the criminal code, state sends an important message to potential criminals. It demonstrates that a society based on principles of justice and humanity will not tolerate such crimes, because of the recognition and awareness of the serious harm inflicted on victims. In addition, such legislation has a practical function, too. It facilitates that such crimes are more visible and simplifies data collection, in order for the state to take preventive steps.¹⁹

According to the Council of Europe recommendation, states have to ensure prompt, impartial and effective investigation of alleged crimes and other incidents based on based on the victim's sexual orientation and gender identity.²⁰ "Any homophobic or transphobic motive, on the basis of which a crime is perpetrated, has to be identified and accordingly recorded by law enforcement authorities, following effective, comprehensive and impartial investigation and have to be considered while bringing charges."²¹

16 A/HRC/29/23, 4 May 2015, par. 11

17 CM/Rec(2010)5, preamble

18 CM/Rec(2010)5, I.A.1

19 CM/Rec(2010)5, comments p. 21–22

20 *Ib.* I.A.1

21 AMNESTY INTERNATIONAL PUBLIC STATEMENT, 16 May 2013, Italy: the new government must be vocal in addressing double standards on hate motivated violence, p. 3–4

Legal precedents of the European Court of Human Rights employs the same approach. The European court has stated in its various decisions, that disregarding discriminatory motive during investigation or punishment, may constitute an indirect discrimination. In the case of *Angelova and Iliev v. Bulgaria* the court stated that „The Court reiterates that States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life, which must be discharged without discrimination, as required by Article 14 of the Convention. Moreover, 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 to turn 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“.²²

Further, the European Court stated in the case of *Identoba and Others v. Georgia* case, that the obligation of the government to prevent the hate crime committed by private individuals (as well as investigate a possible connection between discriminatory motive and criminal act), might be positioned in procedural aspect of article 3 of the convention. However, it may also be viewed as a positive obligation under article 14 to ensure protection of the fundamental right under article 3 without discrimination²³. The court notes that Georgian “domestic criminal legislation directly provided that discrimination on the grounds of sexual orientation and gender identity should be treated as a bias motive and an aggravating factor in the commission of an offence. The Court therefore considers that it was essential for the relevant domestic authorities to conduct the investigation in that specific context, taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question.“²⁴.

Apart from this, in a recent judgment of the European Court of human rights in the case of *M.C. and A.C. v. Romania*, concerning the violence during the 2007 gay pride parade in Bucharest. When examining positive obligation of the state, the court pointed out that „for the investigation to be regarded as “effective”, it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation as to the results to be achieved but as to the means to be employed. The authorities must have taken the steps reasonably available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the

22 *Angelova and Iliev v. Bulgaria*, No. 55523/00, judgment of 26 July 2007, para.115. also, *Nachova and other V. Bulgaria*, No. 43577/98, judgment of 6 July 2005, par. 160

23 ECHR, *CASE OF IDENTOBA AND OTHERS v. GEORGIA* (Application no. 73235/12), 12 May 2015, par. 63

24 *Ib*, par. 77

persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context²⁵. The court additionally remarked, that for the purpose of exposing discriminatory motive, government has a duty to take all measures existing in legislation to that the act is not considered identical to those crimes, which are not based on this motive.²⁶

OSCE practical guide on hate crime laws indicate that the effective handling of hate crime cases requires close co-operation across the criminal justice agencies and not only at the operational level, but also at the policy level. Having a uniform definition of hate crimes and systems in place will ensure the smooth flow of case information across the criminal justice system and will facilitate co-operation.²⁷

A document adopted during the Ministerial Council in 2009, decision no. 9/09 on combating hate crimes lists the key measures, which a state needs to carry out for the purpose of eradicating crimes.²⁸ The document is focused on collection of data on hate crime and making it public. In addition, it stresses the importance of making legislation inclusive and taking corresponding measures to encourage victims and witnesses to report about alleged hate crimes. The document also pays special attention to the need to introduce professional training for law-enforcement, prosecution and judicial officials to raise their knowledge and sensitivity in relation to such crimes.

Recommendation CM/Rec(2010)5 adopted by the Committee of Ministers of the Council of Europe on increasing responsiveness to hate crimes, calls for states to take all possible measures in order for law-enforcement authorities and judicial branch to have the necessary knowledge and skills for identifying such crimes and incidents, and assisting/supporting victims and witnesses²⁹. According to the recommendation, states need to take all possible measures in order to encourage that victims and witnesses of crimes based on sexual orientation and gender identity to address to law-enforcement authorities and report about the crime.

These minimal measures could include:

- „drawing up and disseminating a simple and comprehensible definition of “hate crimes” including the motive of sexual orientation or gender identity, aimed at the general public so that these crimes are more frequently reported and at the police services which log the complaints;

25 CASE OF M.C. AND A.C. v. ROMANIA, 12 April 2016, par. 111

26 *Ib.*, par. 114

27 OSCE Prosecuting hate crimes. A practical guide, p. 17-18, see: <http://www.osce.org/odihr/prosecutorsguide?download=true>

28 DECISION No. 9/09, COMBATING HATE CRIMES, see: <http://www.osce.org/cio/40695?download=true>

29 *Ib.*, I.A.3

- setting up training programs in order to ensure that the different structures of the law enforcement authorities, including the judicial system, possess the knowledge and skills required to provide victims and witnesses with adequate assistance and support;
- creating special units tasked, inter alia, with investigating crimes and incidents linked to sexual orientation or gender identity and special liaison officers for maintaining contact with local communities in order to foster a relationship of trust;
- placing special emphasis on the setting up of independent and effective machinery for receiving and investigating reports of hate crimes or hate-motivated incidents allegedly committed by law enforcement staff, particularly where sexual orientation or gender identity constitute one of the motives;
- introducing systems of anonymous complaints or online complaints or using other means of easy access and allow reporting by third parties in order to gather information on the incidence and particular nature of these incidents.³⁰

Reparation of the damage suffered as a consequence of homophobic and transphobic crime and adequate compensation are important elements of due diligence. In a report on discrimination and violence on grounds of sexual orientation and gender identity, a United Nations Commissioner stresses the obligation of states to ensure reparation of victims of homo/transphobic crime.³¹

According to UN Special Rapporteur on violence against women, the goal of reparation needs to be eradication of comprehensive and structural subordination, gender hierarchies, systemic marginalization, and inequality, which are fundamental causes of violence against women. Its aim cannot be to only return the victim to their pre-crime condition. Rather, it has to have a potential for transformation.³² In order to eradicate violence against women, it needs to be understood as an element which influences factors of a woman's individual, family, community, and social life. This goal demands that the governments show due diligence on both, systemic and individual levels.³³ The named standard similarly covers crimes based on sexual orientation and gender identity.

30 CM/Rec(2010)5, comments – general ideas, p. 23, see: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBT_en.pdf

31 A/HRC/29/23, par.78.b

32 A/HRC/23/49, par. 75

33 A/HRC/23/49, par. 20

1.1. Hate Crime Regulation and Institutional Challenges in Georgia

In the recent years, crimes based on sexual orientation and gender identity in Georgia have become systematic. However, responses of the government have not complied with the standards of effectiveness, promptness, adequacy, and impartiality. To this day, the state has not become aware of the negative effects of hate crimes, which might pose an essential threat to the principles of pluralism and equality in the society, as well as democratic and safe environment, ensuring of which falls under the obligations of the state.

On the institutional level, measures taken by the state in terms of fighting hate crimes are superficial and ineffective both for investigation, and eradication of structural causes of hate crimes. Despite essential improvement in the Legislative framework, which considers that the fact that criminal acts were based on sexual orientation and gender identity to be aggravating circumstance,³⁴ its practical implementation and use of it as an effective mechanism for protecting discriminated groups from violence has not been successful.

The provision regarding bias-motivated crimes was introduced to the Georgian legislation in 2012, when article 53.3¹ was added to the Criminal Code. However, the norm has not been put into practice either on the legislative or at the policy level. The norm was formally introduced and mainly related to the recommendation given by the European Commission against Racism and Intolerance, repeatedly pointing to the need of regulating hate crimes.³⁵ The declaratory nature of the new provision is further indicated by the fact that the state had not carried out an informational campaign on such crimes that could be helpful for stressing the principled policy of state against hate crimes and fostering trust of victims towards law enforcement authorities.

Since the adoption of the provision in 2012 and despite numerous hate crimes against the LGBT group in the meanwhile, a bias motive is not identified, recorded and appropriate punishment is not applied by the law enforcement and judicial authorities at the stages of investigation, pressing charges and imposition of sanctions. Moreover, in the official statistical database of the Georgian Ministry of Internal Affairs, no hate crime has been registered that was committed based on gender identity and sexual orientation.³⁶ According to the official position of the Ministry of Internal Affairs, the above-said article belongs to the general part of the code, and sets the prerequisites for imposing criminal sanctions, thus, this circumstance is taken into account by court when the sanction is imposed³⁷ and therefore it would be not advisable to include it in the electronic case management system³⁸.

34 Criminal Code, article 53.3¹

35 ECRI Report on Georgia, CRI (2010)17, fourth monitoring cycle, Adopted on 28 April, par. 11

36 Registered Crime in Georgia 2012-2015, MIA Information Center of Information-Analytical Department.

37 Response letter from Georgian Ministry of Internal Affairs N1189435, 03.06.2015

38 *Ib.*

Before 2016, the Prosecutor's Office of Georgia maintained the same approach. It did not keep records of hate crimes. The latter was explained by the argument that article 53.3¹ of the Criminal Code is a norm to be applied in terms of imposing sanctions by court based on its exclusive powers. However, according to the Prosecutor's Office, in the first half of 2016, article 53.3¹ was explicitly indicated in the resolution on charges of the presumed perpetrators in four criminal cases. All four cases were related to alleged hate crimes based on sexual orientation.³⁹ Despite the positive steps taken towards collection of data on hate crimes, these cannot be considered adequate in view of the number of crimes committed based on homo/bi/transphobia only throughout the previous year. The information gathered by non-governmental organizations about homo/bi/transphobic crimes, both regarding hate crimes committed in this and previous years is different from the government's official statistics. For example, according to a 2012 research⁴⁰ from among the 48 interviewed LGBT persons, 32% had at least once been a victim physical violence, while 89% of them had experienced psychological violence. From among the victims of physical violence in 2011-2012 – 60.87% were victimized once, 17.39% became victims twice and this happened to 21.74% of them three or more times. From among 134 respondents, who had experienced psychological violence (threats), 75.37% had experienced similar treatment three or more times, 11.94% – twice, and 12.69% of them- once⁴¹.

According to a research by organization "Identoba", from among 150 LGBT respondents, 45.83% pointed to the street as the place of an attack, 18.75% of them stated it took place in the family, and 14.58% said it happened in bar/club. Several incidents took place in public transport, 2 – in a store, and 4 – in various other places. As most frequently the street is the place for attacks, it can be concluded that the attackers on LGBT persons are mostly strangers. The most widespread forms of violence are beating (58.33%) and sexual violence (11.67%)⁴².

In 2014, research on the situation of transgender people showed that 9 out of 14 respondents had experienced physical violence because of their gender identity.⁴³ In 2015, a report showed that 20% of respondents had experienced physical violence, and 68% said they were victims of psychological violence. It needs to be remarked that despite a small decrease in the number of cases of violence, number of people who have experienced such treatment three or more times has increased.⁴⁴

39 Response letter from Georgian Prosecutor's Office N13/63344, 03.10.2016

40 „Situation of LGBT Persons in Georgia“ 2012, p. 28, see: http://women.ge/wp-content/uploads/2012/12/WISG_situation-of-lgbt-persons-in-Georgia_GEO-www.pdf

41 *Ib.*, p. 27-28.

42 I. Vacharadze, "Research of LGB Discrimination in Georgia", WISG 2012. p. 28. Also response letter from Public Defender of Georgia N 08-2/7110, 02.09.2015

43 N. Gvianishvili „Situation of Transgender Persons in Georgia“, WISG, 2014

44 E. Agdgomelashvili, "Needs of LGBT group in the field of healthcare", technical report, WISG, Tbilisi, 2015

For the purpose of adhering to obligations prescribed under the Human Rights action plan of 2014-2015, Minister of internal affairs on December 23, 2014 adopted instruction №47 on Measures to be taken by MIA divisions/agencies for prevention of discrimination and effective response to illegal acts based on discriminatory motives. The instructions foresees a direction to relevant employees of the ministry with respective authorities to indicate the “possible” existence of a bias motive and a specific discrimination ground under article 53.3¹ in corresponding field of electronic system of case management – “facts of the crime”, in case of crimes based on alleged discriminatory motives,. Information-Analytical Department of the ministry was assigned the responsibility for keeping the records. However, it needs to be noted that to this day, the instructions have not been put into practice. This can explained by internal institutional challenges, as well as the absence of political will to effectively combat homo/bi/transphobic crimes.⁴⁵

In addition, a recommendation relating to implementation of paragraph 3¹ of article 53 of the Georgian Criminal Code in relation to aggravating circumstances of a crime was prepared for the prosecutors by the human rights division of the Prosecutor’s Office of Georgia. The recommendation on viewing discrimination as an aggravating factor was reviewed by an expert of the European Council and was approved starting from 2016. However, the civil society has not been given the opportunity to get familiarized with the content of the recommendation, which makes it hard to evaluate its effectiveness.

Apart from the absence of statistics, as an important tool for prevention that has to be the basis for analysis of the core causes of crime, identification of possible target groups and devising strategies for fighting crime, low level of trust of hate crime victims towards law enforcement authorities and the problems of reporting represent major challenges. Qualitative research carried out by EMC shows that this is caused by combination of socio-economic factors, lack of trust and structural shortcomings of the law-enforcement system. Among others, the interviewed persons pointed to the fear of secondary victimization – reflected in cynical, insensitive and humiliating attitudes of law enforcement officers; risks of non-observance of confidentiality (especially in case of minor victims); risks of losing jobs and alienation from the agents of socialization (especially in regions, where relationships and sources of spreading information are tighter); past experience of ineffective police response; bureaucratic and lengthy procedures.⁴⁶

It is an essential challenge to achieve required knowledge and sensitivity of MIA employees and the Prosecutor to properly identify the motive of a crime. These challenges became apparent during the investigation of and criminal proceedings in important cases, such as the violent attacks on LGBT activists on May 17, 2013;⁴⁷ the murder case of transgender women – Sabi Beriani ⁴⁸ and Zizi Shekhlidze⁴⁹.

45 Response letter from Georgian Ministry of Internal Affairs N1189435, 03.06.2015

46 Qualitative research was carried out in 3 cities of Georgia – Tbilisi, Batumi, Kutaisi, during the first half of 2016

47 See Amicus Curiae prepared by EMC on May 17 case: <https://emc.org.ge/2016/01/22/amicus-curiae/>

48 See Amicus Curiae prepared by EMC on the case of Sabi Beriani’s murder: <https://emc.org.ge/2016/12/29/emc-197/>

49 see: <https://emc.org.ge/2016/10/23/emc-166/>

According to a report on implementation of 2014-2015 human rights action plan, employees of the Ministry of Internal Affairs are now being specially trained on hate crimes⁵⁰. However, these training sessions fall under the general framework of the issues related to prohibition of all forms of discrimination and human rights⁵¹ and does not entail capacity-building of specific competencies. Therefore, this cannot be seen as a thorough method for training MIA employees on hate crimes.

An essentially high rate of homophobia and transphobia in the society and state loyalty towards dominant discourses deters an implementation of the legislative framework and effective policy. Research conducted in 2015 on societal attitudes towards LGBT persons and their equal rights illustrated that the society expresses a very negative attitude towards the issues of equality rights of LGBT community. The homo/bi/transphobic attitudes are significantly influenced by the societal views on gender roles, as well as prevailing right-wing authoritarianism and religious fundamentalism.⁵² The fight against such hate crimes requires a comprehensive approach and examination/awareness of the needs and challenges of the community. Chaotic activities of law enforcement authorities, among others single training sessions and educational programs, cannot ensure an effective prevention of such crimes. The effective prevention can be achieved by developing unified strategy and plan that will take into account social dimensions of crime, needs of the community, as well as the psychological and sociological causes of such hate crimes.

For the purpose of increasing effectiveness of the fight against the violence and hate crimes directed to LGBT persons, the report of 2016 by European Commission against Racism and Intolerance (ECRI) on Georgia unambiguously stated that Georgia has to establish a specialized unit in law-enforcement system that will specifically deal with hate crimes based on sexual orientation and gender identity. Relevant experts from the Public Defender's Office, non-governmental and international organizations need to be involved in the process of such establishment.⁵³

The recommendation regarding the establishment of a similar unit under law enforcement system was given to Georgia in the framework of United Nations Universal Periodic Review (UPR) also.⁵⁴ Creation of such a unit is also supported by OSCE recommendations. They indicate that unit equipped with specific knowledge and sensitivity will probably be more effective in the pro-

50 Governmental action plan on human rights protection (2014-2015) executive summary, p.226

51 Response letter from Georgian Ministry of Internal Affairs N1966182, 07.09.2015

52 E. Agdgomelashvili „From Prejudice to Equality – research of societal knowledge, awareness and attitudes to LGBT group and their equality rights in Georgia”, 2016, p. 120

53 Report on Georgia, European Commission against Racism and Intolerance (ECRI), the fifth monitoring cycle, December 8, 2015, published on March 1, 2016, para 53, see: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/georgia/GEO-CbC-V-2016-002-GEO.pdf>

54 A/HRC/31/15 Report of the Working Group on the Universal Periodic Review Georgia, para. 118.10

cess of combatting discriminatory crimes⁵⁵. The government made a reservation in relation to the recommendation in the framework of UPR stating that in terms of concerns related to full coverage of the country, overload of cases and the need for comprehensive response to such crimes, a separate centralized police unit would not be an effective mechanism for combatting hate crimes. However, the Ministry of Internal Affairs undertook the responsibility to train specialized police officers in all regional police departments.⁵⁶

55 OSCE/ODIHR, PROSECUTING HATE CRIMES a practical guide, 2014, p. 77, see: <http://www.osce.org/odihr/prosecutorsguide?download=true>

56 A/HRC/31/15/Add.1, item 118.10. It is important to note that work on creating specialized groups against hate crimes was supposed to have begun in 2014, according to instructions N47 by Minister of Internal Affairs. Report by MIA reveals that departments of the ministry have already presented their position, and work is being done on general concepts of the group's activities (Response letter of Georgian Ministry of Internal Affairs N1966182, 07/09/2015); Prosecutor's Office explained that creation of a special department on investigating hate crimes is not planned.

Chapter 2

Main Concepts

2.1. Definition and Significance of Homophobia and Transphobia

In a resolution adopted by the European Parliament on January 18, 2006, the term “homophobia” is defined as: “an irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgender (LGBT) people based on prejudice and similar to racism, xenophobia, anti-Semitism and sexism”.⁵⁷

Consideration of homophobia, racism, xenophobia, antisemitism, and sexism together indicates on the one hand, similarity between social and psychological aspects that define each phenomenon, and on the other hand, stresses the necessity and significance of fighting homophobia as a dangerous social problem.⁵⁸

The term “homophobia” was coined by an English psychotherapist, George Weinberg. However, initially he used this term to refer to a clinical condition similar to other phobias. This definition described a personal attitude and did not denote the content of collective attitudes to homosexuals. Certainly, today it is not regarded as a phobia, as a manifestation of “fear”. Rather, it defines societal negative attitudes towards LGBT community.

It is also important to note that Weinberg considered homophobia as a specific form of prejudice of one group towards another. Such definition contributed to seeing such prejudice as a social problem. Generally, the use of a term “homophobia” played a decisive role in the 20th century in analyzing violence against, rejection and invisibility of gay and lesbian persons. It transformed assumptions of heterosexual society in such a way that the “problem” was localized as one stemming from in heterosexuals, who are intolerant towards gay, bisexual, and lesbian persons, rather than homosexuals themselves. In turn, this once again questioned the established gender roles in society, especially those of men.⁵⁹

Moreover, international use of the term once again stresses the significance of the problem, and puts an accent on the obligation to protect rights of LGBT persons.

57 European Parliament resolution on homophobia in Europe. P6_TA(2006)0018. 18 January 2006

58 Ekaterine Agdgomelashvili, journal “Me”, N2 (5), source: www.minority.ge

59 Gregory M. Herek “Beyond “Homophobia”: Thinking about sexual prejudice and stigma in the twenty-first Century”, Journal of Sexuality Research and Social Policy, San Francisco State University, Vol. 1, No.2, April 2004, p. 8

Until recently, scientists mostly studied the effects of homophobia on LGBT groups and its members. Less attention was paid to studying it as a social problem, and searching for its causes and ways to eradicate it.⁶⁰

In order to better understand social, psychological, and cultural factors of oppression faced by the LGBT community, Gregory Herek, a professor of psychology, outlined three important constructs. According to them, hatred based on the basis of sexual orientation exists in the form of shared knowledge, which is transformed into cultural ideologies defining sexuality. On the basis of the latter social groups are divided and given respective values. These cultural ideologies are expressed in societal structures, institutions and power relations, while individuals adopt and strengthen them by expressing it in their attitudes and actions.⁶¹

Individual members of the society might express their attitudes in different ways, however, what they have in common is the shared prejudice about the negative values of homosexual relationships, which produces stigma. Stigmatized people are not only different from the majority, but they are also condemned and discredited by the society because their identity is seen as a deviation from the norm. Therefore, they have less access to resources, as well as less power than other members of society.⁶²

Consequently, the stigma that exists towards any non-heterosexual relationship, identity, or group is a sexual stigma. Its final result is a hierarchical difference in powers of heterosexuals and non-heterosexuals. In the hierarchy of status and power, heterosexuality is prioritized. Homosexuality is devalued and considered inferior, members of LGBT community are considered to be “sick” and “immoral” unlike other members of the society while in the hierarchy of powers and status heterosexuals are privileged.⁶³ This is strengthened and encouraged by a cultural ideology such as heterosexism (similar to racism, sexism, anti-Semitism). Heterosexism rejects, denigrates and persecutes all forms of non-heterosexual behavior and identity, relationships and groups. Heterosexism is expressed in various cultural traditions and institutions such language, religion and even the legal framework.⁶⁴

These cultural ideologies encourage members of the society to adopt them. Therefore, they produce antipathy and prejudice on the basis of sexuality. This can be expressed in negative attitudes and behavior, including violence.⁶⁵

60 Ekaterine Agdgomelashvili, journal “Me”, N2 (5), source: www.minority.ge

61 Gregory M. Herek “Beyond “Homophobia”: Thinking about sexual prejudice and stigma in the twenty-first century”, National Sexuality Resource Center, San Francisco State University, Journal of NSRC, Vol.1, No.2, p. 14

62 Ib.

63 Ib., p.15

64 Ib., p. 16

65 Ib., p.16-17

In addition, apart from LGB groups, **transgender persons** represent the most marginalized and oppressed group. They often become victims of exclusion from public spaces, humiliation, labeling as “sick” from medical institutions and violence from other segments of society.⁶⁶

Transphobia, just like homophobia, represents a negative attitude towards transgender people. It refers to an irrational fear, hatred and discrimination of people, whose gender identity, appearance, or behavior does not correspond to established social norms.

Homophobia does not fully cover the harm that exists in society for transgender people. Therefore, it differs from crimes committed on the grounds of sexual orientation due to the fact that it might be caused by completely different predictors.

According to Julia Serano, American transgender activist and writer, just as “homophobia is driven by the repressed homosexual tendencies of homophobic people, transphobia is first and foremost an expression of one’s own insecurity about having to live up to cultural gender ideals. The fact that transphobia is so rampant in our society reflects the reality that we place an extraordinary amount of pressure on individuals to conform to all of the expectations, restrictions, assumptions, and privileges associated with the sex they were assigned at birth”⁶⁷.

Among transgender groups, transsexuals additionally experience other forms of prejudice, which rejects them from public spaces, and considers them as inferior men or women. The justification for this denial is generally founded on the assumption that the transperson’s gender is not authentic because it does not correlate with the sex they were assigned at birth. Further, the society attempts to create an artificial hierarchy with transsexuals on its lowest level.⁶⁸

According to Serano, cissexism, transphobia, and homophobia are all rooted in oppositional sexism, which is the belief that female and male are rigid, mutually exclusive categories, each possessing a unique and nonoverlapping set of attributes, aptitudes, abilities, and desires. Oppositional sexism attempts to punish or dismiss those of us who fall outside of gender or sexual norms because our existence threatens the idea that women and men are “opposite” sexes. This explains why bisexuals, lesbians, gays, transsexuals, and other transgender people (who may experience their genders and sexualities in very different ways) are so often lumped into the same category.⁶⁹

66 Julia Serano “Whipping Girl – A transsexual woman on sexism and scapegoating femininity”

67 *Ib.*

68 *Ib.*

69 *Ib.*

According to interviews with people, who believed that the violence against them was based on their sexuality identified it from what was said about their gender. Based on research on intersection of sexuality and gender, LGBT persons often indicate that the violence based on their gender is essentially connected with homophobia. Awareness of the latter makes the social processes connecting gender non-conformity with homosexuality more visible.⁷⁰

Because of a lack of education on transgender people, a cycle of fear and rejection is created. This, in turn, is expressed in intolerance and discrimination, and in radical cases, violence. In addition to this, unlike LGB persons, for transgender people it is hard to hide their gender identity. Their identity is more visible to society.⁷¹

The problems that transgender persons face in expressing freely their experienced gender reinforce the barriers to recognition of their preferred gender further perpetuated by the lack of public awareness about the reality of transgender persons' identities and lives. This creates a vicious circle of fear and ignorance reflected in intolerance and discrimination or even in more radical cases – hate-motivated violence. In addition to that unlike LGB persons, transgender individuals are less likely to be able to conceal their identity as it is more visible and easier to notice by society.

