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When hate becomes crime

Hate crime: what it is and the legal framework against it

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When hate becomes crime

1. Introduction

*by Vittorio Rizzi**

> *There are no races; the human brain is the same. There are racists. We must defeat them with the weapons of wisdom.*
>
> RITA LEVI-MONTALCINI

The glorification and condoning of Nazism and continuing antisemitic attacks, racist chanting from supporters in the stadium stands, the threat from white supremacist violence, the horrific toll of femicide victims, bullying attacks against the disabled, vile acts of discrimination against gay communities. This is the news that we read every day: crimes connected by the red thread of hate against those who are different by race, religion, gender, sexual orientation. Incidents that, beyond figures and statistics, are a signal of sick passions that cannot be underestimated and must be immediately restrained.

Since ancient times humanity has asked itself about the ontological, philosophical and moral meaning of the concept of hate. Which comes first and which is stronger, hate or love? Are human beings naturally good or bad? What force keeps the world together, good or evil?

The history of human thought and science have provided different, often contradictory responses to such complex questions, second only to the question about the origin of life.

An overview of the various approaches ranges from those who, like Empedocles in ancient Greece, maintained that the world was in continuous tension between two divine forces, Love and Hate, (with the former keeping together the four roots of water, fire, earth and air and the latter separating this harmony named "Sphere"), to theories according to which human beings are born bad – Hobbes' Homo homini lupus –, to Nietzsche and Freud, who share the idea of the death of God and foretell the destruction of everything by humans because of the hatred they harbour inside themselves.

Scientific discussions include those who believe violence is necessary to survival in the great circle of life, as argued by Lorenz, or those like ethologist Eibesfeldt, who believe that the potential of good and evil is equally present in human nature. This debate involves the very concept of culture and civilisation: from Rousseau's theory of the noble savage according to which human beings are born good and become cruel and corrupted by civilisation, to the many philosophers and scientists who support the opposite thesis of the domesticated beast, according to which man is Cain and the fiercest animal on earth who enjoys torturing and killing even his own brothers.

In his book The Better Angels of our Nature: Why Violence Has Declined (published in Italian by Mondadori in 2017 with the title of Il declino della violenza), neuroscience researcher Professor Steven Pinker from Harvard University argues that, despite the general, widespread perception, figures clearly show a decline in vio-

lence and "today we may be living in the most peaceable era in our species' existence". In the Middle Ages the homicide rate in Europe was thirty times higher than the current rate in proportion to the population, and slavery, torture and capital punishment were the order of the day. Today's dramatic drop in the number of homicides is the result of the prevalence of the "better angels" of our nature - empathy, socialization, the ability to mediate conflicts, the moral sense, and reason - having the upper-hand over our "inner demons" of predation, violence, ideological extremism and blind consciences.

Philosopher Zygmunt Bauman explored hate, taking up Freud's theories and recalling the concept of fear that those involved in law enforcement face every day. According to Bauman, hate and fear are as old as the world and will not cease to exist. There is a vicious circle where one hates because one is afraid of those who are different, and that fear fuels and reinforces hate, in a liquid world characterized by unchecked individualism, where nobody is regarded as a travelling companion but rather as an antagonist to be guarded against. The prevailing uncertainty of our society magnifies the fear of difference (which has always existed) and generates the need to discharge pent-up hate and anger on a target, be it a migrant or a Jewish person, a gay person or a Muslim person, a disabled person or a black person. All this might seem like mere philosophical speculations and stylistic exercises, were it not for the fact that every day the news is full of hate incidents and that hate issues are on top of the agendas of those in politics, law enforcement and education.

The purpose of this supplement is then to address hate as a criminological category from a law enforcement perspective.

As evidence of how often hate crime is a divisive concept, there is no legal definition for these crimes motivated by prejudice towards the victim based on a characteristic that reflects a deep and fundamental aspect of the identity of the victim and of the victim's group.

As discussed below, these are 'multi-offensive', under-reported and under-recorded crimes with a risk of escalation.Tackling these crimes, which requires targeted training, is the core business of OSCAD (Observatory for Security against Acts of Discrimination), an Italian example of innovative best practice, unique in the international arena, which has been operating since 2010 within the Department of Public Security to enhance the work of generalist police forces in preventing and countering crime motivated by discrimination.

The challenge of making tolerance and inclusion fundamental aspects of our society is complicated by the fact that in addition to real world threats, there is online hate, which poses devastating potential harm to victims and which countermeasures are still unable to address in the swift and timely manner that the speed of web defamation requires.

The most powerful antidote then can only be culture to combat the ignorance of those who fear difference, who bury themselves in stereotypes and are unable to look beyond them. Police forces play a pivotal role in stopping every form of intolerance before it escalates to suffering, destruction and death through crimes that already have dishonoured human history. Hence, nothing can be underestimated; we should always be alert and keep a clear mind, as the "sleep of reason produces monsters".

**Director General of Criminal Police, OSCAD Chair*

The etching by the Spanish painter Francisco Goya.

2. Hate crimes

It is the mark of an educated mind to be able to entertain a thought without accepting it.