Therefore, by introducing the term “transphobia”, it is stressed once again that these crimes require a separate and special attention from governmental institutions and more importantly Ministry of Internal Affairs.

2.2. For the Better Understanding of the Phenomenon of Hate Crime

Because of its subjective nature, it is very difficult to create a whole, universal definition of hate crime. At different times researchers attempted to conceptualize its content. In its conceptualization, power imbalance in society is brought to attention, the victim represents socially or politically marginalized group, when the presumed offender is a member of the privileged majority.⁷² In addition, such crime represents not an isolated incident, but the result of a political culture that brings together rights, privileges and prestige based on biological or social characteristics.⁷³

70 Doug Meyer, INTERPRETING AND EXPERIENCING ANTI-QUEER VIOLENCE: RACE, CLASS, AND GENDER DIFFERENCES AMONG LGBT HATE CRIME VICTIMS, *Race, Gender & Class: Volume 15, Number 3-4, 2008* (262-282), p. 268

71 FRA, *Being Trans in European Union, Comparative analysis of EU LGBT survey data*, p. 9, see: https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf

72 Carolyn Petrosino “Connecting the Past to the Future, Hate crime in America”, Perry B. “A Reader: Hate and Bias Crime”, Routledge, New York-London, 2003, p. 9-26

73 Sheffield C. “Hate Violence”, 1995, p. 438 (as quoted, Chakraborti N., Garland J. “Hate Crime: Impact, Causes and Responses”, Second Edition, Sage publication, 2015, p. 3-6)

Thus, hate crime can be identified as a mechanism of power, the aim of which is to maintain an already existing social hierarchy through resorting to physical violence and threats. As a rule, it is aimed at those who are stigmatized and marginalized in the society. From this perspective, such crime is seen as an instrument for defending the order of the racial and gender differences.⁷⁴

As derived from these ideas, it should be noted that crimes based on prejudice and stereotypes are not finalized by the commission of specific actions or incidents, and neither do they develop in a social and cultural vacuum.⁷⁵ It is believed that in the case of such crimes, the victims themselves a specific victim carries only a symbolic meaning and they are accidental targets. The actions are not aimed at a specific person, rather towards an entire group which the individual either in reality, or by perception, belongs to.⁷⁶

In this regard, hate crime should be seen as an activity meant to communicate a message, as it is not directed specifically to the victim, but the entire subordinated group. Certainly, this widens the scope of the case and investigation far beyond the individual victim and spreads the feelings of vulnerability and desperation to other members of a group.⁷⁷ It has to be underlined that crimes motivated by intolerance and prejudice, based on the fundamental, inalienable identity of a person, are a lot more painful for the victim than crimes that did not have such a motive.⁷⁸

Policy, as well as academic papers, unambiguously point to the fact that the word “**hate**” should not be interpreted literally when investigating such cases. Moreover, the use of it may mislead law-enforcement authorities, who might assume that the individual must necessarily hate the victim or the group the victim belongs to for the crime to be categorized as hate crime. This, however, would not be a correct interpretation. The circumstance that turns a regular crime into a hate crime is the fact of selecting a victim by a perpetrator based on his prejudice and intolerance towards the group that the victim belongs to. Definitely, the latter does not rule out the possibility of experiencing a strong negative emotion such as “hate”, however proving this would be extremely difficult and accordingly, it cannot have a direct legal significance and effect.⁷⁹

Thus, when investigating such crimes, “hate” should be conceptualized as “prejudice.”⁸⁰ Such definition, naturally, led to further debates on what it should encompass and how it should relate

74 Barbara Perry “In the Name of Hate”, 2001, p. 3

75 *Ib.*

76 *Ib.*

77 Kellina M. Craig “Examining Hate-Motivated Aggression”, Perry B. “A reader: Hate and Bias Crime”, Routledge, New York-London, 2003, p. 117–130

78 Chakraborti N., Garland J. “Hate Crime: Impact, Causes and Responses”, Second Edition, Sage publication, 2015, p. 7

79 OSCE/ODHIR, Prosecuting Hate Crimes. A Practical guide, Warsaw, 2014, p.20

80 Jacobs and Potter 1998; Lawrence 1999 (as quoted, Chakraborti N., Garland J. “Hate Crime: Impact, Causes and Responses”, Second Edition, Sage Publication, 2015)

to the subjective nature of the crime (*mens rea*). The main question asked when defining hate crime is how, exactly, “prejudice” should be defined in the context of criminal law, and which “prejudices” should be draw attention of the criminal legislation.⁸¹

In academic textbooks, “prejudice” is defined as “an antipathy based on false and fixed generalization. It may be felt or expressed and be directed toward a group or an individual belonging to that group.”⁸²

In order to stress the importance of prejudice, the academic scholar Gordon Allport defined different stages when it comes to prejudice. According to his theory, even mild forms of prejudice can be a basis for aggression and violence.⁸³ The above-mentioned steps are as follows:

1. Verbal Aggression (name calling, stereotyping) – humiliating nicknames, making fun of. When the members of the majority joke about the minority group as a whole (the jokes are usually related to negative stereotypes and assessments). This is often referred to as hate speech. The majority does not see this as a problem. It is the first stage on the prejudice scale and paves way for more severe forms of aggression.
2. Avoidance (social marginalization) –members of the majority avoid the members of the minority group, and thus marginalize them. The group itself and issues concerning them become “invisible” for the society as a whole.
3. Discrimination (denying their rights, opportunities) – members of the majority are engaging in activity and trying to harm members of the minority group. For example, getting in the way of their education, employment. Denying them the services members of the majority use, etc.
4. Physical attack (physical violence, murder) – members of the majority, either individually or in groups, attack the members of the minority group, beating them up, destroying or appropriating their property.
5. Extermination (mass-murder, genocide) – members of the majority seek physical elimination of the minority group.

Certainly, the prejudice of an individual or a group towards marginalized or minority groups, does not mean that necessarily these emotional disposition will transform into violence. It does, nonetheless, point towards such a risk and danger.

81 Mark Austin Walters “A General Theories of Hate crime? Strain, doing difference and self control”, Springer, 2010

82 Gordon Allport “The Nature of Prejudice”, 1954,

83 Allport, G.W. (1954). *The Nature of Prejudice*. Reading, MA: Addison-Wesley.

Worldwide along with hate crime, the concept of “discriminatory crime” is also used. This is also a correct term, underlying the fact that the crime constitutes an extreme form of discrimination. Legislation in different countries refer to different terms for regulating such crimes. In Georgia Criminal Code, for instance, the reference is to the “bias motive” and as such, stresses the subjective emotional disposition of the perpetrator.

2.2.1. Existing Academic Theories on Hate Crime

Sociological and criminological theories involve an understanding of a wide spectrum of criminal and antisocial behavior. While the crime can be committed for a multitude of reasons, hate crimes are believed to be special because of their symbolic and functional characteristics.

The extent of homophobia and transphobia present in a society is dependent on several factors, such as group (societal) ideology, traditions, social-economic, political and demographic processes.

As a rule, the motive related to obtaining financial gain does not stand behind homophobic or transphobic crimes. Rather, mainly the immediate motive is to violently demonstrate the absence of acceptance for another person’s sexual orientation or internalized homophobia.⁸⁴

Various studies show that stressing homosexuality and gender roles as a moral choice, contributed to justifying negative attitudes towards homosexuality.⁸⁵ It has to be noted that homophobia is expressed by an individual level when individual’s desires/demands intersect with cultural ideological attitudes towards homosexuality. It can only be significant for an individual to express his/her anti-homosexual attitude if they are affiliated with a social group which rejects homosexuality.⁸⁶ Thus, when committing an offence, perpetrator of a hate crime does not act with a deviant belief, rather according to the beliefs of the majority.⁸⁷

Numerous criminological theories point towards the fact that antisocial behavior has a positive correlation with a high degree of attachment to a small social circles or small groups of friends, rather than an attachment to the society as a whole. In cases of homophobic or transphobic crime, however, this might be the other way around – the perpetrators have a strong connection with the

84 Nicholas A. Guittar “Micropanics: A Theoretical Explanation for Anti-Gay Hate Crime Perpetration”, *International Journal of Criminology and Sociological Theory*, Vol. 6, No.4, December

85 *Ib.*

86 Gregory M. Herek “The context of anti-gay violence, Notes on Cultural and Psychological Heterosexism”, *Journal of International Violence*, Vol. 5, No.3, September 1990, Sage Publications, Inc. p. 325

87 Nicholas A. Guittar “Micropanics: A Theoretical Explanation for Anti-Gay Hate crimes Perpetration, *International Journal of Criminology and Sociological Theory*, Vol.6, No.4, December 2013, 164-170

community at large. In fact, the individuals committing hate crimes are protecting a dominant ideology. Such loyalty is precisely what they try to justify acts otherwise believed to be brutal.⁸⁸ This helps minimizing/neutralizing their guilt and punishment. In such cases, in the eyes of the criminal, there is no victim, and the damage done to them is perceived as a deserved punishment, not a crime.

Theories described below attempts to explain the causes for hate crime to a certain extent, something that might be useful for criminal justice system for planning effective measures in terms of prevention of homophobic and transphobic crimes.

Social Identity Theory

According to the social identity theory, each social unit or group creates their own criteria for membership in favor of their unit at the expense of another group's identity.⁸⁹ According to this theory, in an effort to positively differentiate our group(s) from other groups, we emphasize our perceived superiority on some valued dimension (religion, race, sexual orientation, etc.). We do not belong to one social group; rather we maintain multiple social identities. Our beliefs and actions in any given context match up with the characteristics of our unit and our corresponding social identity. Accordingly, it is our desire to differentiate ourselves from other groups that drives people to perpetrate hate crimes against members of other groups.⁹⁰

“Heterosexuals use denigration and discrimination, including violence, to create a negative perception of gays and lesbians and thereby to create a positive differentiation between them and others; this results in essential increase of self-esteem in them.”⁹¹

Despite the fact that the social identity theory was widely used, it does not explain why, exactly, one group picks another in order to stress on their own differences.

88 Sykes and Matza, „Techniques of Neutralization: A Theory of Delinquency”, American Sociological Review, 1957, 22(6):664-670 (as quoted, Nicholas A. Guittar “Micropanics: A Theoretical Explanation for Anti-Gay Hate crimes Perpetration, International Journal of Criminology and Sociological Theory, Vol.6, No.4, December 2013, 164-170)

89 Nicholas A. Guittar “Micropanics: A Theoretical Explanation for Anti-Gay Hate crimes Perpetration, International Journal of Criminology and Sociological Theory, Vol.6, No.4, December 2013, 164-170

90 lb.

91 Hamner, K.M. “Gay Bashin: A social identity analysis of violence against lesbian and gay men”(as cited Nicholas A. Guittar “Micropanics: A Theoretical Explanation for Anti-Gay Hate crimes Perpetration, International Journal of Criminology and Sociological Theory, Vol.6, No.4, December 2013, 164-170)

Theory of “Doing Difference”

The theory was developed by Barbara Perry in her influential book, “In The Name of Hate”. Perry states that we should see hate crime as an extreme form of discrimination, which stems from the culture of segregating, discriminating and marginalizing those that are “different” from the society.⁹² She believes that in the modern society, the hierarchy of power involves dominating over those that are “different.”

Precisely the marking of difference is used for creating intersectional social hierarchies along divisions such as gender, sexuality, class and race. In this process a concrete identity becomes hegemonic, and accordingly, any member of the society that does not have such identity will be others and different.⁹³

Such generalized “mythical norm” dictates the society on how it is to function.⁹⁴ Hate crimes are the result of the conflict between such norms and the invented threats against the culture developed by the society. Thus, a certain segment of the society is subordinated in the hierarchy, reinforced by both public and private institutions. For example, if a lesbian woman publicly announces her identity, this is seen as a threat towards the heteronormative society.⁹⁵

According to the theory, the fear towards the “different” that is presented as a threat to the social group and cultural norms, may turn into feelings of helplessness and other negative emotions. As a response, some individuals may take more radical measures against those people, who were the direct cause of such feelings of helplessness.⁹⁶

Strain Theory

According to this theory, hate crimes are symptoms of the strain placed on a community. Communities that have a functional and solidified social and economic structure tend to have less strain compared to those where the community system has flaws. Accordingly, in a neighborhood with a very low socioeconomic status, limited opportunities, and lack a clear social structure, strain can be caused by the lack of basic needs, social support, personal responsibility and feelings of uselessness, cultural racism, and prejudice.⁹⁷

92 Perry B. “Accounting for Hate Crime: Doing Difference”, Perry. B “Hate and Bias Crime”, New York, Routledge, 2003, 97-108
93 *Ib.*

94 Lord A.”Age, Race, Class and Sex: Women Redefining difference. *Cultural Politics*, 11, 374-380, 1997 (as cited, Nicholas Gala, M.S. “Hate Crimes: A Conceptual Overview and Analysis”, *Gallaudet Chronicles of Psychology* 2015, Vol.3, No.2, p. 6)

95 Walters M.A. “A general Theories of Hate crime? Strain, Doing Difference and Self Control”, Springer, Science+Buisness Media B.V. 2010

96 *Ib.*

97 Nicholas Gala, M.S. “Hate Crimes: A Conceptual Overview and Analysis”, *Gallaudet Chronicles of Psychology* 2015, Vol.3, No.2, p. 7

The essence of the theory is that deviant behavior is caused by a gap between culturally defined goals (which should be achieved) and socially structured means (with which they should be achieved). To be more specific, the feeling of frustration when trying to achieve success as set by the society triggers negative behavior.⁹⁸ The success of a modern human being is measured by their well-being, accumulated material wealth and status. However, today when “a society is divided by race, class and gender, access to resources necessary for achieving these goals is unequal and limited.”⁹⁹ Not every person can achieve these goals, which reinforces the strain, especially for those who belong to a lower class, have less access to education and have limited employment opportunities.¹⁰⁰

Those people who, according to this theory, suffer from strain, do not have identical reactions to their own failures. However, there will be categories of people who will strengthen their status by victimizing others. Different authors state that youth belonging to lower social class tend to use violence as an alternative means of achieving success, status and prestige, which they were deprived of up to that point.¹⁰¹ Thus, by acting against minorities, they emphasize their own capabilities. For example, according to Levin and McDevitt’s typology of offenders, attention is paid to youth subculture, marked by alienation, mobilization in the underground, economic instability and a loss of privilege. As a response, either as individuals or in groups, the young men try to adapt to their environment by attacking others, through creating a “reason” for their weak position and victimization of others.¹⁰²

It should be noted, however, that despite very precise emphasis of these theories, none of them independently can fully explain the reasons behind hate crimes. Analyzing them will be more effective and useful when considered together. Nonetheless, the theories might not be all too relevant to the local context considering existing politicized nature of LGBT issues and its instrumentalization. However, the theories may be a good basis for conducting similar in-depth research and for future preventive measures to be adopted against homophobic / transphobic crimes.

2.2.2. Typology of offenders

There has not been any research done in Georgia that would help create and analyze the profiles of the offenders and develop preventive measures, or would make it possible to base educational activities on such analyses.

98 Perry B. “In the Name of Hate”, Routledge, New York-London, 2001, p. 35

99 Ib.

100 Ib.

101 eg. Miller, Cohen, Cloward, Ohlin (as cited, Perry B. “In the Name of Hate”. 2001, Routledge, New York-London, p. 36)

102 Perry B. “In the Name of Hate”, Routledge, New York-London, 2001, p. 36

There are few researchers who had worked on analyzing the types of offenders committing hate crimes. The scholarship, for the most part, explains the actions of the offenders and their immediate motivations.¹⁰³ These studies, however, have their flaws, too. The typology offenders mostly used today is based on the work of Levin and McDevitt, which was later on expanded by McDevitt. The authors used 169 different cases of hate crime from the Boston police department. Based on these cases, they managed to outline four categories of offenders:¹⁰⁴

- “Thrill-seeker”
- “Defensive”
- “Retaliatory”
- “Mission-based”

Levin and McDevitt’s research showed that in 66% of all cases, the offenders fell under the category of thrill-seekers. The members of this category are typically young men, who act in small groups, and are sometimes under the influence of alcohol. In some cases, their actions are related to sports and a desire to have fun. Such people often intentionally go to areas of the city where either gay bars or churches / places of worship are located, and deliberately pick their targets. It should also be noted that the selected victim is not accidental in the sense that they specifically target those people, who are different from them based on certain characteristics.¹⁰⁵

In the research, it is stated that the main motivation for thrill-seekers is to show their strength and demonstrate their superiority over others. In communication with the police, such individuals state that their main goal is “self-validation” through sadistic and violent acts in order to appear “cooler” in front of their friends.¹⁰⁶

In addition to this, other research also shows that such groups are more likely to be engaged in anti-gay activities.¹⁰⁷ The reason for this might be that a lot of young men perceive homosexuality as an insult to their own masculinity. The identity of gay men (especially that of feminine men, despite their identity) is a social construct, categorized as “different” and labelled as socially unacceptable.¹⁰⁸ Some young men react to this with either verbal or physical assault. Accordingly, violence against homosexuals is a means of proving their masculinity, thus announcing their

103 Mark Walters “A General Theory of Hate Crime? Strain, doing difference and self control.” Springer Science+Business Media B.V. 2010

104 Jack McDevitt, Jack Levin, and Susan Bennett “Hate Crime Offenders, An Expanded Typology”, Perry B. “A reader: Hate and Bias Crime”, Routledge, 2003, p.109-116

105 Ib.

106 Ib.

107 Franklin K. “Antigay behaviours among young adults: Prevalence, patterns and Motivations in a noncriminal populations”, 1999, *Journal of Interpersonal Violence*, 15 (4), , 339-362

108 Barbara Perry “In the Name of Hate”, Routledge, New York-London, 2001

solidarity towards their “inner group” by oppressing those who do not belong to it. In addition to this, such destructive acts can also be a means to find a subject for humiliation.¹⁰⁹

In such a situation, there is an apparent interaction between on the one hand, the criminal’s prejudice, the formation of fear against those that are “different,” and satisfaction of their extreme feelings. „The climate of prejudice within which the offender operates, is just part of the reason why he or she chooses to commit a hate crime. The desire to feel the rush of such a crime provides the impetus for their offending. There exists a crucial intersection here between the socio-structural influences affecting an individual’s perception of ‘difference’ and his or her desire for instant gratification (the thrill). Hence, in acquiring the thrill, offenders use their prejudices, stereotyping and the result of constructions of difference – the perceived threats posed by certain minority individuals, as a means of justifying their partly bias-motivated actions“.¹¹⁰

In McDevitt and Levin’s typology, crimes under the “defensive” category were attributed to 25% of all criminals. As opposed to the instances where the crime is committed “in the heat of the moment,” where deliberation was but one part of the motive, in the cases of “defense,” deliberation is very much present. This is the type of crime which is committed as a means of protecting one’s neighborhood, or even one’s nation, from “other” people, who are assumed to be a threat. In such cases, when the criminal is interrogated by the detective, they claim that the “other” people (Asians, Latinos, African-Americans) had moved in to their neighborhoods, and the primary motive for the crime was to show such groups that they are to move out, thus leaving a message for the rest of the kind that they’re not welcome in the environment (where the previously-mentioned criminal belongs).¹¹¹

In cases of “reactionary” crimes (8% of all crimes), revenge is a more likely motivator than deliberated actions against minority groups. Such crimes are typically a reaction to a hate crime that the society learned to be such, regardless of whether or not the crime was in fact committed.¹¹²

And lastly, there are some criminals that act out on a “mission.” Such crimes involve deliberate action based on one’s fanaticism, the goal of which is to “free” the society of evil, something that is, according to the criminal, a very serious threat. Such crimes are often carried out in organized

109 Byers, B., Crider, B. W., & Biggers, G. K. (1999). Bias crime motivation: A study of hate crime offender neutralization techniques used against the Amish. *Journal of Contemporary Criminal Justice*, 15 (1),78–96 (as cited, Mark Walters “A General Theory og Hate Crime? Strain, doing difference and self control.” Springer Science+Business Media B.V. 2010)

110 Mark Walters “A General Theory of Hate Crime? Strain, Doing Difference and Self Control.” Springer Science+Business Media B.V. 2010

111 Jack McDevitt, Jack Levin, and Susan Bennett “Hate Crime Offenders, An Expanded Typology”, Perry B. “A reader: Hate and Bias Crime”, Routledge, 2003, p.109-116

112 Ib.

crime groups, albeit, individual crimes are not unheard of.¹¹³ This type of crimes, as per Levin's and McDavid's analysis, account for less than 1% of all crimes.

The specified typology clearly shows the possible predictors to crimes committed in several different countries, with a basis on culture, ideology and the social-economic status in the society. The application of the above typology to the case of Georgia cannot be straightforward – however, it can act as a basis for a typology specifically created for analyzing hate crimes committed in Georgia, something that can be helpful for planning preventive measures.

2.2.3. The legal nature of Hate Crime

Until 2012, the criminal code, in regards to crimes committed with a discriminatory motive, included only the grounds of race, nationality, ethnicity and linguistic belonging, excluding the crimes based on sexual orientation and gender identity. In order to fix this gap, on 27th of March, 2012, article 53.3¹ was added to the criminal code. This determined the motive based on sexual orientation and gender identity to act as an aggravating circumstance for all crimes in the Code. This change was based on the general policy recommendations of the European Commission against Racism and Intolerance (ECRI) in the year 2010. The European commission had, once again, urged the Georgian government to make racial bias an aggravating circumstance for each crime under the Criminal Code.¹¹⁴

There is article 142, also recently introduced to the Criminal Code of Georgia, which determines that violation of equality is a criminal offense. The norm refers to sexual orientation and gender identity as one of the possible basis for violation of equality.

The use of words by a legislator to outline the content of a criminal act is essentially significant, because precisely this determines necessary elements for classifying an act as a hate crime.¹¹⁵ Different countries have different approaches for regulating hate crime. However, there are two such core models – “hostility” and “discriminatory selection.”

In the hostility model, the alleged offender has to be, at least partially, based on their negative prejudices, intolerance or hatred towards the victim's identity. In such cases, the burden of proof is more difficult, as the prosecutor must be able to objectively prove the suspect's subjective attitude. While the content of hate crime is most accurately embraced through the

113 Ib.

114 ECRI Report on Georgia, CRI (2010)17, fourth monitoring cycle, Adopted on 28 April, par. 11, see: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/georgia/GEO-CbC-IV-2010-017-ENG.pdf>

115 OSCE/ODIHR “Hate Crime Laws, A Practical Guide”, p. 46

use of this approach, it may create obstacles for proving one's case and implementation of the provision.¹¹⁶

In the case of "selective discrimination," the suspect deliberately picks the victim because of his/her affiliation with a certain group. With this model it is not necessary to prove the subjective attitude of the suspect. This means that in such cases legislators pay particular attention to the link between the act and the reason for the choice of the victim, as opposed to the perpetrator's subjective attitudes.¹¹⁷

Article 53.3 of the Georgian Criminal Code stresses the **bias motive**. In this regard, the provision is analogous to "hostility" model. However, regardless of the model, the harm, stress and trauma inflicted on the victim and the community are equally dangerous and disproportionately painful.¹¹⁸

Despite the model used, it is important that the existing norm is defined broadly by the law enforcement authorities and not limited to „hatred" understood as an expression of strong emotions.

The core difficulty involved in applying the said provision is the excessive emphasis on the perpetrator's subjective attitudes. In criminal justice theory, understanding of the content of criminal act – its subjective and objective elements has critical significance for its correct qualification. Correct application of a material norm of the criminal code is possible only through proper analysis of those elements. The objective element of a criminal act is the external characteristics of a crime, while the subjective element and guilt pertains to internal mental processes of the perpetrator. In the three-step approach of qualifying a crime, part of the subjective elements of a crime are examined at the stage of describing a criminal act, while part of is considered at the stage of establishing guilty mind. It is possible that the same subjective elements are examined either along with consideration of the criminal act or the guilty mind.¹¹⁹

In general, criminal law may display motive in different ways. Specifically, it may be a primary component of a criminal act when it is necessary for establishing a wrongful act. In such cases motive is an objective circumstance and there will not be a criminal act committed without such a motive. In turn, if a motive is an aggravating circumstance, then it is always component of guilty mind. Thus, a wrongful act remains the same, however, the degree of guilt is elevated.¹²⁰

116 *Ib.*, p. 46

117 *Ib.*, p. 48

118 *Ib.*

119 „methodology of resolving criminal case studies" Irakli Dvalidze, Giorgi Tumanishvili, Nino Gvenetadze, 2015, GIZ, p.101

120 I. Dvalidze „legal nature of motive and purpose in crimes", Georgian Electronic Scientific Journal: Jurisprudence, 2006, N1 (7), p. 6

Finally, a motive may be a mitigating or aggravating circumstance in terms of a criminal sanction. Such is the regulation under paragraph 3¹ of article 53. With this provision the legislator requires that motive and purpose of a crime is taken into account while imposing punishment. Correct qualification of an act as a specific crime and realization of the purposes of crime is impossible without investigation of the reasons for the crime, namely psychological explanation of it.¹²¹

In criminal justice theory, all authors agree that a motive is a driving force conditioned by needs and interests, which appears to be the reason for the decision to commit a crime.¹²² Despite the fact that the criminal code does not always make a reference to the motive of the perpetrator, crime without motive is psychologically impossible. Therefore, it is necessary to determine motive of a perpetrator in the case.¹²³ Because crime is a voluntary act, determination of the motive is necessary precondition for the correct qualification of an act.¹²⁴ Otherwise, if we disregard the motive, “it will be impossible to properly investigate the case and the court will be deprived of the possibility to ascertain objective truth in criminal proceedings.”¹²⁵

Apart from qualifying the crime, identification of the motive and purpose has a preventive function. It not only makes it possible to describe a perpetrator’s mental state when committing a crime and uncover the reasons for acting wrongfully, but also to properly establish the degree of guilt, and determine the nature of danger the perpetrator poses to the society.¹²⁶

Certainly, revealing subjective elements of crime is related to essential difficulties as it is the individual’s personal, psychological attitude towards the act committed, something that is not always possible to be perceived by law enforcement authorities.

Moreover, a person’s individual attitude – prejudice, intolerance or hatred does not automatically mean that a crime was committed on such a basis. It is important to keep in mind that for the relevant norm to be applied, it is necessary that a criminal act is partly or fully motivated by prejudice based on sexual orientation and gender identity. Furthermore, because of the difficulty of establishing subjective motivation of a perpetrator, motive will be referred to in a case only if investigation produces sufficient evidence of objective facts that would convince an objective and reasonable observer that the crime was partly or fully motivated by intolerance.

121 *Ib.*

122 I. Dvalidze “Motive and purpose in the doctrine of Georgian Criminal Law” review of Georgian criminal justice, 10/2007-2-3, p.242

123 Guram Nachkebia “Criminal Justice” textbook, 2001, p.290

124 I. Dvalidze “Motive and purpose in the doctrine of Georgian Criminal Law” review of Georgian criminal justice, 10/2007-2-3, p.264

125 Guram Nachkebia “Criminal Justice”, textbook, 2001, p.290

126 I. Dvalidze. „legal nature of motive and purpose in crimes“, Georgian Electronic Scientific Journal: Jurisprudence, 2006, N1 (7), p. 6

The identification of such motive is only possible if **before, during, or after committing the crime**, the perpetrator expressed his will in the form that it can be objectively discerned by the victim, as well as the other individuals present, But it should be stressed that demonstration of hostility by possible offender is not the only way to convince a court. A skilled investigator can obtain evidence of hostility through questioning of the suspect, by examining historical behaviour such as offence history and through circumstantial evidence such as membership of hate groups, positing hate online etc.

Chapter 3

Indicators of a Bias Motive

3.1. Difficulties related to identifying a motive

Identification of homophobic and transphobic crimes can be a very difficult task for the law enforcement authorities, especially in cases when there is not sufficient information about the crime, and the police officers lack adequate knowledge and sensitivity to identify the circumstances and facts pointing to the motive and refer to it in the case files.

According to a document prepared by the European Union Agency for Fundamental Rights (FRA), there can be several factors causing difficulties that the police officers face when trying to identify the motivation behind the crime¹²⁷:

First, some police officers do not adequately understand the concept of hate crime and its particular impact on victims, so they limit their investigation only to the physical manifestation of the crime believing that the motive is of minor importance.

Second, proving a crime's discriminatory motive is more difficult than establishing the objective facts, and the police often lack time, skills and other resources (e.g. staff) to make the additional effort to identify a motive.

Third, the police often believe that uncovering the criminal's motivation is the job of the court or the prosecution in the later stages of the investigation, thinking that their job mainly involves gathering facts surrounding the crime itself.

Third, the police tend to think that it is not their task to investigate discriminatory motives and that the prosecution service or judiciary should establish these at a final stage of criminal proceedings. The police believes that they need to be concerned only with collecting the facts.

This relates to the crucial question of whether criminal legislation clearly distinguishes between crimes committed with a bias motive and crimes committed without such a motive. If establishing the bias motive does not alter the legal characterization of the crime, the police have little motivation to investigate it and to record possible bias-motivation when documenting the circumstances of a crime.

¹²⁷ FRA, Ensuring justice for hate crime victims: professional perspectives, p. 46

Fourth, police officers are members of the society the same way other citizens are. Accordingly, they are not immune to the beliefs and prejudices held by the rest of society, sometimes they share the discriminatory beliefs of the offenders and thus do not feel the need to address them. Further, it needs to be emphasized that the mentality and attitudes of police officers are changing as societies become more open to diversity. Accordingly, working with police officers is as important as carrying out awareness-raising campaigns.

3.2. Indicators of a motive

General overview of the characteristics of homo/transphobic crimes

In hate crimes, a different identity of a victim/witness and the defendant is the first factor indicating homophobic and transphobic motive. According to several studies, persons who become victims of different forms of violence based on their sexual orientation, can identify the motivation of a crime through hate speech and insulting epithets used by a defendant.¹²⁸ However, whenever homophobic statements of a defendant is not easy to discern, a motive becomes evident to the victim through the observation of all circumstances.¹²⁹

The said research also showed that those members of the LGBT community that belong to lower social classes of the community and display a high degree of social vulnerability, are less likely to pay attention to the motivation behind the crime and the possible causes of it.¹³⁰ Accordingly, the fact that a criminal provision exists is not sufficient for the victim to take measures based on them, among other to report to the police. A person who does not know that a criminal provision exists, or does not know how it is invoked, may not be able to obtain adequate service and his/her case may not be appropriately addressed.

Apart from the perceptions of the victim, it is also important to determine the circumstances of a crime and identify personal characteristics of the perpetrators of homo/transphobic crimes.

One of the studies (California, Sacramento), which dealt with the experiences of those persons that had become victims based on their sexual orientation, showed that 60% of the respondents (N=450) were victimized based on their sexual orientation in a public place. 68% of the respondents stated that were attacked by one individual. However, there were usually two or more perpetrators in cases of crimes based on a bias motive (46%), unlike cases of crimes without such a motive (17%). In addition,

128 Doug Meyer, „INTERPRETING AND EXPERIENCING ANTI-QUEER VIOLENCE: RACE, CLASS, AND GENDER DIFFERENCES AMONG LGBT HATE CRIME VICTIMS“, *Race, Gender & Class*: Volume 15, Number 3-4, 2008 (262-282)

129 *Ib.*

130 *Ibid*

in 70% of cases the perpetrator was a stranger to the victim. It is emphasized that in most (61%) cases the offenders were teenagers, adolescents, regardless of the type of crime committed.¹³¹

While the research showed that a large number of crimes occur on the streets or public places and are perpetrated by one or more men, it would still be incorrect to qualify the acts as “street crime” because members of the LGBT community are subject to victimization not only on the streets, but in schools, their neighborhoods, workplaces, and even in their own families. This illustrates that they are facing danger of violence in all sorts of environments and this occurs each time they are identified as either gay, lesbian or bisexual.¹³²

It is believed that hate-crime is often perpetrated by people with minimal or no personal connection with the victim. Despite the fact that such conceptualization helps us understand how social hierarchies are being reinforced by hate crimes, it would be incorrect to argue that this is always the case. For example, some authors confirmed that a large number of victims and perpetrators do know each other. This questions a popular view that hate crime is a form of “Stranger Danger”.¹³³ This may be problematic in view of correctly qualifying domestic violence based on a bias motive as a hate crime.

Domestic Violence

Hate crime do not occur only in public places, or in those private places which the victim frequently visits. Violence stemming from parents or other family members based on a person’s sexual orientation and/or gender identity, also constitutes a hate-crime and has to be classified as such.

The nature of a crime – brutality

According to OSCE office for democratic institutions and human rights (OSCE/ODIHR) practical guide, In the case of a violent attack in which at the initial stage no obvious other motive can be identified, and where the identities of the victim and the perpetrator differ, the severity and brutality of the crime is a strong indicator that the crime might have been motivated by bias. Precisely extreme and essentially brutal forms of commission of a crime may be selected for dehumanizing and degrading those victims, towards whom the presumed perpetrator has prejudice.¹³⁴

131 Herek G.M., Jeanine C.Cogan, an J.Roy Cillis “Victim Experiences in Hate Crime Based on Sexual Orientation”, from Perry B. “Hate and Bias Crime”, Routledge, 2003, p. 243-259

132 *Ib.*

133 Chakraborti N., Garland J. “Hate Crime: Impact, Causes and Responses”, Sage, p. 13

134 OSCE/ODIHR, Prosecuting Hate crimes: A Practical Guide, p. 48

Interpretations of the victim and the witness

- During the investigation of a crime, special attention has to be paid to the victim's and the witness' perception of the act. If the victim believes that the crime happened because of his or her sexual orientation and/or gender identity, the police has to take appropriate investigative measures to confirm such perception with objective evidence.
- In general, the opinion of a victim, as a rule, is an indicator that the act was, indeed, a hate-crime as the assumption is based on the victim's personal experience, the circumstances of the attack, the identity of the perpetrator and several other factors. In addition, the perception of a witness may also be helpful as it can be a strong indicator in terms of the perpetrator's attitudes and subjective elements of the crime.¹³⁵

In several countries, such as the United States, Canada, and Great Britain, statistics is based on the victim's perception. Regardless of the fact whether this is sufficient evident or not in the case, the police is obliged to indicate a possible bias motive in the crime recording system accordingly. This does not, as some commentators would claim, indicate a two-tier response but it leads to re effective monitoring from managers and the prompting of the extra considerations in response to hate crime, such as fear in the wider community, repeat offending etc.

Characteristics, actions and history of a presumed perpetrator

As a rule, **before, during, or after committing a homophobic or transphobic crime**, the offender expresses their negative attitude towards the victim's gender identity or sexual orientation in one form or another.

The actions committed by the presumed perpetrator such as referring to a victim with the use of derogatory terms, body language, name calling, may represent very strong evidence for proving that a crime was motivated by homophobia/transphobia.

- Physical, verbal, non-verbal actions, gestures, or words, statements before, during, or after committing the crime, which display a negative preconception/prejudice of the victim's identity or the group the victim belongs to (or is perceived by the perpetrator to do so);

135 OSCE/ODIHR "Preventing and Responding to Hate Crimes – A Resource guide for NGOs in OSCE region", 2009, p. 21

- The presumed perpetrator either verbally, in writing, or through gestures expressed hate towards the victim. For example, the criminal was addressing the victim with homo/bi/transphobic epithets;
- A drawing, symbol, or graffiti expressing prejudice was left at the crime scene. For example, a swastika was drawn near the place where LGBT persons gather;
- The presumed perpetrator left an item at the crime scene, which points to a bias motive;
- The presumed perpetrator's public statements, their past, or post-offence activity in social media pointing towards their negative preconceptions against the LGBT community;
- The presumed perpetrator's clothing, tattoos or other extremist symbols. For example, Nazi symbols and/or semi military clothing;
- The actions of the presumed perpetrator, which may help to identify him/her as a member of an organized Nazi, racist, or some other radical group. For example, if they had taken part in establishing a radical organization, etc.;
- Any sign as to the participation of a radical group in the crime, e.g. after commission of crime a radical organization took responsibility over the act or it is active near the crime scene;
- Criminal past of a presumed perpetrator similar to the attack in question. For example, the perpetrator had taken part in similar crimes, or is a member of a racist, xenophobic, or homophobic group/organization.

Characteristics of a victim

- The presumed perpetrator and the victim have different sexual orientation or gender identity;
- The fact that a victim is, in one form or another, different from the presumed perpetrator or from general public, may indicate towards a homophobic and/or transphobic motivation. For example, the victim's clothing/appearance is different

from what the society would expect from someone of their gender (i.e. the victim has piercing, tattoos, etc.);

- If a victim is either a public figure or a human rights defender and/or member of an LGBT organization, known for protecting the members of the LGBT community, or represents the LGBT community at large;
- If a victim, regardless of his/her identification with a certain group, is often found in the company of lesbian, gay, bisexual, transgender persons, or is perceived to belong to these groups;
- the victim is not targeted for belonging to a group identified as sexual or gender minority, but publicly supported the vulnerable group;
- The victim was engaged in activities, which are aimed at strengthening sexual and gender minorities. For example, the victim participated in a demonstration on the international day against homophobia and transphobia, or another public event, which was connected to protecting LGBT rights.

Circumstantial Evidence

- Historically there has been confrontation between the groups of the presumed perpetrator and the victim;
- The crime was committed on a symbolic day, for example, the International Day Against Homophobia and Transphobia (IDAHOT);
- The crime was committed on November 20– Transgender Day of Remembrance;
- The crime was committed on March 31 – International Transgender Day of Visibility;
- Several crimes were committed at the same time and location against a number of persons all members of sexual or gender minorities;
- The victim happened to be in a place, where previously hate crime was committed based on sexual orientation or gender identity and where the degree of hostility against the victim's group is high;

- The crime was perpetrated in the proximity of or the neighborhood where LGBT organization and/or community center is located;
- The crime was committed in an LGBT-friendly club, café, some other gathering place or in close proximity to it;
- The crime was committed during an event/discussion (or in the proximity of it) related to the issues of sexual orientation or gender identity;
- The crime was committed at a location where a member of the LGBT community lives, and this fact is known to other people living in the same area;
- Significant part of the residents in the same area where the crime was committed think that the crime was based on a bias motive;
- The crime was perpetrated around the sex workers' (gay, MSM, transgender) workplace or in close proximity to it.

In relation to the above-mentioned criteria, the FBI guideline warns against the mistake of the investigator to identify a relevant motive and states that he/she has to pay attention to the following factors:

1. A misleading fact is evident – For example, the perpetrator used a homophobic/transphobic epithet against the victim, but the case was not a hate-crime, as both the victim and the perpetrator belong to the same identity group;
2. The perpetrator staged a hate crime;
3. The perpetrator, by mistake, assumed that the victim belonged to a targeted group. In such case, while the perpetrator may be wrong to assume that the victim belongs to sexual or gender minorities, the crime will still be a hate-crime. The reason is that crime would not have occurred if the perpetrator had not had a hostile attitude towards a certain group. For example, a middle-aged heterosexual man was walking around the area where a gay-friendly bar is located and he was attacked by 6 young men, who mistook the victim for a gay man leaving the bar. In this case, the young men have to be imposed punishment based on a hate crime.
4. The assumed motivation of a crime may change in case further evidence is obtained. Initially, it may seem that a crime is not based on any bias motive and this information may be uncovered

at a later stage of the investigation. It is also possible for the evidence to have, initially, pointed to a racially-motivated crime and later it may be established that instead the basis of a crime was religious intolerance. The information/data about the crime has to be updated based on a newly discovered evidence.

5. The presumed perpetrator had personal relations with people belonging to the group that the victim belonged to. There is often a misconception that the criminal's relationship to these people, i.e. the members of the group that the victim belonged to, excludes the possibility of a bias motive in a crime. This, however, is not always the case. Motive and prejudice are very complex phenomena: sometimes people know representatives of different groups, even like them, but they may see those persons as an exception, rather than a reason to reject their own stereotypes. Because of this, in order to uncover the motive behind a certain case, uncovering only superficial evidence will not provide a full picture to the law enforcement authorities.¹³⁶

136 OSCE/ODIHR, Prosecuting Hate Crimes: A Practical Guide, p. 69

Chapter 4

Response and Mechanisms of Criminal Justice System

4.1. Role of the Ministry of Internal Affairs – Response, Implementation and Prevention

4.1.1. The Role of the Patrol Police

Effectiveness and Promptness

According to the regulations¹³⁷ of patrol police approved by Georgian Ministry of Internal Affairs, the patrol police is a department of the ministry, which within its competencies conducts investigation, takes operative measures, measures of coercion envisaged by criminal procedure code, fulfills the function of ensuring public order and carries out other powers as indicated in the Georgian legislation.

The same regulations define the principles for the patrol police department's activities, which are based on the protection of dignity and honor of a person, social justice, humanism and publicity.¹³⁸

The patrol police may obtain information about a crime from various sources, among others through the reports of the victim or a witness, a complaint, information disseminated in media or on the web, as well as various other sources.

In addition to this, the victim or the witness can report information about the crime to agencies competent to handle it.¹³⁹ It is also important that LEPL 112, when responding to emergencies before the arrival of the authorized persons to handle the situation, provides first consultation to the citizens within its competencies.¹⁴⁰

In addition, the patrol police duty and information unit ensures that the information received regarding the crime, administrative offence, and other actions dangerous for the

137 Regulations by Georgian Ministry of Internal Affairs, May 2006, order N 634, article 1, see: http://police.ge/files/sajaro_informacia/SAPATRULOS%20DEBULEBA.pdf

138 *Ib.*, article 4.

139 Order of the Minister of Internal Affairs №1073, December 28, 2011; The regulation of MIA LEPL – „112“, article 9.2(b)

140 *Ib.*, article 9.2(d)

society, is registered, processed, responded to and notified in a timely manner to appropriate units.¹⁴¹

The victim and/or witness who contacts the LEPL 112 may not indicate the motive of a crime, their or the victim's identity, or for what reason the crime was committed. Accordingly, it is important that the report, submission and phone call of a victim/witness or a third party which provide specific information about a crime committed, or the potential danger of its occurrence, is addressed promptly, risks are evaluated adequately and effective measures are taken to eliminate them.

Establishing Contact with the Victim/Witness and Initial Measures

The dispatched patrol police crew and their activities should be adequate in relation to the situation.

When arriving at the crime scene, the patrol police employees should, first of all, in a clear and coherent manner explain to the presumed victim or witness what are the actions they can take.

The initial activities of the patrol police officers have to be the following:

- assess the risks of the anti-social behavior against the victim and the people around him/her promptly;
- Investigate the situation, question the victim or a third party who they can obtain the information from;
- Have a sensitive approach and in this way uncover full and comprehensive information;
- Identify any harm inflicted on the victim or the witness, among others any wound, and in case it is necessary, call the emergency service or ensure provision of any other relevant service.

141 Order of Georgian Minister of Internal Affairs N 634, 16 May, 2006, Tbilisi, On adopting regulations of the Patrol Police Department of Georgian Ministry of Internal Affairs, article 12 (a).

Questioning the Victim/Witness

When questioning the presumed victim or witness, it is essential that the patrol police officers observe standards of ethics, and avoid any type of discriminatory behavior, which could stop the victim/witness from opening up and cooperating with the police. In addition, the police officers have to treat victims/witnesses with empathy and pay attention to every little detail. This shows the victim/witness that their case is being taken seriously.¹⁴²

Oftentimes, the attitude of the police coincides with that of the criminal, i.e. a negative attitude towards members of the LGBT community. There might be an informal practice in the police units to not take crimes against members of the LGBT community seriously. In such an environment, the employees of the patrol police might not pay attention to, or incomprehensively question the victim/witness or a presumed perpetrator in view of uncovering the motive of bias or do not record the motive in respective documents.¹⁴³

Because of this, there needs to be a clear instruction to patrol police officers within the system, which will attributes a high priority to tackling such crimes, and increase the motivation of the police officers to respond adequately to such crimes.¹⁴⁴

Officers need to expect that their response may be subject to managerial scrutiny in the future.

It is important that during the questioning of the victim/witness, their individual perception of the circumstances, as well as the motivation behind it is taken into consideration. As it was noted above, one of the initial indicators of a homophobic/transphobic crime is the victim's subjective belief.¹⁴⁵ If the victim believes that the basis of the crime was their orientation/identity, **the police should not disregard this fact/opinion.**

In addition to this, members of the patrol police should, first of all, ensure that the questioning of the victim/witness is confidential, if the victim deems it necessary.

It is important that the police officers describe the information shared by the victim/witness in exactly the same words it was told. If it is possible to do after the arrival at the crime scene, the patrol police officers should ask for the following information from the victim/witness:

142 OSCE/ODIHR, Preventing and Responding to Hate crimes, p. 27

143 *Ib.*, p.28

144 Bowling – chakraborti

145 OSCE/ODIHR "Prosecuting hate crimes: A practical guide, p. 46, see: <http://www.osce.org/odihr/prosecutorsguide?download=true>

- to describe the situation briefly;
- details of the incident/crime, including whether a weapon or threats were used;
- nature of wounds;
- who else was present at the crime scene, and whether it was possible for them to witness what had happened;
- signs to identify the presumed perpetrator(s), and description of their looks/other characteristics.

These details should be enough for another police officer/investigator to question an identified suspect, and detain them in compliance with the law. A more detailed questioning should be carried out at a later stage.

In addition, it is important that when questioning the victim/presumed victim, the patrol police officers or the investigator **should not ask questions about the individual's sexual orientation or gender identity**, unless such information is essential to the case.

When interacting with a transgender individual, it is possible that law enforcement officers are confused about the appearance, clothing, or behavior of such person, as it does not fit with the traditional gender roles of men and women determined by the society. **In such cases, it is of critical importance for the police officer to ask the victim how they would like to be referred to**, and under no circumstances, ask why they are dressed in that way, or “whether they are a woman or a man,” or any other unethical, and often humiliating questions.

It should also be noted, that a transgender person might not have their name and/or sex changed in their identification documents. Accordingly, it is important that in communication with them police officers use the name with which they had introduced themselves. Not only is non-observance of this principle unethical, but might also unintentionally cause disclosure of the individual's identity. It is, however, obvious that in official documents the name, last name and gender needs to be the one found on their identification documents.

If the victim/presumed victim himself/herself specifies their own sexual orientation or gender identity, then it has to be recorded respectively in the interrogation protocol, **the confidentiality of which should has to be observed strictly**.

The employees of the police who are in one way or another involved in the investigative process, conduct the investigation and/or have access to relevant information, are also responsible for protecting personal information of the victim/presumed victim/witness, including their sexual orientation and/or gender identity, and **should not disclose this to** the victim's parents and friends without their **explicit permission**. In order to avoid rejection and stigma, the victim might not have disclosed to their family members or friends their sexual orientation and/or gender identity. While conveying this information might be unintentional, it is possible for it to have harsh consequences for the individual in question, as well as to their trust towards the police.

When the police informs the victim's family and friends about the crime, it is better to just indicate that the individual in question was a victim of a crime, without specifying any information about the motive, location of, or the reason for a crime. Accordingly, disclosure of any type of information that might unintentionally reveal the victim's identity should be avoided as far as possible.

Storing and securing the evidence

When the police officer either by himself or through the indication of a victim/witness, comes to the conclusion that the crime was committed based on sexual orientation/gender identity of the victim, it is important for him/her to thoroughly inspect the crime scene. This has to be done in order to discover any possible evidence left behind by the perpetrator, which could be an indicator of his/her motivation.

If the perpetrator is to be found on the crime scene, or is later identified, and the police objectively discerns the criminal's attitudes towards the victim **before, during or after the crime** (for example, the victim was addressed with discriminatory epithets, or was nonverbally harassed), the police should take this as an indicator of homophobic/transphobic motivation. The patrol police officer should document every possible evidence, including by taking photographs and providing descriptions, regardless of the fact whether it is related to a motive of a crime or not.

Drawing up a Record

After the patrol police arrives at the crime scene and studies the situation, a response record needs to be drawn up. A situational description of the circumstances, as well as any indicators of homophobic and/or transphobic motive need to be recorded. This will give the investigator directions as to which steps to take next in the investigation process.

4.1.2. The Role of the Detective-Investigator

Beginning the investigation

According to Criminal Procedure Code of Georgia, an investigator is a state employee, who within his/her competencies is responsible for conducting investigation of criminal cases.¹⁴⁶

Upon receiving information about a crime, the investigator and the prosecutor are obliged to start the investigation. The prosecutor should be notified by an investigator immediately when it is started.¹⁴⁷

Basis for initiating an investigation shall be the information provided to an investigator or a prosecutor, information revealed during criminal proceedings, or information published in mass media.¹⁴⁸ Information regarding a crime may be reported in writing, orally or in any other way and is recorded.¹⁴⁹ This means a patrol police officer will fill in the response record form.

The primary document – a response record form received by an investigator after the crime was committed, is most probably drawn up by a patrol police officer, who was first dispatched to the crime scene. It is possible that certain evidence might not have been obtained yet, or might be lost completely if necessary and appropriate measures were not undertaken or were not indicated by the police officer for discovering them.

It is important that precisely the investigator is involved in the case who is specialized in hate-crimes, as they have the required knowledge and sensitivity to handle every necessary detail in a sensitive manner in order to uncover the motive.

In the process of investigating a crime, one of the core standards to observe is to **conduct the investigation in a full, comprehensive and objective manner.**¹⁵⁰

Communication with the Victim, and Primary interrogation protocol

According to 11th article of Georgian Law On Police, the police is obliged to respect and protect individual's rights and liberty, regardless of their race, spoken language, sex, age, religious, po-

146 Criminal Procedure Code of Georgia, article 37, part 1

147 Ib. article 100, part 1

148 Ib. article 101, part 1

149 Ib. article 101, part 2

150 Criminal Procedure Code of Georgia, article 37, part 2

litical or other views, national ethnicity, social standing, place of birth, wealth or status, place of residence, or any other characteristic.

The said article introduces the principle of non-discrimination in relation to all police activities. In addition, the “other characteristics” should be understood to include grounds of sexual orientation and gender identity. Each activity of the police officer has to be guided by this principle.

As derived from the said principle, standards of ethics and confidentiality have to be observed in all communications between the detective-investigator and the presumed victim/witness. The police is obliged to interact with the victim in such a manner that the victim does not feel like they are being discriminated/victimised. Otherwise it could cause additional stress and harm trust to the police.¹⁵¹

During the primary questioning conducted by the detective-investigator, several relevant circumstances may be uncovered about the motive:

- **The victim/witness may indicate himself/herself, that the act was motivated by homophobia/transphobia based on his/her perception** – in this case, the investigator has to carefully select questions and try to identify the objective aspects of such perception. For instance, the investigator has to ask specifically which circumstances pointed to such a motive (words, symbols, clothing of the perpetrator etc.), what made him/her think like that, and he/she should try to make the victim/witness describe/recall all the circumstances before, in the process of and after the commission of a crime.
- **The victim/witness may not have identified the reason for the commission of a crime** –in this case, the investigator has to, similar to a previous case, interview the victim/witness with scrutiny, and try to make the victim/witness describe/recall all the circumstances before, in the process of and after the commission of a crime.
- **The victim of a crime may not be aware of the reason for the commission of a crime, however, the latter may be indicated by a witness** – Despite the fact, whether, for various possible reasons, the victim is aware of the motive for a crime or not, if this can be objectively discerned by other persons, this might point to the fact that the crime was motivated by homo/transphobia. Accordingly, the investigator, through a detailed interrogation method, should try to identify the source pointing to these facts.¹⁵²

151 Hate Crime Operational Guidance, College of Policing, 2014, p. 82, see: http://www.report-it.org.uk/files/hate_crime_operational_guidance.pdf

152 According to paragraph one of article 75 of the Criminal Procedure Code, witness testimony cannot be evidence, if the witness cannot point to the source of the information or if it is ascertained that because of physical or psychic health condition, he/she can not correctly perceive, remember or recall facts.

- **A victim may indicate that the crime was committed on the ground of gender identity, which in reality may have been based on sexual orientation** – In practice there may be cases, when a subjective perception of a victim regarding the motive of a crime will not coincide with its actual ground. For instance, a transgender man attacked on the street may have the feeling that he was targeted because of his identity; however, the motivation of a perpetrator may be related to his presumed sexual orientation, namely him being lesbian, or the opposite, a transgender woman was attacked, and the perpetrator thinks that she is homosexual. It depends on sophisticated skills of an investigator, whether the latter can be revealed or not. It is important that detailed questions are asked to a victim so that the real motive of a crime is identified. However, in both case scenarios above, despite the specific motive identified, acts need to be qualified as hate crimes.
- **If the victim is deceased or it is impossible to interview him/her because of the harm caused as a result of the crime** – in this case, the different identity of an identified suspect and a victim may be the first indicator of a possible hate motive to an investigator. The investigator should carry out other investigative measures for supporting or refuting this assumption.

It is necessary that the investigator and the supervising prosecutor of an investigation take into account the fact that it is not important whether a victim belongs to a lesbian, gay, bisexual or transgender community, for identifying the motive and for the crime to be qualified as committed on the grounds of sexual orientation and gender identity.¹⁵³ The crime against a specific person, who has gay friends, or a woman, who was presumed to be a lesbian by the perpetrator, has to be qualified as the one based on sexual orientation.

In each of the above-mentioned cases, while drawing up the record of an initial interrogation, along with the other important information, the one regarding a motive and individual perceptions of the victim and a witness relating to the reasons and/or circumstances of a crime has to be included also.

The registration card of investigation and initial qualification of a crime

When the investigation is started the detective-investigator of a case is obliged to provide an initial qualification of a crime based on information that was received from a patrol police officer or obtained by himself/herself.

153 OSCE/ODIHR, Preventing and responding to hate crimes, p. 22, See: <http://www.osce.org/odihr/39821?download=true>

The instruction on integrated record-keeping of crimes adopted by the Ministry of Internal Affairs, defines the principles for integrated record-keeping of crimes¹⁵⁴, which is fulfilled first by filling in the form N1 – registration card of preliminary investigation, which has to contain information about the initial qualification of a crime. Obviously, based on the instruction, in case the qualification of a crime has changed, new registration card has to be filled in (form №1a).¹⁵⁵

Under such circumstances, as the risk of losing the information regarding the motive of a crime is high, the following method can be used:

First, the investigator explicitly indicates “*possible hate crime*” in the registration card of the crime form N1, which will be helpful for drawing attention to the existence of a motive on the next stage of crime investigation and will point to the necessity of making efforts for its identification. Based on the instruction, at a later stage, in case evidence of hate motive is obtained or to the contrary, is not found, a new registration card will be drawn up and the information will be modified.¹⁵⁶

According to the instruction on integrated record-keeping of crimes, the registration cards of crimes (form N1) is filled in immediately and within 72 hours is sent to the department of information and analytics, where data on crimes, perpetrators, victims, criminal cases etc. is recorded accordingly.¹⁵⁷

Investigative measures and collection of evidence

After the initiation of investigation investigative measures are carried out in order to obtain different types of evidence. Generally, investigation is unity of measures, which aim at collection and representation of evidence related to a crime.¹⁵⁸

While planning investigative measures to be carried out, the investigator and a prosecutor have to select those measures, which will play an essential role in revealing not only a punishable act, but the motive of a crime.

In the process of obtaining evidence, investigative authorities have to observe the standards set by chapter 10 of the Criminal Procedure Code.

154 The order of the Minister of Internal Affairs №423 „Regarding the adoption of the instruction on integrated record-keeping of crimes”, April 28, 2005

155 Ibid, article 2.1 (a) (b)

156 Ibid

157 The order of the Minister of Internal Affairs №423 „Regarding the adoption of the instruction on integrated record-keeping of crimes”, April 28, 2005, article 2.3

158 Paragraph 10 of article 3 of the Criminal Procedure Code of Georgia

Possible sources of evidence

Interrogation of a person has critical importance for the collection of evidence. Each person, who may have important information for the case, may be interviewed voluntarily by parties. It is inadmissible to force the person to be interviewed to present evidence or give information.¹⁵⁹ In case of consenting to the interrogation, the person to be interviewed has the obligation to provide correct information to the party undertaking the interrogation regarding the circumstances known to him/her in relation to the case.¹⁶⁰

Apart from interviewing possible victim and a witness noted above, the investigator is authorized to interview the presumed perpetrator of a crime (if he/she is identified and appeared in the Police department, or is detained), who at this stage as well as other participants of the criminal process, have the status of a witness. Before the interrogation, the identity of a person and other necessary information have to be determined. The information has to be included in the interrogation record.¹⁶¹

As it was noted in previous chapters, because crimes motivated by intolerance are symbolic and carry a certain message, presumed perpetrators are often encouraged to make the motives of their actions discernible for others. For this reason, the attitude of perpetrators towards members of LGBT community may be expressed in insulting phrases or other epithets and remarks.¹⁶²

In such cases, it is important to identify where the perpetrator was before and after committing a crime, or the places, which the presumed perpetrator often visits, so that the police can identify possible witnesses, who could have heard/perceived the homophobic/transphobic attitude expressed out loud by the presumed perpetrator.¹⁶³

The presumed perpetrator(s) may not hide their motives to law enforcement officials either on the crime scene, or after their transfer to the patrol police station¹⁶⁴, because as negative attitudes towards the LGBT community is shared by a broader society, frequently, a perpetrator will assume, that law enforcement system will be loyal to his conduct and on the contrary, he/she may express his motives out loud.

However, there will be the cases, when a perpetrator does not admit commission of a crime, or does not talk about the motive of a crime. In turn, investigator and prosecutor may not have

159 Paragraph 1 of article 113 of the Criminal Procedure Code of Georgia

160 Ibid, article 113, paragraph 6

161 Ibid, article 113, paragraph 3

162 OSCE/ODIHR, Prosecuting Hate Crimes, A practical guide, p. 57a

163 OSCE/ODIHR, Prosecuting Hate Crimes, A practical guide, p. 57

164 Ibid

sufficient skills, to ascertain cognitive aspects of the presumed perpetrator's conduct, attitudes towards the victim, that point to possible intolerant motives of the perpetrator. Accordingly, for confirming such a motive an assessment of a person with relevant expertise is important. Based on Criminal Procedure Code such person is defined to be an expert.¹⁶⁵

An expert is a person with specific knowledge, skills and experience, who is invited either by a party or the court upon the request of a party in order to carry out necessary examination and issue conclusions on the criminal case. Apart from this, an expert assists parties and the court in identification, examination and presentation of evidence.¹⁶⁶

In this specific case a **psychologist** may be considered as an expert, who because of his/her professional skills will be able to determine whether there is any kind of link, among them negative attitude towards the victim, which could have caused the commission of a crime.

The said method can be used in cases of particularly grave crimes and more importantly of crimes committed with special brutality, which apart from judicial-psychiatric expert opinion for the determination of the mental capacity of the presumed perpetrator, may also focus on the conclusions of psychologist to determine whether the brutality of the crime, the used method and choice of weapon, was related to the perpetrator's intolerant attitudes towards the identity or presumed identity of the victim.

For such determination additional and different types of investigative measures may be required, among them interrogation of **friends or/and family members, colleagues of the presumed perpetrator**, to learn what his/her attitudes towards minority groups are, or whether he/she is involved in different organized radical groups.¹⁶⁷

In addition to that, in compliance with the legislation and based on the court's permission through investigative measures of search and seizure, apartment/house, place of residence of the presumed perpetrator may be searched to look for any radical right, nazi, homophobic reading materials, books and other indicator items (flag, symbols etc.)

On certain occasions, the perpetrators of hate crimes may themselves record their wrongful conduct by electronic means for spreading it through internet or showing it to friends¹⁶⁸. For instance, such was the incident, when several young people attacked a black person in the centre of Tbilisi. The video the presumed offenders took was made public by the perpetrators them-

165 Article 111, paragraph 9

166 Article 3, paragraph 21

167 OSCE/ODIHR, Hate Crime Laws: A Practical Guide, p. 52

168 OSCE/ODIHR, Prosecuting Hate Crimes, A practical guide, p. 59

selves.¹⁶⁹ It is self-evident, that in such cases, collection of evidence is not difficult and it is helpful for proving the bias motive.

Generally, obtaining evidence regarding the motive of the presumed perpetrator through **internet communications** is a useful approach, that gives the opportunity to receive information about the groups liked, sites visited frequently by the suspect, even his/her private comments and the attitudes. However, for obtaining such content, there has to be reasonable doubt, that a person is engaged in criminal acts through computer systems. In this case, a prosecutor is authorized to address the court based on the place of investigation with the motion to issue a court ruling regarding the current collection of content, based on which the service provider is obliged to cooperate with the investigation and assist it in collecting or recording current content data, related to specific communications taking place on Georgian territory and through computer systems.¹⁷⁰

Internet communications is also a useful source for identifying public statements/calls of the perpetrator, assessment of past and current activities in the social media may be useful for supporting information regarding his/her hostile attitudes towards LGBT community.

Sometimes, the key to revealing the motive is on the crime scene. This has to be examined by detailed inspection of the crime scene.¹⁷¹

Other circumstances of crime as evidence

Apart from the possible evidence described above, attention has to be paid to other factors related to a crime, that also can point to the motive of a crime and become evidence.

According to article 3 of the Criminal Procedure Code evidence is the information submitted to the court in the manner prescribed by law, an item, document, substance or any other object containing such information, which parties use in a court to prove or refute certain facts, make their legal assessment, perform duties, protect their rights and lawful interests, and which in turn a court uses to establish whether a fact or action has taken place because of which criminal proceedings are conducted, whether a certain person has committed this act and whether or not this person is guilty, also to establish circumstances that affect the nature and degree of the defendant's liability and characterize his personality. A document is an evidence if it contains information required for the establishment of factual and legal circumstances of a criminal case.

169 see: <http://netgazeti.ge/news/44152/>

170 Criminal Procedure Code of Georgia, article 138, paragraph 1

171 OSCE/ODIHR, Hate Crime Laws: A practical Guide, p. 55

At the same time, according to paragraph 1 of article 13 of the Criminal Procedure Code, evidence do not have a prior legal force. Accordingly, despite the fact that circumstantial evidence, taken alone, may represent less strong information for the criminal proceedings, in comparison with the evidence related to immediate circumstances of a case, the aggregate evidence may convince the judge that the act was committed based on sexual orientation and gender identity of a victim. Such circumstantial evidence, that has to be attached to the case or indicated in the respective document are the following¹⁷²:

- Presumed perpetrator is affiliated with organized radical group;
- The incident/crime took place on the date, time and place, that has a certain meaning for the targetted group;
- The crime was committed on the date that has sympolic meaning for the group of perpetrators (e.g Independence day for nationalist groups – May 26);
- The nature of a crime is especially brutal, while other essential evidence indicating homophobic/transphobic motive has not been obtained;
- Circumstances identified in other crimes/incidents are similar to the circumstances in the present crime, for instance use of the same actions, which may create sufficient grounds for assuming that these facts are interconnected.

Mixed motives

As with other crimes, crimes based on sexual orientation and gender identity may have other motives also.

In such cases, it is important that law enforcement agencies interpret the norms broadly and **do not let the existence of other motives cause the homophobic or transphobic motive to disappear or be ruled out**, as the criminal act may be based wholly or partially on a bias motive.¹⁷³

172 OSCE/ODIHR, Prosecuting Hate Crimes: A practical guide, p. 61

173 Ib. p.63

Evidence relating to harm inflicted on a victim

As far as the harm inflicted is concerned, the possible victim's physical and psychological examination is essential. Accordingly, when there are grounds prescribed by law, the investigator is authorized to invite an expert.¹⁷⁴

In case of physical harm, medical records are evidence at the same time. The investigator and prosecutor have to ensure that medical examination covers the full severity of the inflicted harm.

However, it has to be noted, that physical harm might not be present in all types of crimes or the degree of injury may be low. Accordingly, an investigator has to ensure that along with the medical expert opinion, or in a case of it being unnecessary, assessment of the seriousness of psychological harm suffered and inflicted including the description of the nature of harm and its effects on victim, as well as the people around him/her is also obtained.

As the hate crimes reflect the spectre of discriminatory experiences, its effect and impact on marginalized groups may be essentially harsh. Victims of hate crimes suffer from feelings of fear, guilt and shame to a greater extent, and accordingly, the inflicted trauma is far more severe, even when the wrongful act itself may not attain the level of graveness.¹⁷⁵

While assessing the effect of crime on victims, it is important to take into account that “they become targets because of the perpetrators’ perception of them, [...] over which the victim does not have any control (the capability to avoid it).”¹⁷⁶ The latter underscores the importance of viewing the victims of wrongful acts motivated by hate as victims of discrimination.

Various research confirms that physical violence inflicted on the basis of sexual orientation and gender identity may cause a greater suffering to the victim, than any other kinds of violence experienced by them.¹⁷⁷

The degree of psychological harm inflicted on members of LGBT communities might differ on individual basis. For instance, violence inflicted on persons, who are comfortable with their identity and have a higher level of self- acceptance is more of a distracting nature. As for the violence on persons who are less comfortable with their identity, it may discourage victims from disclosing their identity, may modify their behavior, with certainly a far greater psychological impact on them.¹⁷⁸

174 The criminal Code of Georgia, article 37, paragraph 6 (d)

175 FRA, Ensuring justice for hate crime victims: professional perspective, 2016, p. 30

176 ib.

177 Doug Meyer “Severity of Hate-motivated Violence: Intersectional Differences among LGBT Hate Crime Victims”, 2010, BSA Publications Ltd, Volume 44(5): 980–995, p. 991

178 Paul Iganski “Hate Crime Hurt More”, A Reader: Hate and Bias Crime, B.Perry, Routledge, 2003, p. 131-139

Moreover, research has demonstrated, that victims of violence based on the bias motive suffer from neurotic conditions, run the risk of depression and have problems with concentrations, also suicidal thoughts more than victims of other crimes. This means that because of amplified fear and fixed ideas overcoming victimization and rehabilitation is more difficult with victims of hate crime.¹⁷⁹

Apart from individual harm, that has a reflection on specific victims, it is important that such crimes have the effect of “terrorism”, namely the psychological harm goes beyond a specific individual and it also affects the community that the person belongs to.¹⁸⁰ Precisely because of this, hate crimes need to be subject of separate consideration and need to attract dissimilar punishment to the ones for the crimes without such motive.

Accordingly, because relatively less grave hate crimes may have a more essential psychological impact on victims, than other graver crimes without such motive, investigator and prosecutor are obliged to obtain an expert opinion describing the psychological harm inflicted on a victim and attach it to the case files.

In case such expert opinion on the victim’s psychological condition could not have been obtained during the relevant stage of investigation, the prosecutor may rectify the shortcoming during the main trial by showing the full negative harm through examination of the victim.¹⁸¹

However, a victim may not be capable of describing the full harm he/she has experienced at any stage, be it the stage of investigative measures, examination of a victim or preparation of the resolution on charges by the prosecutor’s office, as frequently the effects of such crimes on the life of a person may become visible only later, for instance, when a person changes his/her place of residence, does not go out at night or avoids going to certain public places, not to be subject to repeat victimisation.¹⁸²

Moreover, it has to be underlined that provision of targeted services by the Ministry of Internal Affairs for the support of victims is essential, as because of the experienced violence and the distrust to the police, a victim may not be open or fully describe the harm inflicted. Accordingly, provision of targeted services for the support of victims is necessary, both for obtaining all necessary evidence for the case, as well as for follow-up generalization and analysis of victimization characteristics¹⁸³ with a view to preventive measures to be taken.

179 McDevitt J, Balboni J, Garcia L and Gu J “Consequences for Victims: A Comparison of Bias and Non-Bias-Motivated Assaults”, A Reader: Hate and Bias Crime, B.Perry, Routledge, 2003, p. 139-151

180 Paul Iganski “Hate Crime Hurt More”, A Reader: Hate and Bias Crime, B.Perry, Routledge, 2003, p. 131-139

181 Prosecuting hate crimes. A practical guide, p. 63

182 Hate Crime Operational Guidance, College of Policing, 2014, p. 75, See: <http://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>

183 Prosecuting hate crimes. A practical guide, p. 63–64

Final qualification of a crime under the supervision of a prosecutor

Based on article 18 of the Criminal Procedure Code, investigator and prosecutor are obliged to establish with certainty, whether a crime has taken place, who committed it and examine all other circumstances that is to be proven related to a criminal case.¹⁸⁴

Investigation of a case has to be **comprehensive, objective and full**. Exonerating and incriminating evidence, also aggravating and mitigating circumstances have to be examined with the same diligence.¹⁸⁵

Due to the above, final qualification of the crime has to be based on thorough assessment of all circumstances of the case and all official documents related to the crime have to contain explicit reference to the motive of a crime.

If at the said stage, due to a technical difficulty, the paragraph 3¹ of article 53 of the Criminal Code cannot be indicated in the crime registration card along with the article describing the wrongful act committed based on sexual orientation and gender identity, it still has to be included and spelled out in writing.

Final qualification of a crime has essential effect on the whole criminal court proceedings. Accordingly, appropriate reference to any possible doubt and evidence regarding the motive of a crime is critically important for the prosecutor to be capable of reflecting it in the resolution on charges.

4.2. The role of a prosecutor

The prosecutor's office is the agency responsible for criminal prosecution. For fulfilling the said function, the prosecutor's office conducts the supervision of the investigation. In cases and in the manner prescribed by this Code, the Prosecutor's Office shall undertake full-scale investigation of an offence and support the state prosecution in court.¹⁸⁶

Resolution on Charges and initiation of criminal prosecution

Early identification of presumed homophobic and transphobic motive in the crime may play a critical role and affect the process of collection of sufficient evidence. Accordingly, for appropriate initiation of criminal prosecution cooperation of police and prosecution is necessary. Moreover,

184 Article 18, paragraph 1

185 Article 18, paragraph 2

186 Criminal Procedure Code, article 32

it is important that employees of the police and prosecutor's office agreed with the content of the hate crime and protected grounds under relevant article of the Criminal Code.¹⁸⁷

As it was noted in previous chapters, the prosecutor's role in the final qualification of a crime is critical. The prosecutor, in cooperation with the investigator assesses the circumstances of a case, the evidence obtained and together with him/her determines the qualification of a crime.

According to paragraph 1 of article 169 of Criminal Procedure Code, the grounds for the indictment of a person shall be the body of evidence that is sufficient to establish reasonable doubt that the person committed a crime.

When there are sufficient grounds for bringing charges, the prosecutor may issue a resolution on charges of a person. After issuing the resolution, the prosecutor determines the time and place of presenting charges. Charges shall be presented no later than 24 hours after the resolution has been issued.¹⁸⁸

The resolution on charges shall indicate:¹⁸⁹

- The name and surname of the defendant, father's name, the day, month and year of birth, personal identification number;
- Formulation of charges – description of the incriminating action, indicating the location, time, method, means, instrument of its commission, as well as its consequences;
- Evidence obtained as a result of investigation sufficient to establish reasonable doubt that the given crime was committed by that person;
- the article, paragraph and sub-paragraph of the Criminal Code of Georgia referring to that crime.

The operative part of the resolution on charges of a defendant shall entail the decision on bringing charges against the person.¹⁹⁰

187 OSCE/ODIHR, Prosecuting Hate Crimes: A practical Guide, 2014, p. 45. Moreover, the said OSCE document sees joint training sessions as a useful way of facilitating cooperation between police and the prosecutor's office, which could be an important mechanism for sharing their experience and understanding of the relevant issues better (the said source)

188 Paragraph 2, Article 169 of the Criminal Procedure Code

189 Subparagraphs a; b; c; d of paragraph 3, article 169 of the Criminal Procedure Code

190 Paragraph 4, Article 169 of the Criminal Procedure Code

It is necessary that the formulation of the resolution on charges explicitly and in writing specifies that the act was committed on the basis of intolerance – with a homophobic and/or transphobic motive.

According to article 9 of the Criminal Procedure Code, Criminal proceedings are adversarial and based on equality of arms.¹⁹¹ The court does not engage in criminal prosecution, neither does it fulfil the function of defense or prosecution. The court shall be obliged to provide the prosecution and defense with necessary conditions for presenting evidence, its comprehensive and full examination.¹⁹²

Accordingly, in line with the adversariality of the criminal proceedings, **absence of reference to a bias motive by a state prosecution deprives the court of the possibility to assess circumstances of crime, among them the aggravating circumstances (article 53.3¹), in an appropriate way, render an objective and fair judgement beyond reasonable doubt¹⁹³ and assign adequate sentence.** Precisely for avoiding such consequences, the prosecutor is obliged to describe all circumstances of a case in an objective manner, give comprehensive information regarding the existence of a motive and attach to the case files all evidence obtained during the investigation.

The prosecutor or upon his/her instructions, the investigator, will familiarize the defendant and his/her defense counsel (if the defendant has a defense lawyer) with the resolution on charges; the defendant and the lawyer shall confirm by signature, that they have been presented the resolution and received its copy.¹⁹⁴ Criminal prosecution is initiated as soon as the resolution on charges are presented to the defendants and his/her defense lawyer.¹⁹⁵

Granting victim status to a witness

In order for the victim to enjoy rights set by article 57 of the Criminal Procedure Code, the Prosecutor needs to grant him/her victim status.

As determined according to the *De Facto* standard set by the Prosecutor's office, granting victim status to the victim (or his/her successor) is often rejected, because the prosecutor uses reasonable doubt standard defined by the Criminal Procedure Code.¹⁹⁶ It is important to note that such

191 Paragraph 1, article 9 of the Criminal Procedure Code

192 Article 25 of the Criminal Procedure Code

193 Paragraph 13, article 3 of the Criminal Procedure Code

194 Paragraph 5, Article 169 of the Criminal Procedure Code

195 According to paragraph 1, article 167 of Criminal Procedure Code, however, criminal prosecution commences as from a person's recognition as a defendant by presenting charges (if not detained), as well as, when a person is detained

196 „reasonable doubt – totality of facts or information that, which together with the totality of circumstances of a criminal case in question would satisfy an objective person to conclude that a person has allegedly committed an offence; an evidential standard for carrying out investigative activities and/or for applying preventive measures directly provided for by this Code.“ The Criminal Procedure Code, article 3, paragraph 11

standard does not pertain to granting of victim status and it is impermissible to use it in such circumstances.¹⁹⁷

„Victim with his/her interests in the case naturally is more than just a witness, that itself, requires his/her proper and sufficient involvement in the proceedings. The victim shall be informed of the progress at all stages of the case, shall have the opportunity for all kinds of crimes to appeal, also in court, the decisions of the Prosecutor regarding rejection of granting victims status and non-initiation of prosecution, as well as termination of prosecution/investigation, shall receive copies of the criminal case files, if this does not contradict the interests of investigation, shall have the possibility to attend court sessions and present statements, opinions, evidence. The victim of a crime, as a rule, is willing and determined to listen to his/her story, also his/her position being discussed and taken into account in the criminal proceedings. The victim has to feel satisfied, as he/she is the most direct, immediate object of the crime”.¹⁹⁸

International human rights standards demand granting victim status to victims of human rights violations and equipping them with appropriate procedural rights. In the case *Ognyanova and Choban v. Bulgaria*, the European Court found violation of article 2¹⁹⁹, *inter alia*, for the reason that despite numerous requests by defense lawyers the applicant was not being consistently updated of the progress of investigation by investigative authorities. Moreover, the European Court indicated that the case files has to be accessible to applicants to an extent for them to be able to effectively participate in appealing (final) decisions rendered during preliminary investigation.²⁰⁰ In the case *Khadisov and Tsechoyev v. Russia* the European Court found the violation of article 3, *inter alia*, for the reason, that the case files were not accessible to applicants and that the applicants were not properly informed about the progress of investigation, moreover, the applicants did not have the possibility to effectively appeal the actions and inactions of investigative applicants before the court.

Accordingly, it is of critical importance that a victim, under appropriate circumstances, **is granted victim status in a timely manner**, despite the gravity and nature of the crime, especially if it is taken into account, that the criminal procedure legislation gives the possibility to the prosecutor, to render a decision regarding the repeal of the resolution on granting victim status, if it has become known after issuing such resolution that the grounds for it does not exist, which has to be notified to the victim.²⁰¹

197 Such practice was identified through the correspondence between EMC and the prosecutor's office

198 The decision of the constitutional court , September 30, 2016, para 52

199 It has to be noted that the European Court discusses standards of effective investigation under articles 2 and 3 in connection with each other

200 ECtHR, *Ramsahai and others v. Netherlands*, no. 52391/99, § 349.

201 Paragraph 5, article 56, Criminal Procedure Code

Chapter 5

Working with Victims and Witnesses

5.1. Possible reasons for under-reporting to law enforcement authorities

When analyzing hate crimes, the core issue, that is raised is **under-reporting to police by victims** of hate crimes of homophobic and transphobic nature. The under-reporting of hate crimes does not indicate that such crimes are not committed or are committed rarely, but that there is a short-coming in the criminal justice system, pointing to low level of trust of citizens to the system and demonstrating before the state the necessity of reforming the law-enforcement system.

The survey conducted across Europe, that focused on the violent experiences of the LGBT community, showed that 43% of the interviewed had not addressed the police at all, because they thought that police would not do anything for eliminating the wrongful act, in turn 29% of the interviewed did not address the police to avoid homo/transphobic treatment from police officers.²⁰² Moreover, based on survey conducted among transgender community, only 24% of the persons subject to the most severe forms of violence report to police. The research also revealed that transgender men are less likely to report to police, on the other hand cross-dresses and transgender women do so more often.²⁰³

Further, the survey conducted by the organization Stonewall in Great Britain, where 2500 lesbian, gay and bisexual persons participated across Britain, showed that three-fourths of those persons, who became victims of attacks, did not report to police, in turn two-thirds of them did not address anybody at all.²⁰⁴

The survey conducted in Sacramento, California also identified substantial shortcomings in the police system. From the LGB persons interviewed who had been subject to homophobic crime, had reported to police less, than those members of the community, who had been subject to other types of victimization.²⁰⁵ The research also demonstrated that frequently the reason for the decision not to report to police, is the officers' non-sensitive, anti-lgbt behavior/attitudes and ill-treat-

202 FRA, EU LGBT Survey, 2014, p. 68, table 6.

203 FRA, Being Trans in the EU – Comparative analysis of EU LGBT Survey Data, 2014, p.59, see: https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf

204 Stonewall, Homophobic Hate Crime, The gay British Crime Survey, 2013, p.17, see: https://www.stonewall.org.uk/sites/default/files/Homophobic_Hate_Crime__2013_.pdf

205 Herek G.M., Cogan J.C., J. Roy Gillis "Victim Experiences in Hate Crimes Based on Sexual Orientation", A reader: Hate and Bias Crime, Perry B., Routledge, 2003, p. 243 –259

ment by them (secondary victimisation). In addition, a number of the interviewed persons indicated that such treatment may have been caused by police perception of their orientation. A large number of the interviewed persons stated that the reason for the decision not to report was the fear that their confidentiality would not be observed.²⁰⁶

The research conducted by local NGOs also revealed comprehensive reasons for the under-reporting to law enforcement by LGBT community, which can be explained both by individual experiences with the law enforcement system, socio-economic factors and risks related to disclosure of personal data.

According to the research undertaken in 2012 only 27% of those persons with history of physical violence had addressed police²⁰⁷, in turn based on the data collected in 2015, only 30% did so²⁰⁸. In cases of psychological violence reporting to police is even lower. Such violence is not considered by victims to be of serious nature and accordingly, they do not report to law enforcement authorities.²⁰⁹

Based on this research and also the focus groups with members of LGBT community in three cities of Georgia (Tbilisi, Kutaisi, Batumi) held by EMC in 2016, the following obstacles in terms of the under-reporting were identified:

- Past negative experience with police (for various reasons), because of which members of LGBT community had not reported to police any more;
- Information received from a different source, that police is characterized by homophobic behavior/attitudes;
- Opinion that police did not take their case seriously (also related to how the victim views the gravity of the crime);
- The fear that confidentiality will not be observed (especially in the regions);
- Publicly known examples, in which the police response to homophobic/transphobic crimes was assessed as inadequate and insufficient.

206 *ibid*

207 N. Janezashvili "Hate Crimes against LGBTI persons – Challenges and Perspectives", public policy paper, WISG, 2016, p. 18

208 *ibid*

209 *ibid*

According to OSCE office for democratic institutions and human rights (OSCE/ODIHR) practical guide, there are several important factors that may be the reason for under-reporting of hate crimes to police, especially homo/bi/transphobic crimes²¹⁰, among them:

Fear of identification – the victims’ fear of identification in crimes based on sexual orientation and gender identity is especially crucial as frequently they refuse to report to law enforcement authorities due to the fear that their sexual orientation and/or gender identity will be revealed to family and other people around them;

Absence of trust – members of LGBT community may have a history of negative experiences involving law enforcement, among others, it might be that the victim had been subject to a bias-motivated crime before and viewed the police actions as ineffective or the police did not pay due respect to the motive of a crime. Further, during the previous cases the police might even have tried to dissuade the victim from reporting the case as bias-motivated. Accordingly, following that a victim may not be willing to communicate with police officers and appear to be uncooperative;

Fear of secondary victimization – members of LGBT community might be subject to ill-treatment not only from private persons, but also from institutions, among others, from law enforcement authorities. Mistreatment and/or insensitive behavior towards the victim may negatively affect the victim’s physical and psychological state and later make him/her reluctant to report the crime. The victim with such experience or indirect information may, for the fear of secondary victimization, refuse to address the relevant authorities to take appropriate measures to respond to the crime;

Security concerns – Despite the fact that, on the one hand homo/transphobic crimes may appear as random crimes, it may occur in such places, where the victim appears often, e.g near the place where he/she lives or works or other similar places. In such cases, victim may not report to law enforcement authorities for the fear of repetition of such crime. Such fear may be stronger if organized groups committed the crime.

Apart from these, other predictors may stand behind the under-reporting. For instance, research²¹¹ revealed additional personal factors, namely:

- Incident/crime was not viewed by a victim as sufficiently important, or he/she deemed vain to report as the police would not be able to detain the suspect;

210 OSCE/ODIHR, Prosecuting Hate Crimes: A practical Guide, 2014, p. 52-53

211 Herek G.M., Cogan J.C, J. Roy Gillis “Victim Experiences in Hate Crimes Based on Sexual Orientation”, A reader: Hate and Bias Crime, Perry B., Routledge, 2003, p. 243 –259

- Victim viewed the incident/crime as private/personal business (e.g. one in the friend circle, family etc.) and did not deem reporting to police adequate or necessary;
- Victim did not know that he/she could report to police;
- Victim assumed that he was himself to be blamed for the committed act or/and was ashamed of making it public;
- Victim himself/herself dealt with the incident/crime and took measures to prevent such acts in future.

Apart from the reasons above, empirical research has revealed factors, that are connected with bureaucracy, time and negative visions related to communication with police, despite the fact what kind of outcome was expected to follow as a result of reporting to law enforcement authorities.²¹²

For the police it is a priority issue to have societal support and trust, however, gaining such trust is essentially problematic in relation to hate crimes. Police ineffective, discriminative and in some cases repressive policies, as well as loyalty towards dominant cultural and societal norms creates a certain kind of division between law enforcement authorities and minority groups.²¹³

Taking measures in response to such crimes is an essentially complex task. Law enforcement authorities are obliged to adequately reflect such wrongful acts and facilitate the implementation of existing legislation. Moreover, through their policy and practice, law enforcement authorities may have an impact on how such crimes are viewed by state and society.²¹⁴ Under the circumstances, when very often precisely the police appears to be the first, who happens to communicate with the victim, their degree of response has to be sufficiently sensitive²¹⁵, so that the harm inflicted on the victim is assessed appropriately.

5.2. Avoiding secondary victimization and prohibition of discriminatory treatment by police

Secondary Victimization defines the harm inflicted on the victim, that was not the direct result of criminal action, but followed in the process of the institution taking measures to respond to the crime.²¹⁶

212 Chakraborti and Garland "Hate crime, Impact, Causes and Responses", Second Edition, Sage, 2015, p. 123

213 *Ib.*

214 Gerstenfeld, P.B (2013) "Hate crimes: Causes, Controls and Controversies", 3rd edn. London: Sage. (as cited in Chakraborti and Garland "Hate crime, Impact, Causes and Responses", Second Edition, Sage, 2015, p.118)

215 Chakraborti and Garland "Hate crime, Impact, Causes and Responses", Second Edition, Sage, 2015, p. 118-119

216 UN ODCCP, Handbook on Justice for Victims, New York, 1999, p. 9

Institutionalized secondary victimization is most evident in the criminal justice system. It can be reflected in violation of the rights of persons belonging to a certain group, non-recognition of the harm inflicted through crime and may also relate to unpleasant or inappropriate behavior of the police. Eventually, the entire criminal proceedings may cause secondary victimization.²¹⁷ Moreover, secondary victimization through criminal proceedings may frequently result from a disbalance of rights between a victim and a criminal, namely when the system and procedure does not incorporate victim-sensitive perspectives.²¹⁸

Despite the fact that specific reforms were introduced in the ministry of internal affairs, problems that the persons subject to human rights violations based on sexual orientation and gender identity encounter while communicating with the police, is essentially hard and systematic.

An explanation for the police attitudes towards the victims of hate crimes based on sexual orientation and gender identity may be the prejudices and negative perceptions of LGBT community members, which in fact appears to be posing greatest obstacles to police reform.²¹⁹ Different authors state in their research papers that police culture, as unwritten rules, represent collective values, norms and perspectives, which affect forms of police response to crime, and characterizes “street” police officers most.²²⁰ It is true that such police culture may contain positive content, for instance, solidarity, bravery, responsibility and the urge to catch criminals, however, at the same time it reflects their cynical and stereotypical attitudes towards victims.²²¹ The said behavior is derived from homophobia/transphobia existing in society, which places all non-heterosexual persons on the lowest level of societal hierarchy and accordingly justifies such attitudes towards them.

Further, viewing crimes as separate phenomena, may be helpful for statistics, however, non-awareness of its societal repercussions and original causes, prevents police from seeing the full severity of the harm caused by the crime.²²² In such cases, it may be that “hierarchy of crimes” is formed, consisting in hypothetical unity of values, which is applied, sometimes subconsciously, by police officers when strategies on responding to specific crimes are devised. Therefore, it may be that different kinds of crimes are prioritized differently, which

217 *Ib.*

218 *Ib.*

219 Chakraborti and Garland “Hate crime, Impact, Causes and Responses”, Second Edition, Sage, 2015, p. 112

220 Reiner, R. “The Politics of the Police, 4th edn. Oxford University Press, 2010, p. 113-138 (as cited in Chakraborti and Garland “Hate crime, Impact, Causes and Responses”, Second Edition, Sage, 2015)

221 *ibid*

222 Bowling B. “Racial Harassment and the Process of Victimization, Conceptual and Methodological Implications for the Local Crime Survey”, (originally from British Journal of Criminology, 1993), Perry B. A Reader: Hate and Bias Crime, Routledge, New York, 2003, p. 61–76

may determine the quality of response to hate crimes.²²³ In this hierarchy, homo/transphobic crimes may fall under low priority crimes, for its lack of severity, low social status of victims and nature of the crime.

As the research undertaken and cases documented by NGOs show, that on certain occasions in Georgia while responding to homo/transphobic crimes, police engaged in ill-treatment and/or homophobic treatment. For instance, in 2009-2012 years numerous facts were recorded, when police did not deal with crimes committed against the members of LGBT community with due diligence²²⁴. In addition to that, „facts of threats, cynical attitudes and verbal abuse by police officers were also recorded.“²²⁵

Further, on the International Day against Homophobia and Transphobia – on May 17, 2013, NGOs and victims noted, a number of police officers in the conversations with each other made cynical and insulting references to participants of the demonstration and in some way sympathized with the counterdemonstrators.²²⁶

Such attitudes were identified during the focus groups with members of LGBT community held by EMC in 2016, where participants emphasized cynical and inappropriate behavior by police. Such attitudes were especially evident in case of transgender sex worker women, in relation to which police approach is even more oppressive.²²⁷ In 2014 transgender sex worker women addressed the Public Defender of Georgia numerous times. They pointed to the alleged facts of pressure and transphobic behavior by police officers themselves while carrying out police control.²²⁸

In order to avoid the said secondary victimization, it is important that employees of the Ministry of Internal Affairs are fully aware of their responsibility and that while fulfilling their functions they are guided by the principle of impartiality and do not permit discriminatory treatment towards the victim.²²⁹

223 Bowling, 1999, p. 246–251 (as cited in Chakraborti and Garland “Hate crime, Impact, Causes and Responses”, Second Edition, Sage, 2015)

224 „Discrimination and hate crimes against LGBT persons”, WISG, 2015, p. 18

225 *ibid* p. 19

226 Joint NGO statement regarding May 17 events (as cited in “Discrimination and hate crimes against LGBT persons”, WISG, 2015, p. 19).

227 L. Jalaghania “Human rights condition of LGBT persons in Georgia”, EMC, 2016, p. 63

228 Annual parliamentary report of the Public Defender of Georgia, 2014, p. 693–694

229 Order of the Minister of Internal Affairs N 999, December 31, 2013, Tbilisi, on adoption of code of ethics of police and instruction on conduct of certain MIA officers

This, on the one hand, facilitates effective, adequate reparation of the harm inflicted by a specific crime, and, on the other hand, satisfaction of the sense of justice,²³⁰ meaning that the crime committed against the victim will not go without response, that the state cares and is not indifferent to his/her problems and that precisely the state is the guarantee for the protection of his/her interests and prevention of his/her rights violations. A person shall not be left with the feeling of insecurity, namely that the state is not determined, motivated while fulfilling essential duties of effectively protecting human rights and preventing human rights violations.²³¹

5.3. Protection of the victim's confidentiality

As it was noted above, confidentiality of their identity is a crucial issue for the victims of hate crimes based on sexual orientation and gender identity.

Lesbian, gay and bisexual persons because of stigma and prejudices in society, may refrain from making their sexual orientation public and do not disclose it even to family. Such behavior is mainly conditioned by the fear of rejection from family and public places and marginalization. Members of the community may not report to law enforcement authorities to avoid disclosure of their sexual orientation, even so address other organizations and they may prefer to deal with the crime on their own.

In such cases, police insensitive behavior, may inflict substantial harm on victim's well-being. Therefore, it is necessary that law enforcement authorities are aware of the importance to observe confidentiality fully and uncompromisingly and take adequate measures to ensure protection of personal data.

Disclosure of information regarding their gender identity may have a catastrophic effect on **transgender persons**, their private life and cause irreversible harm to his/her interaction with outer world, among others to relationships with a partner, family, around the place where they live, at work and with other people around them. This may cause repeat victimisation, threats to life, various forms of violence and damage to his/her property. It is important for transgender

230 Decision of the Constitutional Court on the case "Khatuna Shubitidze against Georgian Parliament" states that "crime may raise feelings of insecurity, isolation from society, fear and aggression in the victim. Therefore, obviously, victim requires protection to overcome such feelings and state support in this process. He/she shall not have the feeling that his/her problem will remain without response, one or another right/interest will be irrevocably violated, moreover, state shall protect victim from fear that he/she may still face the same/a new problem. Each person requires the feeling, hope and guarantee that state will be effective in preventing his/her human rights violations, protecting his/her lawful interest. Therefore, it is in the interest of each victim, to demand prosecution against the criminal and for this purpose, effective investigation, correct qualification of a case, identification of the exact perpetrator and imposition of the responsibility prescribed by law. Moreover, it shall be kept in mind that a victim is one of the main reasons for the initiation of criminal process and he/she objectively has substantial interests towards the results of the criminal proceedings." par. 9

231 Ibid, par. 9

persons (not all of them) that people around perceive them to be representing the gender that they view themselves to be belonging to, accordingly, direct or indirect disclosure of the sex, that they were assigned to at birth inflict substantial harm on them. Apart from such harm, disclosure of gender also affects a person's self-perception and the society's view of them as individuals with full moral worth.

It is of crucial importance to observe confidentiality in case of minor victims. According to Juvenile Justice Code of Georgia, legal representative of a minor, in case of need – a psychologist and in specific cases – also a defense lawyer attends court sessions and is present when procedural measures are undertaken.²³² Further, at the stage of investigation, a prosecutor may not allow the legal representative to attend procedural measures only when best interests of the child requires this.²³³

However, as the practice shows, a legal representative always attends the investigative measure of interrogation of those minor witnesses, victims and wrongdoers, who may be members of LGBT community and when the crime may relate precisely to this circumstance, despite the fact that the information that the legal representative may learn during the interrogation (a person's sexual orientation and/or gender identity) can contradict the principle of best interests of the child and on the contrary bring substantial harm on his/her well-being.²³⁴

In such cases, not a legal representative, who as a rule is a parent or other close relative, but a psychologist has to be involved in the case, if such wish is expressly stated by a minor.

5.4. Strategies aimed at minimizing harm to the victim and services

For the purpose of minimizing harm to victims of bias-motivated crimes it is necessary that the law enforcement system develops an integrated victim-sensitive policy, which will be based on their needs and enable provision of good quality and adequate services.

When investigating a crime, law enforcement system has to be careful to approach victims with empathy and respect. Victims need to have access to criminal justice and possibility to eliminate the harm experienced because of the commission of a crime.²³⁵

232 Article 29, paragraph 2

233 Article 29, paragraph 3

234 Such practice was revealed in several cases documented by EMC, where members of transgender community, minor victim and witness were not interrogated without the presence of legal representatives, despite the fact that minors themselves did not want their presence

235 A/RES/40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, 96th plenary meeting, Annex, principle. 4, see: <http://www.un.org/documents/ga/res/40/a40r034.htm>

According to Rec (2006)8 of the Committee of Ministers of the European Council on assistance to crime victims emphasizes several important principles. It states that the state should ensure the effective recognition of, and respect for, the rights of victims [...], they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims²³⁶. States should ensure that the measures set forth in this recommendation are made available to victims without discrimination²³⁷. The granting of these services and measures should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the criminal act.²³⁸

First, in the criminal justice system it is important to be aware of victim perspectives. For this purpose, it is crucial that the victim of human rights violation is informed about the progress of investigation at all stages of criminal process, especially in criminal cases, where inflicted harm was substantial. Victims need to have the possibility to have their concerns and opinions considered at all stages of the criminal process.²³⁹

The law enforcement system has to take all measures to minimize all obstacles and inconvenience to victims, protect their personal data, and, when necessary, ensure their security, as well as that of their families and witnesses, avoid any kind of impediments at the stage of case consideration and implementation of resolutions issued, among others regarding granting of victim status.²⁴⁰

Victims should receive the necessary material, medical, psychological and social assistance through governmental and other sources. Victims should be informed of such availability so that they are readily afforded access to them.²⁴¹

All personnel working under law enforcement system should receive training to sensitize them to the needs of victims, and guidelines, which will regulate the issues related to provision of proper and prompt services.²⁴²

United Nations Office on Drugs and Crime (UNODC) recommends states to establish victim service programmes dedicated to providing services to victims and helping them cope with the

236 COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Recommendation Rec (2006)8 of the Committee of Ministers to member states on assistance to crime victims, principle 2.1. see: http://www.coe.int/t/dlapil/codexter/Source/CM_Recommendation_2006_8_EN.pdf

237 *ibid*, principle 2.2.

238 *ibid*, principle 2.3.

239 A/RES/40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, 96th plenary meeting, Annex, principle 6 a); b)

240 *Ib*. Principle 6 d);e)

241 *Ib*. Principle 14; 15

242 *Ib*. Principle 16

traumatic effects of the victimizing act, ensuring their participation in the criminal process and reparation of the harm inflicted in the victimizing process²⁴³

However, before initiating a victim assistance programme, UNODC encourages states to make a systematic assessment of the needs of victims of crimes, of available resources, also analysis of the problems identified in communication with the law enforcement authorities and based on them devise action plans and strategies that need to be updated periodically.²⁴⁴

The victim assistance programme should ensure the provision of at least the following services²⁴⁵:

- Crisis intervention;
- Counselling on their rights and existing services;
- Advocacy;
- Keeping the victim informed at all stages of criminal process;
- Support during investigation of a crime;
- Support during criminal prosecution and trial;
- Training for personnel on victims' needs;
- Prevention of violence.

According to UNODC, provision of services under law enforcement system is much more effective, as law enforcement officers are precisely the ones, to have the first contact with victims and be tasked with assisting victims in overcoming victimization and avoiding secondary victimization.

EU Directive tasks governments with establishing special mechanisms that coordinate and, where needed, support financially initiatives aimed at providing support services to victims.²⁴⁶

Police-based services, when adequately administered, can fulfill a critical function in victim assistance. Each law enforcement agency at every level should assign a staff member/members to work specifically with victims and deliver appropriate services. Based on UNODC, the designation of a victim-witness coordinator will fulfill such function, however, involvement of non-governmental organizations and other specialized groups in developing service strategies and procedure is very important.²⁴⁷

243 *Ib.* p12

244 UNODC, Handbook on Justice for Victims, p. 12

245 *Ib.* p16

246 FRA, Ensuring Justice for Hate Crime Victims, A professional Perspective, p. 40

247 UNODC, Handbook on Justice for Crime Victims, p. 58

In Great Britain, there is the Code of Practice for Victims of Crime that places an obligation on the police service to provide victims of bias-motivated crimes with the enhanced level of service. This includes the victim being notified of the developments in the investigation on a regular basis, criminal justice process within shorter timescales, and an explanation of special measures where the victim is likely to appear before investigation and court as a witness.²⁴⁸

Based on Hate Crime Operational Guidance of Great Britain, several important measures have to be taken, aimed at minimizing harm experienced by victims²⁴⁹, among others:

- police officers and staff have to, both individually and collectively, fully understand the impact of hate crimes;
- Express support for victims of crime and their families, also develop a professional relationship with them to help them feel safe to be involved in the criminal case;
- Law enforcement system should liaise with appropriate statutory agencies and voluntary organizations that can support victims and work on prevention of further crimes, or help those statutory agencies and voluntary organizations take suitable action to support victims;
- Update victims about the criminal proceedings on a regular basis and ensure their involvement in it;
- Prompt investigation of a case and punishment of perpetrators, as a way providing reparation for the harm experienced by a victim, however victims need to be informed of other forms of reparation, such as restorative justice, a right to demand compensation etc.²⁵⁰

Moreover, while administering victim-sensitive services and for increasing its effectiveness, application of interdisciplinary approach enhances effective response of the criminal justice system to crime, among them it is of utmost importance to ensure involvement of social workers and psychologist in each individual case (in case of minor victims and children in conflict with the law involvement of social workers is necessary).

In Georgia there is no such service focused on special assistance of victims of hate crimes. Witnesses and the victim coordinator service was established to ensure observance of the interests

248 Hate crime operational guideline, College of policing, p. 82

249 *ibid*, p. 82–86

250 *ibid*

of victims, however, it covers general services to be provided to victims of all kinds of crimes and does not take into account the specificity of a crime. Its main function is to simplify communication between a citizen and a prosecutor (court) during criminal proceedings and to provide detailed information regarding the progress of a case. It is also tasked with assisting victims of violent crimes in tackling the trauma caused by the crime, assessing victim's personal-psychological condition and when necessary, providing primary psychological support. For creating as comfortable environment as possible for victims during continuation of a case, the service is also responsible for offering available services (e.g. rehabilitation centers, shelters, legal aid – contacting the organizations and organizing meetings with their representatives).²⁵¹

Activities for minimizing harm to victims is essential as for individual reparation, also generally for pursuing preventive functions and reconstruction of trust between law enforcement authorities and society/community. In this regard, the Ministry of Internal Affairs has to undertake important activities, namely:

On individual level:

- Recognition of harm experienced by a victim and full awareness of it;
- Police personnel, investigator, prosecutor need to ensure that the victim is approached with understanding, respect and due support;
- Listening to victims and consideration of their wishes as far as possible;
- Police personnel need to provide additional services to victims (identify the said needs) and when necessary ensure involvement of specific service providers;
- For avoiding repeat victimization, precise and individual assessment of risks through its prevention and adoption of appropriate measures;
- Ensuring that the victim is fully informed, as initially, also at all stages of investigation and of all developments of the court proceedings.

251 See: http://pog.gov.ge/geo/projects/current?info_id=10

On institutional level:

- The Ministry of Internal Affairs through interdisciplinary approach should devise strategies/plans aimed at minimizing the harm to victims of hate crime, which will take into account both individual and collective needs of victims on the basis of all possible discrimination grounds, among others specific interests/needs of victims of hate crime on the basis of sexual orientation and gender identity;
- The Ministry of Internal Affairs has to establish victims protection and assistance group (victim coordinator service), which will be equipped with relevant knowledge and specialists with specific expertise, among them psychologists, social workers, officers working on crime prevention, and will provide adequate support to victims and their family at all relevant stages of criminal justice process.
- The ministry of internal affairs has to ensure communication with local institutions (e.g crime prevention service) and non-governmental organizations and, when necessary, ensure their participation or refer victims to them;
- Special information leaflets need to be prepared for victims providing information about specific services;
- Effectiveness of victim protection and assistance services has to be measured/analyzed and they have to be updated and modified regularly.

Chapter 6

Mechanisms of Prevention of Homo/transphobic Crimes

6.1. Working with criminals and young persons in conflict with the law

It is impossible to prevent bias-motivated crimes without the study of the crime dynamics, scale of its coverage, regional specificity and psycho-social behavior of criminals, as well as punishment of perpetrators.

The state has a legitimate interest of imposing criminal liability on perpetrators. “Crime affects an individual or several individuals (victims), as well as the entire society, because apart from separate individuals, it harms the public order agreed between persons, harm is expressed in two forms – harm inflicted on victim and harm expressed in caused feelings of intimidation, insecurity, distrust to each member of society .”²⁵²

In cases of bias-motivated crimes, certainly, it is not decisive how harsh the criminal liability based on applied material norm of the criminal code is, but it is essential what kind of effect such punishment will have on the perpetrator’s resocialization, his/her awareness of the negative consequences the crime committed has brought and on the victim’s sense of justice. Some authors note, that the role of aggravating punishment for perpetrators of bias-motivated crimes in reparation of emotional, social or cultural harm that the crime/incident has caused, is essentially unimportant, moreover, neither can it fully disintegrate perpetrator’s/wrongdoer’s prejudices.²⁵³

In this regard, restorative justice (RJ) has emerged as an especially topical and outcome-oriented concept in the criminal justice process, which is the model of criminal justice, based on conflict resolution, aimed at repairing harm caused by a crime and facilitating dialogue between parties. The model is actively applied in different countries, among others the United States of America and Great Britain while dealing with hate crimes. The model ensures involvement of parties – victim, perpetrator and community – in the discussion (in a safe environment) focused on awareness of the harm caused by a crime – how it was

252 The decision of the constitutional court, September 30, 2016, para 18

253 „Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms“ Mark Walters, see article: <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/>

reflected on victim and community, on disintegration of stereotypes and prevention of future incidents.²⁵⁴

The use of restorative justice in the criminal justice process has become especially relevant in the last period. As different authors indicate, prison has restricted opportunities of rehabilitation programs for convicts and it may sometimes even strengthen prejudices of intolerant nature and raise his/her urge to join organized groups.

At the same time, the concept of restorative justice offers the system an effective, more inclusive alternative by supporting joint work on victims and nurturing understanding through voluntary and sincere dialogue, that is also useful for minimizing harm. Restorative interventions while facilitating dialogue between victims and perpetrators (persons in conflict with the law) intensifies communication of a kind between them, which enables the wrongdoers to become aware of the harm caused by them, which can reduce the intimidation, prejudices and stereotypes being the basis and grounds for the act.²⁵⁵

The effectiveness of interventions similar to mediation in terms of fighting against hate crime is supported by numerous research. The research demonstrates that activities tailored to the needs of victims and resocialization of a perpetrator is essentially helpful for preventing repetition of crimes and at least, disintegration of stereotypes and prejudices on individual level. For instance, research conducted in Great Britain showed that dialogue between a victim, perpetrator and community, had a positive impact on participants, namely they felt that they could play an active role in the resolution of their conflict. Participants had the opportunity to explain to the perpetrator and others about the harm suffered because of the crime and communicated to them what it is like to be “different” in the society; Parties had the opportunity to share their own versions of the incident and thoroughly analyze it through the direct participation of a mediator. In addition to that, the research showed, that simplified mediation process reduces anger, anxiety and intimidation and can prevent repetition or escalation of future incidents.²⁵⁶

According to different authors, there is critical necessity of applying restorative justice in case of bias-motivated crimes. As a rule perpetrators of such crimes are dehumanizing victims through techniques of their “neutralization”, however, face to face encounter with the victim gives them the opportunity to see the harm suffered by a victim and perceive them as living individuals, persons and not as valueless members of rejected, stigmatized groups. Moreover, such forms of

254 Repairing Harm, Rebuilding confidence and Reaching a Resolution: How Hate Crime Victims are Benefiting from Restorative Justice in the UK, ob: <https://lawlessons4life.com/academic-articles-and-essays/hate-crime-and-restorative-justice/>

255 Chakraborti N., Garland J. “Hate Crime: Impact, Causes and Responses”, Second Edition, Sage Publication, London, 2015, p. 129–130

256 „Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms“, Mark Walters, see article: <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/>

mediation gives the opportunity to parties to consider the incident and the emotional impact caused by it, which is a way of overcoming the emotional stress related to bias-motivated crimes. Eventually, mediation facilitates a better rate of reporting of future incidents to police, as well as prevents criminal recidivism.²⁵⁷

However, it must be noted that restorative justice, and namely mediation, as a method of intervention, has to be carried out by professional and sensitive mediators; at the same time, the repeat victimization of victims should be avoided, as well as, the aggravation of the harm and future crimes.²⁵⁸ Apart from general risks, mediation technique should be used selectively, since it may not be relevant and acceptable in all situations; there will be cases, when the offender's prejudices are so rooted in his personality that restorative dialogues will have a very limited transformative effect. At the same time the victim/offender may not be willing to communicate with each other and in some cases, it may even be impossible. There are occasions where, because of a power imbalance between the victim and perpetrator that the victim may feel 're-victimised' by a meeting and understanding the victim's wishes are paramount to avoid secondary victimisation. There are occasions where a 'proxy' has stood in for the victim, being someone who has knowledge of the crime and has the ability to represent his/her interests in such a process.

In Georgia, restorative justice is crucially important in terms of fighting hate crimes. Apart from resolving individual cases, it is reflected in the overall justice system and the society, since, in most cases, the offenders share the exact prejudices and views about power, as the society; their prejudices and stereotypes towards the people belonging to certain groups, may be more structural, than individual, and its transformation can be possible.

In this regard, it is important:

- For the Ministry of Internal Affairs to work with the prosecutor's Office and the Ministry of Justice on developing the specific strategy for restorative justice for hate crimes, which will include all grounds of discrimination and will take into account specificities of crimes based on sexual orientation and gender identity;
- To consult with and ensure involvement of the community and community organizations, in case of necessity, ensure their participation in the process of restorative justice.

257 Shenk, A "Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice" Ohio State Journal on Dispute Resolution, 2001. Vol.17 p. 185-217

258 Repairing Harm, Rebuilding confidence and Reaching a Resolution: How Hate Crime Victims are Benefiting from Restorative Justice in the UK, see, article: <https://lawlessons4life.com/academic-articles-and-essays/hate-crime-and-restorative-justice/>

6.2. The importance of public statements

Effective legislation on hate crimes and its implementation has practical value and reflects the State's political will, not to tolerate prejudices and to protect diversity and equality. By effective policy, the State sends a message to the offenders and also victims and stigmatized groups that the State is ready to protect human rights and equality. Clear public statements helps to build trust towards the criminal justice system and underline the significance of harm inflicted by such crimes.²⁵⁹

The public statements by politicians and law enforcement are very important in terms of prevention, while homophobic or transphobic public statements may further escalate intolerance and hostility towards the LGBT community. This, on the one hand, concerns the negative obligation of the State that political figures avoid hate language in their public statements, not to stigmatize LGBT community and indirectly encourage crime; and on the other hand, it is a positive obligation of law enforcements authorities to make the outcomes of investigation in such crimes public, for the purposes of prevention and awareness raising.

The European Court for Human Rights reiterates that State's discretion is limited, when it concerns expressions by a politician, since his or her activities are directly connected with free political debates in the society. The court asks for demonstrating pressing social need in order to justify restriction of such expression and otherwise finds a violation of the convention²⁶⁰, but in turn even when establishing that a politician's freedom of expression was violated, the court underlines the increased responsibility of a politician²⁶¹ in terms of the fight against intolerance. Namely, it notes that "politicians should avoid making comments likely to foster such intolerance."²⁶²

As for the necessity for law enforcement to publicly and clearly state their position on hate crimes, the European Commission against Racism and Intolerance (ECRI), in their report, has repeatedly called for the States, to send clear message to the public that the law enforcement system will not tolerate such actions.

ECRI published such recommendation for Georgia in its report in 2016, which stated that the government should inform the public about the provisions in the criminal code, which are used in cases

259 Chakraborti N., Garland J. "Hate Crime; Impact, Causes and Responses", second edition, Sage Publication, 2015, p. 128

260 ECHR, Judgment on *Erbakan v. Turkey*, par. 55

261 The UN Committee on Racial Discrimination, in one of the recommendations, urges States to take appropriate measures against hate speech, especially in case of the politicians, civil servants, teachers and the media. It should be noted, however, that the United Nations Human Rights Committee favors the American model approach to the freedom of expression of only limiting the hate speech if it connected to violence,

262 ECtHR judgment on *Erbakan v. Turkey*, par. 64

of homo/transphobic crimes.²⁶³ This means that the state has to send a clear message to the society that these crimes are not permissible which will help eliminate the climate of impunity in the society.

Consequently, the law enforcement authorities should realize the importance of making public the information related to the measures taken in order to respond to hate crimes and take the following steps:

- On an individual level, the employees of the Ministry of Internal Affairs and the Prosecutor's Office should refrain from using homo/bi/transphobic language and follow the principles of secularism and religious neutrality;
- Publish a press release on its official website, not only describing individual incidents/crimes and the response to it, but also expressing the position regarding the negative effects of those crimes and specifying that they are unacceptable;
- Allocate special space on its official websites, to the hate crimes, namely crimes based on sexual orientation and gender identity, which will include information about such crimes, the harmful nature of them, interpretation of the relevant provisions from the criminal code, and will underline the importance of prioritizing such crimes and the role of law enforcement authorities in preventing and eliminating such crimes;
- Explore the use of social media and other internet resources as a way to reach out to specific affected groups. One such example is True Vision (www.report-it.org.uk) owned by the police in Great Britain.

6.3. Public Campaigns and awareness raising activities

Public campaigns and awareness-raising activities against the crimes committed based on sexual orientation and gender identity are crucially important.

For example, in Austria, the integration and diversity department of the police carries out number of activities, works closely with the community and conducts public campaigns for awareness raising, information sharing and increasing the rate of reporting. It also conducts informational campaigns on cultural and social values, also domestic violence and discrimination of minorities.²⁶⁴

²⁶³ The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016 par. 70

²⁶⁴ See the information about these practices at: <http://fra.europa.eu/en/promising-practices/departement-integration-and-diversity-cooperation-fair-und-sensibel-osterreich>

Also, in **Netherlands**, in order to raise public awareness, the Ministry of Internal Affairs, Labor and Social Protection, developed a media campaign plan and relevant mechanism for the victims of discrimination. The said mechanism contained information about the organizations that play important role in the fight against discrimination, on what they can do to protect victims, and how to approach them. The mentioned mechanism was developed by the Ministry of Internal Affairs together with relevant agencies and organizations, which work on eliminating hate crimes. The partners agreed to create one unified website²⁶⁵, which contains all relevant information. Later, media campaign was also developed for the given site and focused on the issues of prohibiting discrimination. Again the Ministry of Internal Affairs discussed the idea of this media campaign with relevant local organizations.²⁶⁶

In Georgia, no public campaign or awareness raising activity has been carried out so far, which would be aimed at homo/transphobic crime prevention and eliminating stigma of LGBT community, while coordinating the work between different governmental agencies, implementing unified action strategy and monitoring its execution, are important factors in preventing such crimes.

It is important that ECRI in the 2016 recommendations for Georgia emphasizes the importance of conducting homo/transphobic awareness raising programs in schools and universities.²⁶⁷

For public campaigns and awareness raising activities, it is important:

- For the Ministry of Internal Affairs together with the Prosecutor's Office, the Ministry of Justice and other relevant agencies (for example, the Ministry of Education) to plan awareness raising campaigns in Georgia;
- The campaigns should be based on the assessment of the needs of LGBT persons. For this it is crucially important that the NGOs working on the cases of hate crimes and discrimination and cases against LGBT persons are also involved;
- To develop a media strategy, which will provide significant support to the the Ministry of Internal Affairs to disseminate appropriate information to the wider public in the correct way and have a preventive function;
- To recognise the importance of public statements by officials in the media. A set of key messages aimed at reassuring communities and deterring offending should be provided to all public officials who comment on crimes and criminal proceedings.

265 see: <http://www.discriminatie.nl/#/home>

266 See the information about these practices at: <http://fra.europa.eu/en/promising-practices/discriminatie>

267 The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016. par. 70

6.4. Trainings for the Ministry of Internal Affairs

It's necessary to train law enforcement agencies for the purposes of identifying motives of hate crimes, and recording and processing of reliable statistical data, so that all police officers have the knowledge, sensitivity and sufficient information about what they should pay attention to during an investigation, identifying motive, communicating with victims and what methods need to be used for proper recording of crimes.

In order to increase knowledge among police officers and prosecutors in view of investigating crimes and to support the process of investigation, many countries have developed special guidelines and training materials, which describe in details all possible scenarios and help law enforcement officers develop broad and comprehensive vision of investigating such crimes.

The USA Federal Bureau of Investigation (FBI) has developed guidelines and training materials for collecting information about the crime. Training materials are designed to ensure that those who are directly involved in the crime registration, can also identify hate crimes, and the criteria that point to a motive, assess a hypothetical case, qualify a criminal act in a particular case as a crime or a "possible hate crime" and indicate relevant argumentation for that.

US Hate Crimes National Coalition is actively working with the FBI to ensure that the indicators pointing to motives and the crime scenarios in training materials (case studies) are realistic and reflect the experiences of vulnerable groups.²⁶⁸

In addition to the effectiveness of permanent trainings, which are aimed at a specific institution, for example, the Prosecutor's Office and the police, in the form of separate training programs, OSCE/ODIHR believes that interdepartmental cooperation and in particular, joint trainings, aimed at ensuring effective cooperation between the agencies, is also a useful mechanism.²⁶⁹

In addition, it is important to note that the function of the training sessions are not only to equip law enforcement authorities with specialized knowledge and sensitivity, but also to draw the employees' attention to the significance of such crimes and demonstrate that proper investigation of hate crimes has to be a priority.

One of the main shortcomings in terms of investigating crimes based on sexual orientation and gender identity attributable to Georgian Ministry of Internal Affairs consists in the *de facto* hi-

²⁶⁸ Hate Crime Data Collection Guidelines and Training Manual, Criminal Justice Information Services Division, Uniform Crime Reporting Program, Federal Bureau of Investigation, US Department of Justice, see: www.fbi.gov/about-us/cjis/ucr/hate-crime/data-collection-manual

²⁶⁹ OSCE/ODIHR, Prosecuting Hate Crimes: A Practical Guide, p.45

erarchy of crimes, namely, hate crimes are not a priority crime group, which creates essential difficulties for investigation and the subsequent stage when the punishment is imposed. Such attitudes are also reinforced by viewing these crimes as fragmented, isolated and separate incidents that results in the lack of knowledge based on analysis of its causes, as well as, the absence of state strategy in the fight against hate crime.

Apart from that, the problems of maintaining detailed statistics by the Ministry of Internal Affairs and the Prosecutor's Office, a low-level of reporting as a result of ineffective responses to such crimes, leads a regular law enforcement officer to believe that such crimes do not occur or occur only in limited quantities. Consequently, this makes analysis of homo/bi/transphobic crimes, as well as, justifying prioritization of such crimes more difficult.

Although the police and Prosecutor's Office staff trainings are organized according to human rights action plan of 2014-2015 and 2016-2017, approved by Georgia's parliament, in the absence of the institutional setting in the form of a special department, the training sessions and training programs due to their fragmentary and non-systemic nature, are not effective.²⁷⁰ In addition, there are no mechanisms for measuring the outcomes. Also, the training materials, which discuss these crimes separately, only as principles, do not permit deeper analysis of the nature of such crimes²⁷¹, accordingly compilation of relevant statistics and planning of preventive measures.

The European Commission against Racism and Intolerance (ECRI) recommends for Georgia to increase training activities on hate crime investigation for [court], and law enforcement officials. In addition, training sessions need to cover the homo/transphobic hate crimes. As ECRI points out the government has to assess the outcomes of the training and, if necessary, amend them accordingly.²⁷²

Consequently, it is crucially important that:

- The Ministry of Internal Affairs should permanently and systemically provide trainings for its employees regarding investigation of hate crimes;
- develop guidance document on investigation of hate crimes, including homo/bi/transphobic crimes, identification of motives, interaction with victims and presumed perpetrators and the possible measures to be taken, based on internationally recognized standards and best practices;

270 Decree by the government of Georgia №338 of July 21, 2016, Tbilisi, Georgia, on approving, Human Rights Action Plan (for 2016-2017) article 13.2.2.2.

271 OSCE/ODIHR, Preventing and responding to hate crimes, A resource guide for NGOs in the OSCE region p.28

272 The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016par. 67

- While creating training modules, incorporate an interdisciplinary approach, focusing not only on crime investigation techniques in its criminal dimension, but will be aimed at increasing sensitivity towards LGBT (and other discriminated) groups and in this regard, will involve psychologists, social workers, experts working with the community and if necessary, community organizations;
- Develop separate module on hate crimes statistics and recording, which will not only emphasize the importance of registering such crimes, but give technical information to employees for adequate recording of information in the relevant database;
- Develop relevant criteria for measuring the outcomes of teaching/training and ensure its analysis and timely interventions for renewal of training modules;
- Law enforcement authorities should communicate a message internally to the police and the Prosecutor's Office employees on the seriousness of such offences and the priority of their investigation. Also, a bonus system may be developed, which will help increase the motivation among the police officers to investigate such crimes and to avoid secondary victimization.²⁷³

273 Individual interview with the representative of the Public Defender, Ekaterine Skhiladze on 05.10.2016

Chapter 7

The Importance of Statistics and Mechanisms

7.1. Possible methodology for maintaining statistics

For the fight against hate crimes, maintaining detailed and reliable statistics is essential. Well-designed mechanisms for recording and compiling information, encourages law enforcement agencies to collect information on the nature of the crimes, including its distribution and frequency, which will help them correctly identify the resources needed to fight crimes and enhance the investigative process.²⁷⁴

At the same time, proper statistics and relevant information is helpful for policy makers, because it makes the experiences of those groups more visible, which are most likely to suffer from hate crimes, and make appropriate decisions based on that, which also contributes to sending the right message to this particular group, and to the public in general.

The European Commission against Racism and Intolerance encourages the government of Georgia to create a unified database of all hate crimes, also indicating those cases where the ground for aggravating circumstances was used.²⁷⁵

The police department is the first responsible agency for the correct and timely response to such offenses, accordingly, the information that they collect, represents a backbone of the official statistics on hate crimes.²⁷⁶

For the law enforcement authorities to correctly identify the crime and record them in the system, it is important that within the agency, employees have appropriate **knowledge and awareness** and there is an agreement on a **general definition of a hate crime**.

According to the guidelines by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), the definition of a crime should be one, comprehensive and simple, so that on the basis of it, the police, the Prosecutor's Office and the court are able to collect information consistently.²⁷⁷ Paragraph 3¹ of article 53 of the Criminal Code of Georgia foresees those three

²⁷⁴ OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 11

²⁷⁵ The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016. par. 48

²⁷⁶ *Ib.*

²⁷⁷ OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 12

criteria so it is in line with **internationally accepted standards**. However, a major problem arises at the stage of its practical application.

It should be noted that, on December 23, 2014, the directive of the Minister of the Interior N47–“On implementation of prevention and response measures by the units of Georgian Ministry of Internal Affairs in relation to the offenses committed on the grounds of discrimination” – came into force. The directive discusses major obligations of the police agencies in combating discriminatory crimes.

According to article 2 of this directive, in case of crimes committed based on discrimination grounds, possible motive and discriminatory ground has to be specified in the relevant field of the electronic case management system – “crime story” as defined by Article 53.3¹ of the Criminal, should be specified. The Information and Analytical Department of the Ministry was assigned the responsibility for maintaining statistics. It should be noted that the directive is not implemented in practice.

Currently, it is not technically possible to include hate motive and respectively article 53 in the electronic case management system. However, it is possible to indicate the provision along with the list of other norms. The core issue is that the provision, other than its legalistic content, is to incorporate the function of a normative basis for maintaining statistics, and that the Ministry of Internal Affairs should not interpret the provision narrowly, just as a ground for aggravating punishment.²⁷⁸

Alternatively, it is possible to add a more specific article to the Criminal Code, with designated to set the requirement for maintaining statistics. Precisely this kind of changes were introduced when article 11¹ was added to the Criminal Code for the purposes of ensuring statistics on domestic violence cases, which, to some extent, contributed to increased visibility of domestic violence crimes, and the accountability of law enforcement authorities to indicate the said article in relevant cases.

Many State law enforcement agencies, ensure that crimes are classified at the initial stages of the investigation. **The decision, of course, should be based on objective facts, circumstances and/or behavioral characteristics, which either together or separately, point to a bias motive or absence of it.**

However, it's possible that evidence of homo/transphobic motive is not revealed at the initial stages of investigation, and consequently, there is not sufficient evidence for the investigator to enter it into the system.

278 Response letter from the Ministry of Internal Affairs N1189435, 03.06.2015

The instruction on integrated record-keeping of crimes, which were approved by the Ministry of Internal Affairs, define unified crime reporting principles,²⁷⁹ which is primarily fulfilled by filling out a registration card of preliminary investigation in the form N1, which should include preliminary qualification of the crime. Obviously, in the case of changing the qualification of the crime, according to the instructions, new registration card (form №1a) should be filled out.²⁸⁰ Initial recoding of crimes, offenders and criminal cases (registration), within their competences, is conducted by the competent bodies of the Prosecutor's Office, the Ministry of Internal Affairs.²⁸¹

In such circumstances, as there is a risk of losing information about a motive, the following method can be used:

Firstly, in the registration card in the form N1, the investigator should clearly indicate “**possible hate crime**”, which will contribute that on the next stage of the investigation attention will be paid and effort made to reveal the motive. At a later stage, if evidence regarding existence of a motive or proof of the contrary is uncovered, card will be changed accordingly and the new registration card will be filled out as defined by the instructions.²⁸²

Secondly, the investigating authority should rely on the **victim's perception of crime**. If a victim believes that an offense was committed based on a homo/transphobic motive, investigative authorities should automatically record it as a hate crime based on victim's sexual or gender identity, which will be confirmed or refuted by the evidence obtained through investigation. This is the most comprehensive method to identify homo/transphobic crimes.²⁸³

*For example, the UK uses a broad approach to maintain hate crimes statistics; more specifically for the purposes of recording statistics, the hate crimes are defined as crimes, which were perceived by the victim or any other person, as bias-motivated acts. In addition, the victim or any other person does not have to justify his or her belief. The Prosecutor's Office is required to present evidence for the proof of the motive in court, while it is not necessary at the stage of registering cases for statistical purposes.*²⁸⁴

279 The decree №423 by the Minister of Internal Affairs “on approving the unified instructions for recording crimes” April, 28, 2005. It should be noted that, there also exists another decree by Minister of internal affairs of the year 2011, 31 December, N1094 “on regulation of the some issues for electronic crime recording” which in the process of transitioning to electronic crime recording system prohibits to filling out the statistical forms of crime recording and to transfer it to Information Center of Analytical Department (art.1). However, despite this new decree with communication to MiA, EMC has found out that decree for 2005 sets methodological standards for crime recording and is used nowadays in practice and the ban indicated in the decree N1094 applies only on manual/non-electronically recording process.

280 Ibid. paragraph 2.1 (o)(ð)

281 Ibid. paragraph 2.2.

282 Ibid.

283 OSCE/IDIHR, Hate crime data-collection and monitoring mechanisms, p. 15

284 Hate Crime Operational Guideline, 2014. Para.1.2.3, see: <http://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>

Although all forms of hate crimes have in common specific features, including the severe harm to the victims and grave emotional experience, on the other hand the causes of crimes, the purpose and the impact on the community at large may be different in nature and character. Consequently, it will always be useful, that the relevant authorities are able, to **categorize hate crimes** committed on different grounds in its internal recording system – the registration card of the investigation²⁸⁵ and for better planning and implementation of preventive measures analyze the materials attached to different categories.

Furthermore, article 53.3¹ of criminal code includes a bias motive on various grounds; consequently, the difficulty may arise when a police officer tries to separate crimes based on the motive of a specific category – sexual orientation and/or gender identity – for recording purposes. To avoid this difficulty, detailed definition can be developed for monitoring purposes (e.g. a special code), which will make it visible internally for respective agencies, which ground the discriminatory motive behind the crime is based on.²⁸⁶

Consequently, creating a technically efficient system that reflects hate crimes or a possible bias motive for the purposes of recording hate crimes is essential, as this will guarantee inclusion of information as comprehensively as possible.

At the initial stage, the registration card used by police officers while recording information on crimes must be designed to enable the investigator by either checking a box or using designated space to insert relevant information, in particular:

- The motive of a crime or the alleged/possible motive;
- Grounds defined by criminal code- 53.31 – sexual orientation and gender identity;
- Indicator(s) of Motive identifier;
- Perception of the victim or witness that crime was committed for homo/transphobic motives.

Developing standardized forms with clear categories of crimes and motives, will help collect reliable and comparable information. The system should also ensure that, at the very first stage of the investigation, registered information is reflected in the statistical database automatically.

According to the instruction on integrated record-keeping of crimes, crime registration cards (form N1) should be filled in immediately and sent within 72 hours to the department of information and analytics, where data on crimes, perpetrators, victims, criminal cases etc. is recorded accordingly.²⁸⁷

285 OSCE Ministerial Council, Decision No. 10/07.

286 OSCE/IDIHR, Hate crime data-collection and monitoring mechanisms, p. 14

287 The decree №423 by the Minister of Internal Affairs “on approving the unified instructions for recording crimes” April, 28, 2005. paragraph 2.3.

*In order to include motive in the card and to avoid losing the information, as an alternative, the information filled by the investigator could be checked by the immediate supervisor, before it is entered into the system. In some countries, where a special unit works on the investigation of hate crimes, they can verify the information recorded by the police, in order to produce and maintain the crime statistics. The latter requires a lot of resources, but is useful for the purposes of quality control.*²⁸⁸

The crime recording system must have a keyword-search function, which will be useful in the process of further analysis of crimes.

*For example, in Sweden, the police officer prepares a written report on all incidents that are specified as “possible hate crime” in the electronic system of crime recording. Victim’s report to the police, electronic submission, anonymous phone calls or police reports from the crime scene can be attached to such crime. After the information about the crime is included in the system, the Swedish National Council for Crime Prevention, for purposes of obtaining information and analysis, uses the search terms (e.g. “homophobic”, “racist”) to find crimes committed on specific grounds.*²⁸⁹

Creating comprehensive and reliable crime registration and statistics system requires clearly developed internal policies, guiding principles and methodologies, which should be transparent to define the role and responsibilities of the police officers, at all stages of information collection and record keeping.²⁹⁰

In addition to the nature of motives and its grounds, it is important to collect the information, which will help later define typologies of offenders, describe how homo/transphobic crimes are spread, and what is their nature.

According to the instruction on integrated record-keeping of crimes, Information Support and Analysis Division of MIA Information-Analytical Department is responsible for centralized recording (registration) of crimes, perpetrators and criminal cases,²⁹¹ which based on crime registration cards processing, conducts crime statistics and analytical reporting.²⁹²

Analytical reporting and research, apart from relating to information about the motive of a crime, should cover other important issues, which will help law enforcement agencies and policy-makers to better understand the nature of such crimes and strengthen the mechanisms of response.

288 OSCE/IDIHR, Hate crime data-collection and monitoring mechanisms, p.20

289 see: <https://www.bra.se/bra/bra-in-english/home/crime-and-statistics/hate-crime.html>

290 OSCE/IDIHR, Hate crime data-collection and monitoring mechanisms, p. 21

291 The decree №423 by the Minister of Internal Affairs “on approving the unifie instructions for recording crimes” April, 28, 2005. paragraph 2.2.

292 Ibid. paragraph 2.3.

Such information may be, demographic data about the offender and the victim, location, time, form and severity of crime and other possible motives.

In addition, the responsibility of collecting and processing data regarding criminal prosecution, charges and responsibility by the Prosecutor's Office are as important, as the police function to obtain and analyze primary information about the crime. The percentage of the persecution of hate crimes compared to crimes documented by the police will be small. Nevertheless, it will always be useful to compare to what extent findings of the police and the Prosecutor's Office reflect information about the form and distribution of hate motivated crimes.²⁹³

Sharing statistics, processed information and research are very important in terms of formation and transformation of attitudes in society towards the Ministry of Internal Affairs and the Prosecutor's Office. Therefore, OSCE/ODIHR stresses the need for such publicity, moreover, according to ODIHR, **processed and recorded information/statistics should be shared with the community directly affected by crimes and the general public**. This can be done in various ways, including through annual reports, dissemination of information through media and informing the public on high-profile cases.²⁹⁴

For integrated record-keeping system and effective implementation of a monitoring mechanism, the following is necessary:²⁹⁵

- Create and improve a clear system of registration, as well as, guiding documents and instructions;
- Ensure training for police officers, so that they are prepared to enter the necessary information in the electronic case management system, adequately and with caution;
- Regularly assess and update crime record keeping systems and programs, in order to avoid any technical or content related obstacles in the implementation process.

293 OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 31. For example, if the findings by prosecutors and police demonstrated on homo/transphobic crime characteristics and the distribution are approximately the same, this indicates that the coordination work between the institutions is effective. If the findings are essentially difference, then it is clear that cooperation between the agencies is unbalanced and inconsistent, which is reflected in the confidence of the victims towards these institutions.

294 Ibid.

295 OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 19–20

7.2. Obstacles in the process of obtaining reliable information on hate crimes

In order to increase the number of reports to the police by the victims of hate crimes and the community members, it is necessary to increase the rate of documenting such crimes by the police. The police and other civilian institutions are faced with the challenge to develop strategies for supporting the victims of crime in reporting to the police. As a rule, the quality of work with the community and other external work by the police, as well as trainings provided to police officers are in direct correlation with the documented number of hate crimes.²⁹⁶

Consequently, the increase in the number of documented hate crimes, more specifically those motivated by the victim's sexual orientation and gender identity is a positive sign, meaning that the training of the police officers and its external field work are effective and victims can have more confidence in reporting to the police.²⁹⁷

The police working in close coordination with the civil society groups, which unite the community, providing services to victims and the community, is more likely to obtain information about hate crimes. This approach gives the police better chance to receive additional information from the community on specific incidents and also to be aware of those incidents, concerning which the police has not been notified.

Besides, in order to increase the reporting rate, anonymous electronic submission system may also be used.

For example, in the UK an electronic system was created – True Vision, where citizens, victims and any third person, can fill in the questionnaire anonymously in connection with the incident or crime based bias motive and indicate relevant circumstances. This information will be sent immediately to the police in the territorial district. The site also provides information on what the police response could consist in and also warns the applicant about the cases when it is not appropriate to use this system (e.g. when the alleged offender is in the victim's close proximity or is expected to come back, or in a case where someone was seriously wounded and the act was essentially grave).²⁹⁸

The British experience is also interesting, because the government has established “Commissioner of crimes and victims” (PCC), whose main function is to prevent crime and help improve police work locally. PCC plays the role of a mediator between the government and the people (commissioners are elected by the population), and contribute to the community-based approach

296 OSCE, p. 24

297 Ibid.

298 see detailed info on True Vision at:http://report-it.org.uk/your_police_force

to strengthen crime prevention and investigation process.²⁹⁹ In addition, PCC, at the local level, supports civil society organizations and groups (including financially; provides funds), which are aware of the needs of specific communities, trusted by them and have a clearer vision of what needs to be done for crime prevention.³⁰⁰ For example, PCC funded “the strategic group on hate-crimes and incidents” in one of the cities in Britain, which with the involvement of third parties carries out monitoring of hate crimes in specific regions of the country, and among others has anonymous submission system. Similar to the above example, information submitted in this way are sent directly to the appropriate territorial police department.³⁰¹

Based on the above practices, it is clear that it is important that Georgian law enforcement authorities develop simplified ways of communicating with community or obtaining information on crimes and incidents; accordingly, the following measures need to be taken by the Ministry of Internal Affairs:

- Carry out the work in close coordination with the civil society groups, which unite the community, provide services to victims and the community, in order to receive further information on the facts, carry out timely and effective response to incidents, and to be informed of the possible risks;
- Create an anonymous electronic submission system, which will help get information about a crime, and, ensure that effective response is carried out through the involvement of the community-based non-governmental organizations and communication with the victims.

7.3. Research on crimes and victimization

Considering the administrative resources of the police and law enforcement system, in general, maintaining statistics and crime registrations do not give the full picture to ensure in-depth research and analysis of the distribution and the scale of crimes, as well as, rates of reporting.³⁰²

“Crime victimization surveys” is an accepted method, which helps the State and society, to better analyze the nature of the offense and design more effective techniques to eliminate them.

299 see: <https://www.gov.uk/police-and-crime-commissioners>

300 Police Crime Commissioners and Civil Society, March 2015, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416621/PCCs_and_Civil_Society_24_March_2015.pdf

301 see at: <https://gloshate.org/reporting-a-hate-crime-incident-or-crime-online/> also on including their parties, see: <https://gloshate.org/becoming-a-third-party-reporting-organization/>

302 UNODC- UNECE, Manual on Victimization Surveys, Geneva, 2010, par.2

According to the United Nations Office on Drugs and Crime (UNODC) and the UN Economic Commission for Europe (UNECE) victimization questionnaire guidelines, statistics compiled by the police reflect the offences revealed by the police or reported by victims. However, only a small part of the crimes committed are actually recorded. In order for the crime to be included in the statistics, reporting by the victim to report, the police decision to initiate criminal prosecution or to terminate it, etc. is necessary. These decisions are based on the individual circumstances of the case and the assessment by the victim/witness of the gravity of the crime, and benefits related to reporting to police. In addition, the offence can change or no longer exist, for example, this may happen as a result of operational rules, also mistakes made while qualifying crimes or reporting them, and/or in cases when the victim or the investigation decides not to initiate criminal proceedings.³⁰³

It is true that crime statistics and other studies (e.g. statistics on hate crimes) developed by Georgian Ministry of Internal Affairs covers all registered cases, including those in which investigation was/was not initiated, prosecution was initiated/terminated, information about the victim, among others, on his/her gender, it still does not provide the possibility to determine whether the victim was satisfied with the police response to crime, systemic shortcomings and the reasons for rejecting the application.

Unlike the police statistics or analytical documents, the advantage of victimization surveys is that it covers the offences, which have not reached law enforcement authorities, including information relating to the victim's attitudes, nature of crimes and the impact on the victims and their families.³⁰⁴ National victimization surveys represent a valuable source and may be used to learn about the impact of the crime on an individual, family, community and friends, as well as individuals' perceptions of security and trust in the law enforcement authorities.³⁰⁵

The victimization questionnaires will primarily reflect the reports filed to the police and also those crimes, which, for various reasons, were not included the police database; the survey is carried out by random sampling and direct interviewing method; the questions concern victimization experiences, as well as, fears and attitudes to a specific crime, as well as, the State agencies, it also illustrates a variety of socio-demographic characteristics, which contributes to identification of risk groups.³⁰⁶

Since on an international level a crime is no longer seen as an isolated action, policy makers and relevant institutions need to have information about how certain crimes relate to the communi-

303 Ibid. par. 38

304 UNODC- UNECE, Manual on Victimization Surveys, Geneva, 2010, par. 36

305 Ibid. par. 27

306 Ibid. par. 47

ty's socio-economic situation.³⁰⁷ The statistics processed by the police, despite its necessity and importance, can only illustrate one side of the issue, and therefore it is necessary that victimization questionnaires are used simultaneously.³⁰⁸

In developed countries, victimization survey data complements the statistics compiled by the police and the justice system. More broadly, the advantage of this type of research is that it “allows to evaluate crimes using several parameters, analyze the victims’ experiences of cooperating with the police, the quality of services provided by judicial institutions and assess their overall professionalism, as well as, to undertake monitoring of the level of victimization and identify risk factors, determine the level of latency of crimes in Georgia.”³⁰⁹

Crime and Security Survey results have practical value – the latter can be used effectively in the planning of the crime prevention strategy.

The crime victimization survey was last conducted in Georgia at the end of 2010 by the Ministry of Justice. The victimization survey was based on a method used internationally. The selection process covered the whole territory of Georgia’s (excluding the occupied territories). 3,000 respondents aged 16 years and older were interviewed through the direct interviewing method. However, the survey did not cover discrimination crimes (including, based on sexual orientation and gender identity), and as a result, such analysis of hate crimes do not exist.³¹⁰

For the crime victimization surveys to also reflect the frequency of hate crimes, and the degree of severity and its impact on society, it is important that such questionnaires include specially designed questions about the motives.³¹¹ The analysis based on questionnaires should illustrate a comparison between the reported and undisclosed crimes; as well as, offences based on which grounds are most common and in which specific regions. Such analysis can also identify the harm the victims have suffered, as compared to that caused by the offences that are not hate crimes.³¹²

One example of the value of this type of survey can be seen in England and Wales. The Crime Survey of England and Wales is published bi-annually. This survey informs hate crime policy and responses³¹³. It gives clear and reliable data about repeat victimisation, satisfaction levels but its most valuable data is that it shows the levels of disparity between the actual numbers of crimes

307 Ibid. par. 24

308 Ibid. par. 36

309 Giorgi Glonti, Overview of the results of criminalization and victimization sociological surveys, Georgia 2009-2011, brief description of research methodology, p.3

310 Researching crimes in Georgia, Ministry of Justice, GORBI, p. 1

311 OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 35

312 Ibid, p. 34

313 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467366/hosb0515.pdf

and the number recorded and reported by the police. The survey also provides compelling evidence that victims of hate crime suffer much greater levels of psychological harm than victims of non-targeted crimes.

Consequently, it is crucially important for:

- Georgian government to allocate appropriate resources for the implementation of victimization surveys, which will focus on hate crimes, including the crimes that were committed on the basis of a person's sexual orientation and gender identity;
- The Ministry of Justice, together with the Ministry of Internal Affairs and the Prosecutor's Office to develop relevant criteria for the victimization questionnaires;
- Undertake adequate analysis of the victimization questionnaires, which will be used by the Ministry of Internal Affairs and the Prosecutor's Office for developing prevention strategy with appropriate specifications of different hate motives (e.g. relating to sexual orientation and gender identity).

Chapter 8

Monitoring and Reporting

8.1. Developing criteria for internal monitoring

Internal monitoring of investigations relating to hate crimes is an important mechanism for increasing the accountability among certain police officers and carrying out control over the investigation process.

For the purposes of internal monitoring, it is important that the information presented to the supervising officer or body, is based on certain criteria, which will make it possible to measure effectiveness of response measures taken by police in terms of uncovering homophobic and transphobic crimes and initiating prosecution in such cases.

Such criteria may be:

- Statistical information on how many people reported to the police regarding hate crimes based on homophobic and/or transphobic motives;
- Measures taken in response to such reports, also information on the number of crimes in which such motives were confirmed;
- Demographic data on the victim and the witness;
- Demographic data of an alleged offender;
- location, forms and quality of the crime;
- Other relevant information, including the problems identified in the process of effective application of article 53.31 of the criminal code.

An internal report based on these criteria, may indicate important aspects of police work and make more visible weak and problematic issues related to it, or other areas which need to be strengthened or fully revised.³¹⁴

314 OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 29

8.2. Internal agency groups / units and specialized officers

According to international organizations, a specialized unit established by the Ministry of Internal Affairs or the Prosecutor's Office's, will be an effective mechanism for strengthening the system of institutional fight against hate crimes.

For example, ECRI has unambiguously urged Georgia, to establish a specialized unit within the Ministry of Internal Affairs, which will work specifically on homo/transphobic crimes. In the process, the government has to ensure the involvement of relevant experts from the Public Defender's office, NGOs and international organizations.³¹⁵

In the framework of the United Nations Universal Periodic Review (UPR) Georgia received a similar recommendation from the Swedish government, namely that a special department for identification and investigation of hate crimes had to be established within law enforcement agencies. The government made a reservation to this Recommendation stating that in terms of concerns related to full coverage of the country, overload of cases and the need for comprehensive response to such crimes, a separate centralized police unit would not be an effective mechanism for combatting hate crimes. However, the Ministry of Internal Affairs undertook the responsibility to train specialized police officers in all regional police departments.³¹⁶

Different States have their own strategies on hate crimes, but a lot of them agree that it is important that specialized police units exist in order to prevent repeat victimization and to ensure organized and systematic fight against crimes. Non-governmental organizations involved in training sessions of specialized unit employees have an important task. They have control over the outcome, can expose the police officer's unethical behavior, in case of an identified problem can make it public and initiate a case in court representing the victim.³¹⁷

Since 2007, in **Sweden**, various important activities have been carried out by the law enforcement authorities as a response to hate crimes. Stockholm police specialized units operate in all territorial districts, which are responsible for coordinating the investigation of hate crimes, developing the working methods and providing training to the relevant departments. It is important that the units work with specialized prosecutors, who assist investigators and use relevant techniques to identify the motives. In addition, officers have the standard operation procedural cards, indicating the possible indicators of bias motives and what specific actions need to be taken for adequate investigations of such crimes.³¹⁸

315 para. 68

316 A/HRC/31/15/Add.1, par. 118.10

317 Preventing and responding to hate crimes –A resource guide for NGOs in the OSCE region. OSCE's Office for Democratic Institutions and Human Rights (ODIHR) 2009. p. 29, see: <http://www.osce.org/odihr/39821?download=true>

318 OSCE/ODIHR, Prosecuting Hate Crime: A Practical Guide, p. 86

Within the **UK**, Northern Ireland is the most successful in dealing with these tasks, where specialized and trained police officers are allocated in 11 districts. The police response on hate crimes and victim protection strategy has produced particularly good results, thanks to the so-called “neighborhood watch” system.³¹⁹

Early identification and prevention of potential hate crimes are especially important. Therefore, a police officer who specializes in hate motivated crimes, is also responsible for studying and collecting information on what relevant problems may exist in his area of operation and for that regularly patrols in high risk areas,³²⁰ one of the objectives of this is to make sure that the residents have trust in the officers and victims report to the law enforcement authorities without fear, e.g. in 2012-2013, the study conducted by Human Rights Commission of Northern Ireland in Belfast and Craigavon, revealed that preventive measures are ineffective in the places, where there is lack of communication between the police and the population.³²¹

As for **Scotland**, there are 8 main police units³²². Association of Chief Police Officers in Scotland established the **LGBT referral group**, which consists of one representative of all eight units, and non-governmental organizations. The group holds a meeting once every three months, supervises the police communicates with the LGBT community and works towards improvement of its quality.³²³

The above group develops uniform training program for police officers. The training sessions in the police academy last for several weeks. In addition, each year, any police officer is required to take a short course which concerns homophobic and transphobic crimes. Each police division develops a program and determines the annual course duration.³²⁴

Since 1996, in Scotland, there has been specialized homophobic and transphobic crime group (LAG-LO – lesbian and gay liaison officers) in police stations; the group size differs by region. For example, in Hampshire up to 90 specialized officers are assigned to the police stations.³²⁵

Across the United Kingdom, the smartphone and tablet application can be downloaded, through which, the police can be instantly notified about the location of homophobic and transphobic crimes, which makes a prompt response possible.³²⁶

319 Neighbourhood Watch is a widely used system in the world, which means there is an active cooperation between police and citizens for eliminating crimes. see: <https://www.psnipolice.uk/my-area/neighbourhood-watch/>

320 Racist Hate Crime – Human Rights and the Criminal Justice System in Northern Ireland Northern Ireland Human Rights Commission, September 2013, p. 21, see: http://fra.europa.eu/sites/default/files/frc-2013-g-sauberli-investigation_report_full_en.pdf

321 Ibid. p. 24

322 It should be noted that Scotland “model” is accurate at the time of the referenced report, but this is no longer current as the 8 forces of Scotland have merged into one force. This has led to a change of structure and one central response.

323 ILGA-Europe toolkit for training police officers on tackling LGBTI-phobic crime Richard Polacek, Joel Le Déroff, p. 7, see: http://www.ilgaeurope.org/sites/default/files/Attachments/toolkit_lgbtiphobic_crimes.pdf

324 Ibid. p. 11

325 see: <http://www.hampshire.police.uk/internet/advice-and-information/general/lesbian-and-gay-liaison-officers>

326 see: http://report-it.org.uk/police_in_the_uk_launch_hate_crime_app_for_mobi

Canada has an interesting approach and experience in the fight against hate crimes. At present, there are 36 police departments in Canada, but all departments have different strategies to combat hate crimes, because the central government does not require a uniform strategy from all departments.³²⁷

“Broader approach” is the most common strategy in Canada as 16 police departments follow this strategy; this approach implies that each police department should have 4 components.³²⁸

1. Primary response officers;
2. Investigation methodology;
3. Information gathering;
4. Working with community.

The second most common strategy is to have specialized officers. Such officer is added to the staff already present in departments with “broad approach” strategy. Typically, hiring such an officer doesn’t require too much additional expenses. Only one officer can work in the departments that do not deal with many hate crimes. The main function of the officer is to keep in touch with victims in the process of investigation. Also, to compile data in a way that such crimes can be distinguished from other crimes.³²⁹

The third type of strategy is the creation of specialized police units, which have detailed policies and procedures to combat hate crimes. Unit officers are specially trained and have several functions, among others they are responsible for investigation and awareness-raising campaigns against hate crimes.³³⁰

In 2009, in **Barcelona province, Spain**, the Prosecutor Office created a specialized department for hate crimes and discrimination,³³¹ which is responsible for coordinating the investigation and prosecution of hate crimes or, in complex cases, for conducting the investigation. In 2010, coordinator of the agency was granted full authority and the special protocol “instruction for the police officers on identification and registration of crimes motivated by hate and based on discrimination grounds” was developed, which gives recommendations to the police officers to inform the authorities about hate crimes and, if necessary, to refer the victims to the relevant services.

Following the success of the agency in Barcelona Province, since 2013, similar agencies which are responsible for the coordination of the investigation and the investigation of hate crimes, and for the purpose of creating local contact points, were established in all provinces of Spain and attached to the local Prosecu-

327 Hate Crime in Canada: An Overview of Issues and Data Resources, Canadian Centre for Justice Statistics, Catalogue No85-551-XIE, p. 19.

328 Ibid. p. 20

329 Ibid. p. 21

330 Ibid. p. 21

331 OSCE/ODIHR, Prosecuting hate crimes, A practical guide, p. 78

tor's Offices. These agencies are coordinated by the national delegate, who is appointed by the Attorney General. This way and using the following mechanisms the Prosecutor's Office is trying to streamline the fight against hate crimes across the country:

- Developing unified/agreed interpretation criteria of relevant norm in the criminal code;
- Coordinating investigations and investigative activities;
- Cooperation with the police and other agencies, and;
- Improved recording of official statistics and making it public.

From observing and analyzing the mentioned models and their effectiveness, it follows that Georgia's Ministry of Internal Affairs should see the need of establishing such special unit/department within its structure. For this purpose, best practices in other countries should be studied in-depth and adapted to local reality. Regardless of the fact which model is chosen, it is necessary that the following is considered while determining the functions of the unit:

- The unit should consist of those officers (and investigators), who are open and sensitive and agree that the victims of such crimes suffer from substantial harm;
- Those police employees and officers, who are the first to respond to crimes, should receive a clear directive to promptly inform the unit if such possible motives appear in the crimes;
- The special unit should be equipped with specific knowledge about hate crimes, although with special expertise on concrete grounds of discrimination, including crimes committed because of sexual orientation and gender identity; The expertise provided needs to be take into account the special characteristics of the group and focus on the needs and challenges they are faced with;
- Knowledge production and training for the officers of the unit should be systematic and have a permanent nature, aimed at periodic strengthening of their capacities, both in legal matters, as well as, in terms of awareness raising and increasing the sensitivity towards the group;
- The unit should be assigned to supervise the investigation or get directly involved in investigation and in the process of communication with a victim/ witness/alleged offender;
- The unit must create communication channels with the community (including LGBT) activists, and community-based organizations working on these issues and ensure periodic communication for sharing and receiving information;

- The specialized unit should be interdisciplinary, and apart from investigators and other employees of the Ministry of Internal Affairs, may include an expert, a social worker, a psychologist, a crime prevention officer or other persons with expert knowledge, who are capable of providing substantial assistance to the unit while responding to crimes and investigating;
- The unit should have a clear strategy and operational guidance document, which will be used if a possible hate crime (homo/bi/transphobic, etc.) is detected, also for identifying the motive, communicating with a victim and their family, carrying out investigative activities and collection of evidence;
- The unit should be instructed to maintain hate crime statistics and adequate reporting (technical support documents for recording purposes should also be developed) and to ensure an in-depth detailed analysis based on statistics, also its periodic publicity and accessibility to the public;
- The unit should ensure cooperation and communication with the Prosecutor's Office. Despite the fact that the Prosecutor's Office is responsible for supervising investigation, the unit should be authorized to investigate and collect evidence without the involvement of the prosecutor, while a prosecutor may get involved more actively at a later phase of presenting charges.

The unit should be given wide discretion in the process of preventing such crimes, as well as stages of investigation and victim reparation.

8.3. Monitoring and Reporting Mechanisms

According to OSCE/ODIHR, for the State to ensure collection of information and to carry out the monitoring of an investigation, it is significant to set up a **governmental working group** with the participation of all the agencies that are involved in any aspect of hate crime prevention.

In Georgia, the Commission for the Prevention of and Response to Domestic Violence was established within the Ministry of Internal Affairs, the members of which are representatives of respective Ministry units.³³² The Commission discusses the outcomes of the fight against domestic violence against women,

³³² see: <http://police.ge/ge/shinagan-saqmeta-saministroshi-odjakhshi-dzadaladobis-preventsiiis-da-masze-reagirebis-komisiis-shekhvedra-gaimarta/9411>

also, the challenges of working in this direction and the medium-term action plans and activities of the police units.³³³

There is need for a similar working group in terms of the fight against hate crimes, including homophobic and transphobic crimes, in order to ensure effectiveness of the response to them. It is noteworthy that no such group exists within the Ministry of Internal Affairs. This may imply that the State does not see the importance of hate crimes and potential harm related to them.

In order for the state **to openly declare** that LGBT people's rights and their safety is also a priority, and that it is trying to implement effective measures to eliminate violence, on the basis of prejudices related to a person's sexual orientation and gender identity, it is important:

- That an operating team is established within the Ministry of Internal Affairs, which will unite the respective representatives of the police, investigators, and other employees of relevant Ministry departments, including the minister and his deputy(s). Such group will meet periodically in order to share information, identify problems and will develop **actions plans and strategies for eliminating hate crimes and ensuring its publicity**.

8.3.1. General Inspection

Implacable commitment of duties by the employees of the Ministry of the Internal Affairs (MIA) during the process of comprehensive investigation of homophobic and transphobic crimes and communication with victims and/or witnesses substantially depends on independent, objective and effective functioning of internal monitoring mechanisms. Exactly these kinds of mechanisms allow employees of the MIA to disclose and assess gaps made during the fulfilment of obligations as well as to ensure adequate response regarding these gaps. It is essential that each staffer of police acknowledge that any of their actions taken while working on the hate crimes could be subject to inquiry and feedback by the inspection mechanism.

In the system of MIA, the main inspection mechanism is the General Inspection, which is under the direct control of the Minister, and it functions as a department. The General Inspection is the major internal controlling body and is directly responsible for the violation of ethics, disciplinary norms, and deficient completion of official duties and disclosure-response of facts of misconducts³³⁴.

The basis for checking the work carried out by the units of the system of the MIA depends on the information regarding offense/violation and disciplinary misconduct by the employee of the MIA.

333 Such issues are: restraining order monitoring, police training, information campaign and continued meetings with the population, analysis of 112 calls and update of guiding principles;

334 Statute of the General Inspection of the Ministry of Internal Affairs, Article 2 (b)

This kind of information can be received in an oral or written statements, complaints and reports from citizens and employees of the Ministry as well as in the forms of materials and reports from legal or physical persons.³³⁵

The General Inspection, according to the received information, carries out work inspection and based on the results, prepares relevant notice on the termination of the proceedings due to the absence of disciplinary misconduct and recomendatory conclusion regarding disciplinary responsibility which is sent to the Minister and is registered officially. The disciplinary body, on the one hand, collects information and materials to prove the possible misconduct and at the same time, formulates conclusion-whether there was a misconduct or not. Thus, we see that the same body is an “accuser” as well as the one that makes decision;³³⁶ moreover, the conclusion which is prepared by this body is only recommendatory and in the process of making final decision, the Minister has the authority not to take into account the above-mentioned conclusion and make decision which is different. At the same time, the Minister is not obliged to provide arguments for his/her decisions. Therefore, the final decision-maker of the case is not a collective body but an individual person who holds political position that takes away the possibility from the institution to make decisions independently and impartially.³³⁷

At the same time, even though, a citizen/victim can provide information to the General Inspection regarding the unethical behavior of the police officer or improper fulfilment of duties during the process of investigating specific crime or while communicating with witnesses or victims, it should be emphasized that while disciplinary proceedings are still going on, citizen/victim has only the role of the informant and is not the participant of the process. The internal inspection mechanism has the function of representing/defending the interests of citizen/victim that has the authority to start disciplinary proceeding of police employee.³³⁸

The legislation does not take into account the right of citizen/victim to complain the decision regarding termination of proceedings due to absence of signs of disciplinary malefaction. Thus, “the interest of citizen on impartial supervisory process might be under question in the conditions, when he/she does not have a chance to control and influence the disciplinary process. This means that system should guarantee possibility to complain relevant decision or action with impartial arbitrator.”³³⁹

During the process of investigating hate crimes, inappropriate behavior of policemen towards LGBT community or improper fulfilment of duties, including, taking insufficient measures to determine mo-

335 Ibid. Article 9

336 G.Imnadze and others, “Political Neutrality in the Police System”, EMC, 2016, pp. 44-59

337 Ibid.

338 See the Statute of the General Inspection of the Ministry of Internal Affairs

339 G. Imnadze, G.Kekenade “Politics of Invisible Power-the Analysis of the Law Enforcement System”. EMC, 2015, pg.69

tive during investigatory activities, incomplete reflection of guilt resolution, use of homophobic, transphobic hate speech and violation of the principle of secularism should be adequately addressed which has to be guaranteed by the inspection body that is institutionally independent. Therefore, the effectiveness, objectivity and impartiality of the internal monitoring mechanism, change and transformation of the existing institutional arrangement of the General Inspection is substantially important. Exactly within the framework of reformed system, it is possible to fight effectively against hate crimes and ensure trust towards the Ministry of Internal Affairs.

At the same time, it is important that for the General Inspection, there is an internal guide document/instruction which is used during the process of controlling the investigation process of hate crimes so that it has relevant competence to fully identify main gaps while conducting investigation/examination that emerge during the process of investigating such crimes, collect evidence related to the case and determine whether police action can be considered as a violation of the law and in the case of guilt, determine adequate responsibility measures.

Taking into account the above-mentioned points, for the purpose of increasing functioning and impartiality of the internal inspection mechanism, it is important that the state implements adequate changes, such as the following:

- independence of the General Inspection should be guaranteed while defending the principle which outlines that the agency which persecutes for disciplinary offence and the agency which makes decision should be separated to a maximum extent and be independent institutionally from each other, at the same time, there should not be an institutional and hierarchical connection between the persons who proceed the case and the officer against whom is the complaint submitted;
- In the disciplinary process, the interests of the victim should be taken into account through informing him/her and giving him/her right to appeal the decision to terminate/not starting disciplinary proceeding;
- The transparent procedures of disciplinary proceeding and their duration towards employees of the MIA should be determined by the law as well as standards of justifying decision regarding paying the disciplinary sanctions and basis of disciplinary responsibility;
- Effective and impartial mechanism should be created regarding charging disciplinary sanctions where it will be guaranteed to substantially review the conclusion prepared by the General Inspection, control legitimacy of procedures of disciplinary proceedings and etc.

8.4. Enhancing the role of the Prosecutor's Office

Local law enforcement agencies play a critical role in responding to hate crimes.³⁴⁰ Continuing cooperation with the Prosecutor's Office and coordinated work helps the investigation, to use a comprehensive approach to the investigation of such crimes, and make a positive impact on victims and witnesses.

Coordinated and collaborative work is particularly important in the process of investigating cases of alleged hate motive. The Prosecutor's Office's is responsible for ensuring that the motive is thoroughly documented and the evidence is obtained at an early stage of the investigation.

In the **US**, across the country, the Prosecutor's Office uses a variety of techniques, in order to simplify the coordinated work with other crucial agencies. For example, the Los Angeles Regional Prosecutor's Office has developed hate motive indicator sheet (card), which is used by police officers to verify the presence or absence of all indicators when investigating hate crimes.³⁴¹ Also, in Florida, the Prosecutor's Office has developed procedural rules for the police, which outline their role, responsibilities and reporting procedures.³⁴²

In addition, in some jurisdictions, and in particular **Sacramento (California)**, inter-departmental operational groups (task force) were set up, which brings together the representatives of local, state and federal law enforcement agencies who work on hate crimes. Prosecutors and representatives of other institutions ensure proper operation of these task forces.³⁴³

ECRI recommends that it is monitored whether the police investigates [racist] or homo/transphobic motives.³⁴⁴ The Prosecutor's Office, as well as, other agencies play a crucial role in ensuring that investigation of hate crimes is conducted in a proper manner.

Consequently, it is important:

- For the Ministry of Internal Affairs and the Prosecutor's Office to coordinate while investigating hate crimes (including, homo/bi/ transphobic crimes);

340 The American Prosecutor's Research Institute (APRI) „A Local Prosecutor's Guide for Responding to Hate Crimes“, p. 15–16, see: http://www.ndaa.org/pdf/hate_crimes.pdf

341 Ibid, p.15

342 Ibid.

343 Bureau of Justice Assistance (BJA). (1997). "Stopping Hate Crime: A Case History from the Sacramento Police Department." BJA Fact Sheet. Washington, D.C.: Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. (as cited, The American Prosecutor's Research Institute (APRI) „A Local Prosecutor's Guide for Responding to Hate Crimes“).

344 The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016. par.62

- To enhance the supervisory function of the Prosecutor's Office during the investigation of hate crimes, which guarantee not only that the Prosecutor's Office employees give direction to the investigation, but also ensures that the motive is identified and the communication with victims/witnesses is supervised and, if necessary, the relevant instructions are given.

8.5. External Monitoring Mechanisms

In order to increase efficiency of interdepartmental working groups or coalitions, it is useful to involve community and LGBTIQI organizations working on hate crimes.

For example, the **USA** has created a broad coalition of civil rights, religious, educational, law enforcement, professional and civic organizations in order to improve the response to hate crimes on the federal and state levels. The action plans, strategies and findings developed by this interagency group are **published**, which contributes to drawing the public's attention to the need to combat hate crimes. Its aim is to strengthen victims and facilitate the launch of the discussion in the community, which could make new aspects of hate crimes visible.³⁴⁵

Also, special strategy was developed by the **UK** government to prevent hate crimes and to support victims of crimes to report to police.³⁴⁶ To achieve the strategic goals, the government created the united platform, consisting of relevant government departments, as well as, law enforcement agencies, local volunteer organizations, in order to ensure efficient response to hate crimes. Overall, the interdepartmental efforts are aimed at creating a more effective and continuous process, ensuring timely identification of offenders and crimes, and in general unified response to the crimes.³⁴⁷

In **Croatia**, hate crime monitoring group was created, whose operation is based on "Protocol on hate crimes" approved by Croatian government's Office for Human Rights.³⁴⁸ The group is made up of representatives of Croatia's Ministry of Internal Affairs, the Prosecutor's Office, High Misdemeanor Court of the Republic of Croatia, Police Academy, the Ministry of Justice, the Ombudsman's Office and various non-governmental organizations.

345 OSCE/ODIHR, Hate crime data-collection and monitoring mechanisms, p. 31–32

346 Action Against Hate, The UK Government's plan for tackling hate crime, July 2016, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf Also, see the old version of this document, „Challenge it, Report it, Stop it“, March 2012, see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf

347 OSCE, 32

348 The Human Rights Office of the Government of the RC, Working Group for Monitoring Hate Crimes, PROTOCOL FOR PROCEDURE IN CASES OF HATE CRIMES, Zagreb, March 2011, see: <https://ljudskaprava.gov.hr/UserDocsImages/arhiva/protokoli/Protocol%20on%20procedure%20in%20cases%20of%20hate%20crime.pdf>

The working Group analyzes and monitors implementation of anti-discriminatory legislation pertaining to relevant crimes; when necessary, revises the legislative framework for hate crimes, and coordinates recording of information and inter-institutional cooperation in the process of prevention of such crimes. The working group meets several times a year and provides an opportunity for the group members to share information, present individual cases, news and future initiatives.³⁴⁹

Spain created a 40-member multidisciplinary working group in order to view the crimes against LGBT persons from different perspectives, including to discuss mechanisms to be used against hate crimes, data collection issues and the role of different institutions. The group includes prosecutors, people who work in the national and regional security agencies, the media, civil society, non-governmental organizations and also, the actual victims.³⁵⁰

The European Commission against Racism and Intolerance (ECRI) calls the government of Georgia to take effective steps to combat discrimination and intolerance against LGBT persons, which, according to ECRI should be carried out in cooperation with LGBT community and the Public Defender's Office.³⁵¹

For the prevention and efficient investigation of hate crimes, and in particular, homo/bi/transphobic crimes, also in order to develop approaches for reparation of victims and increase accountability of law enforcement, it is important to:

- Create a working group for homo/bi/transphobic crimes, in the form of external monitoring mechanism, which will include high-level representatives of the Ministry of Internal Affairs, the Prosecutor Office, Public Defender's Office, non-governmental and community organizations and LGBT community representatives, which will convene periodically and discuss the progress or challenges and find the ways to resolve them;
- Enhance the parliamentary control of execution of the human rights action plan, ensure publicity of the process and enhance stakeholder involvement in view of increasing law enforcement authorities' accountability.

349 Ibid.

350 see <http://fra.europa.eu/en/promising-practices/network-against-hatred>

351 The European Commission against Racism and Intolerance (ECRI) report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016. par. 108

Chapter 9

Trust Building: Working with Community and Community Organizations

9.1. Field works with community for preventing homophobic and transphobic crimes

The trust of the community, and in this case members of LGBT community is essential for the law enforcement agencies to be able to effectively respond to crimes.

According OSCE/ODIHR guidelines, [the Prosecutor's Office] should not wait for the high-profile case, in order to communicate with the community. Regular communication and consultation with the community groups may have positive effects on the willingness of victims and witnesses to cooperate with law enforcement agencies and also, will provide better opportunities to police and the Prosecutor's Office to analyze the general situation in the community. Such communication helps to be better informed about tensions between different groups and gives direction to the police as to when and how it is necessary to intervene.³⁵²

Apart from this, implementation of educational and awareness raising campaigns by the law enforcement authorities and early intervention has positive impact in terms of dissolving prejudices and crime prevention.

Among the external field work OSCE / ODIHR recommends the following activities:³⁵³

- Organizing workshops with community and law enforcement agencies to discuss the current situation in the community, and to inform community members about the relevant rules (including amendments) on legislative or policy level;
- Making Public statements about hate crimes, including in schools, religious institutions and community centers;
- Develop awareness materials about hate crimes, especially homo/bi/transphobic crimes.

352 OSCE/ODIHR, Prosecuting Hate crimes, A practical guide, p. 79

353 Ib.

In addition to the OSCE/ODIHR general recommendations, in the report on Georgia, ECRI also calls on the government to start awareness raising programs in schools and universities to fight homo/transphobic hate crimes.³⁵⁴

9.2. Regular work meetings with community organization

In order to ensure an effective response to hate crimes, it is important to establish or enhance communication and cooperation with the community and the civil society organizations who work specifically on LGBT persons' rights and the crimes based on sexual orientation and gender identity.

This technique gives the police the ability to be continuously informed about the situation in relation to such crimes and periods of increased danger and risks.

For example, in the UK, the regional police agency and the local organization working on anti-Semitism, signed a memorandum of understanding, under which both sides are obliged to share statistical and other information, which concerns specifically the crimes committed on the basis of anti-Semitism. The agreement also specifies that parties confirm their commitment of holding meetings to discuss newly discovered circumstances in different cases, changes in relation to the nature, spread of such crimes and other relevant problems. There is also, the possibility of holding ad hoc meetings in the period when there are increased risks for the community.³⁵⁵

At the same time, an interesting practice exists in **the US, in New Jersey**, one of the police departments has designed hate crime / community outreach unit, whose work is supervised by the Police Department officer and which consists of an investigator, specialized officer on hate crimes and a prosecutor, who is also a legal adviser of the unit.³⁵⁶

Taking the above practices into consideration, it is important for the Ministry of Internal Affairs:

- To realize the necessity to communicate with the LGBT community and community organizations, which will result in increased awareness of the existing reality in terms of crimes, periods of increased danger and risks.

354 par. 70

355 National Police Chief's Council, Information Sharing Agreement with the Community Security Trust (CST), 1st review April 2016, see: http://report-it.org.uk/files/2016_-_04_-_06_-_isa_npcc-cst.pdf

356 The American Prosecutor's Research Institute (APRI) „A Local Prosecutor's Guide for Responding to Hate Crimes“, p.16

9.3. Ad Hoc meetings with community and non-governmental organizations in case of increased risks

Apart from maintaining communication with LGBT community and non-governmental organizations working on hate crimes based on sexual orientation and gender identity through quarterly meetings or the ones once in six months, there may be necessity to organize ad hoc meetings particularly during the periods of increased risks for the LGBT community.

Such period may be May 17 – International Day against Homophobia and Transphobia (IDA-HOT), also the days before and after May 17 have to be seen as periods of increased risks.

For example, in Georgia, despite the fact that similar to previous years, in 2016 LGBT community and activists were unable to exercise their right to assembly, in the period leading to May 17, 2016 and after that dozens of cases of sporadic violence against the community members and activists were revealed. Such acts of violence were based on the presumed victim's sexual orientation and gender identity, and was mostly committed at night, in public spaces and by strangers.³⁵⁷

It is noteworthy that after the violent and homophobic counterdemonstration on May 17, 2013, further violence escalated towards the members of the LGBT community. The Public Defender of Georgia in total documented 32 cases of violence on May 17 and during the period after the events.³⁵⁸

In the given circumstances, community members and especially LGBT activists are experiencing constant fear, stress and feelings of insecurity. They live under continuous state of emergency. Due to ineffective response from the police and oftentimes homophobic attitude of the police, they are left alone in facing violence and persecution.

Having information about the days and periods containing higher risks, makes it easier for the police to respond promptly to crimes and incidents. For the latter and for planning adequate response mechanisms based on first-hand information, communication with LGBT community is crucially important.³⁵⁹

357 Special statement by NGO on the increasing number of homophobic crimes, 23.05.2016, see: <https://emc.org.ge/2016/05/23/emc-56/>

358 The Public Defender's parliamentary report, 2013, p. 513

359 It is noteworthy that following the initiative of the Public Defender, such ad hoc meeting was held regarding the issues of investigating homophobic crimes of May 31, 2006 and preventing such crimes. Representatives of organizations working on LGBT issues, the Government, the Ministry of Internal Affairs and the Public Defender's Office attended the meeting. The purpose of the meeting was to coordinate and share information on recent homophobic violence, as well as, to review the State strategy for the prevention of hate crimes. However, the meeting was not followed up by any public statement about increased violence or any other such action.

Conclusion and Final Recommendations

The state strategy of fighting against hate crimes should be based on in-depth analysis of typology and its social-economic, cultural causes of such crimes. At the same time, in the process of working on the preventive policy and fighting against hate crimes it is essential that the state acknowledges the importance of following the principle of due diligence.

Unlawful actions committed because of intolerance and on the basis of sexual orientation and gender identity include set of intersectional and complex issues that should be analyzed while taking into account social and political contexts and power structures. In this process, it is essential to acknowledge that the crime based on preconceived attitude will not be ceased by specific criminal act and furthermore, it is not originated in a social and cultural vacuum. This kind of crime has a social and political basis and quite often, there is a certain unjustified public acceptability towards it. The reasons of homophobic and transphobic crimes should be inquired in the hierarchical power structures. At the same time, systemic and irrational character of specifically this kind of crime makes it as a product of social injustice and therefore, oppressive social practice.

Homophobia, biphobia and transphobia might be revealed not only in the behavior of specific person but in inertness of institutions which is largely due to open loyalty of state institutions towards dominant heteronormative prejudices and abruptly negative attitudes towards other sexualities. This situation supports discrimination and strengthens violent practices towards LGBT community and gives it systemic character.

Non-recognition of LGBT community from the side of law enforcement system and quite often discriminatory policy has considerably eroded confidence towards police. Ineffectiveness of the justice system against LGBT community (on the one hand, non-recognition of such crimes and on the other hand, openly discriminatory and repressive policy towards the members of LGBT community) has caused unlawful actions containing homo/bi/transphobic motives to become invisible crimes.

Up until today there is not a holistic state strategy on fighting against homo/bi/transphobic crimes and its social, cultural and economic causes which is shown in the reflection of such crimes as single, isolated and abstract incidents. This approach completely excludes the acknowledgement of negative consequences of the committed act, considering the harm not only of the victim but on the level of the social group as a whole that it belongs to. Therefore, it is critically important to change the agenda of the law enforcement system in a way that it guarantees the priority of homophobic, biphobic and transphobic crime and strengthening the fight against such crimes.

Throughout years, under the circumstances of increasing the tendency of fighting against hate crimes, it is important that the state policy reflects this tendency adequately and is ready not to fight against these crimes through reactionary methods but to strengthen preventive policy and make one of the main objective to fight with the causes of such crimes.

Implementing effective and successful policy on hate crimes, first of all, requires unified definition of these kinds of crimes in the criminal justice system as well as agreeing on the content. In the proposed guideline document the practical and symbolic importance of consistent legislation and policy documents, operational guideline documents was emphasized multiple times. Showing from the side of justice system consistent approach and effort towards fighting against such crimes supports changing negative pre-attitudes towards non-dominant groups and explicitly indicates that discriminatory crimes are unacceptable.

The gaps that exist in the criminal justice system today show that fighting against hate crimes is not priority. Such approach needs to be changed and the consolidated strategy which will unify prevention of crimes, will support the increase of applications, will strengthen the effort to reduce harm of victims and especially will enhance the effective response of local agencies through supporting reinforced, impartial monitoring and consulting processes and involving professionals, community organizations and LGBT community.

Creating specifically such effective mechanism and system is the aim of the proposed guideline document that is focused on the activities that should be implemented by the Ministry of Internal Affairs but is essential for other law enforcement agencies.

As a conclusion, for the purpose of creating effective and successful state strategy on fighting against homo/bi/transphobic crimes and supporting police employees with relevant and sensitive knowledge, it is critically important to take following measures:

- Relevant agencies should develop integrated strategy document on fighting against hate crimes which will include activities that are oriented towards investigation, prevention, rehabilitation and harm reduction and should outline obligations and responsibilities of relevant agencies;
- The Ministry of Internal Affairs, on the basis of proposed guideline document, should prepare an internal strategy on fighting against hate crimes as well as operational guideline that will be registered officially as a relevant normative act. It is essential that in this process, relevant experts, international organizations, civil society and community organizations are involved;

- Employees of the MIA should be permanently and systemically trained regarding investigation of hate crimes; During preparation of training modules, interdisciplinary approach should be considered which will be focused not only on the criminal justice scope of crime investigation technique but will be also oriented on increasing sensitivity towards LGBT persons (and other discriminated groups). At the same time, it is essential that for the purpose of measuring the results of learning/trainings, objective and realistic criteria should be developed so that the analysis of these training materials could be developed and timely intervention for renewal of learning modules could be made accordingly;
- The module which will include and register statistics on hate crimes should be developed and focus on the importance of collecting information about these types of crimes. Through this module, Employees of the MIA will have access to technical information and will adequately reflect the information in the relevant database;
- The Ministry of Internal Affairs and the Prosecutor's Office should ensure to outline the priority of investigating homo/bi/transphobic crimes to the employees and should support them to implement systemic activities;
- The transparent system of crime registration together with guideline documents and filling instructions should be developed and improved; crime registering systems and programs should be periodically updated for the purpose of preventing any kind of technical or content-wise barriers;
- Within the system of the MIA, specialized agency/unit responsible for investigating hate crimes should be created. Above-mentioned agency/unit should include employees who have high sensitivity and acceptance regarding hate crimes and share the substantial harm of the victims; At the same time, specialized agency/unit should be interdisciplinary and besides investigators and other employees of the MIA, should involve expert, social worker, psychologist, crime prevention officer and other persons having expert knowledge and can have significant input for the agency/unit while investigating and responding crimes;
- Specialized agency/unit should be equipped with the specific knowledge hate crimes including highly specialized expertise on concrete signs of discrimination, including the crimes motivated by sexual orientation and gender identity;
- Agency/unit should be responsible for supervising the investigation or be directly involved in investigatory activities and in the process of communicating with victim/witness/possible criminal; The agency/unit should have clearly defined strategy and operational guideline

document which will be used while detecting crimes and determining possible crime motive (homo/bi/transphobic and etc), communicating with the victim and his/her family, implementing investigatory activities, finding and attaching evidence to the case, also producing and analyzing statistics;

- The internal working group should be created in the MIA which will involve relevant employees of the patrol police, detectives-investigators and representatives of important agencies of MIA, including the Minister and deputies. The working group in the format of sharing will periodically hold meetings for the purpose of identifying problems and ensuring the publicity and development of plans-strategies for fighting against hate crimes;
- The impartiality and independence of the General Inspection-the responsible agency within the system of the MIA for detecting/responding to specific cases of unlawful actions and improper performance of duties, violation of ethics, disciplinary norms, should be guaranteed. In addition, engagement of victim/applicant in the process and granting him/her with the right to complain regarding the decision made by the General Inspection should be reformed in a way that the General Inspection should not be an accuser and decision-maker body at the same time. The latter should be independent and impartial arbitrator;
- The working group as an external monitoring mechanism on homo/bi/transphobic crimes should be created. This working group should include high-level officials from the MIA, Prosecutor's Office, Public Defender of Georgia, non-governmental and community organizations and representatives of LGBT community. The group will hold meetings periodically and its scope of work will be determined by the achieved progress or through identifying existing challenges and searching for the ways of solution;
- Communication with LGBT community and community organizations should be ensured and active communication plan should be developed which will support increasing awareness about existing crime-related reality, periods and risks of increased threat;
- Recommendations that are included in the proposed operational guideline document should be reflected in the human rights action plan and for the purpose of increasing accountability of the law enforcement system, the parliamentary control on the implementation of human rights action plans should be strengthened and the involvement of stakeholders as well as publicity of the abovementioned process should be guaranteed.

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