ARISTOTLE

In Italy there is no legal definition of "hate crime". The definition generally used is the one provided by the OSCE (Organization for Security and Co-operation in Europe) Office for Democratic Institutions and Human Rights (ODIHR) according to which hate crime is a criminal act committed against an individual and/or property associated with him/her motivated by a prejudice the perpetrator has towards the victim based on a "protected characteristic" of the latter. To be considered a hate crime, the offence must meet two criteria: first, the act must constitute an offence under criminal law (so-called base crime); second, the act must have been motivated by bias against the person chosen as a "target".

That is the reason why hate crimes are also defined as target crimes or message crimes, because they are crimes with a specific target and the perpetrator intends to send through them a message of non-acceptance of that person and of the community he/she belongs to.

Protected characteristics

This definition refers to fundamental or core characteristics shared by a group of people, which reflect a profound aspect of an individual's identity and create a typical group identity. Among the characteristics most widely protected by democratic legal systems there are: "race" (or, more correctly, ethnicity), religion, nationality, sexual orientation, gender identity, disability.

These characteristics can be real, when victims (or property associated with a particular group such as a place of worship') have the characteristic that identifies them as belonging to a particular minority, or presumed, when the perpetrator chooses the victim erroneously thinking he/she is linked to a minority group.

Discrimination by association describes the situation where victims, though not belonging to a "minority community " suffer discrimination as they are somehow linked to this community (for instance, an individual can be assaulted as he/she is married to a person of colour). When victims are discriminated against because they express more than a protected characteristic (for example, a black Muslim, or a disabled homosexual), it is a case of "multiple bias motive".

The specificity

The main features of hate crimes are: their multi-offensive nature, the occurrence of under-reporting and under-recording and the risk of escalation.

First of all, they are multi-offensive crimes, that is, they 'they impact on several levels. As a matter of fact, when a hate crime is committed, it firstly affects the victim(s) (who were simply chosen on account of one or more protected characteristics). However, considering that the characteristic in question represents a shared identity for a given community, the attack doesn't limit its harmful effects to the direct victim(s), but indirectly damages the minority group he/she belongs to. In the most serious cases, even social cohesion can be jeopardized, with considerable repercussions on public order and security.

The phenomenon of under-reporting means that victims and witnesses of hate crimes tend not to report them for various and complex reasons (especially psychological ones). The main difficul-

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ties for victims and witnesses to report hate crimes lie in:

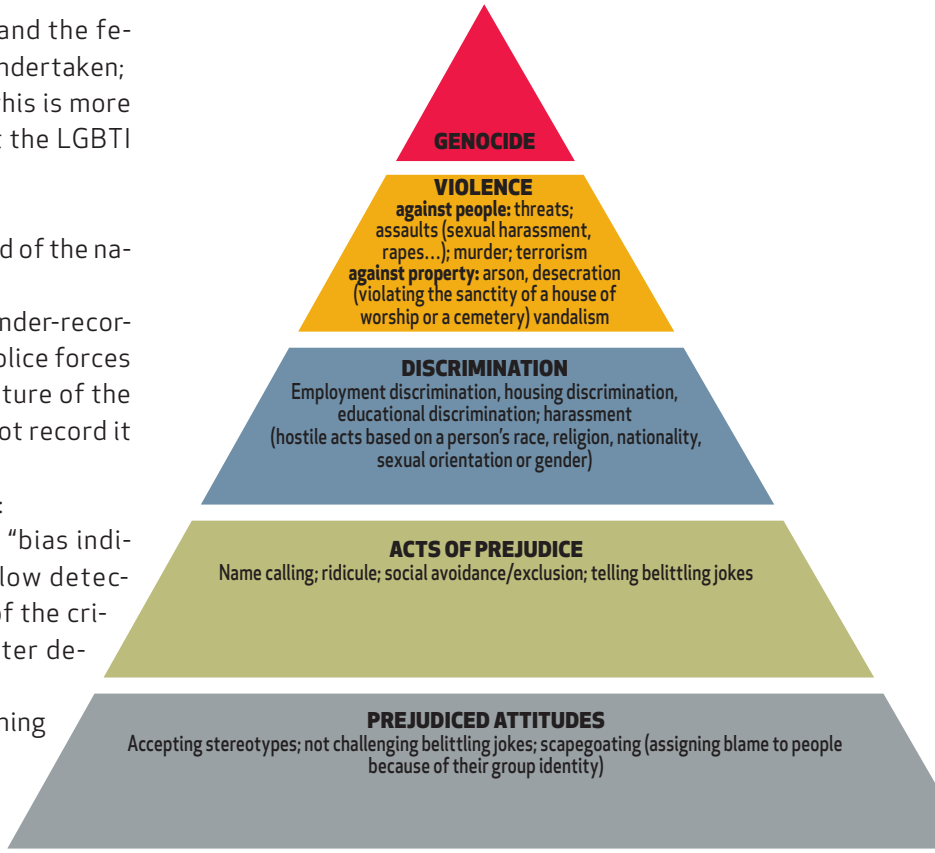
> lack of awareness (or rejection) of the fact that the reason of the assault was the prejudice against the protected characteristic they often blame themselves for;
> lack of confidence in police forces and the fear that a full investigation won't be undertaken;
> fear of an invasion of their privacy (this is more likely for crimes committed against the LGBTI community);
> fear of retaliation;
> lack of knowledge of the language and of the national legal system.

On the other hand, when we talk of under-recording, we refer to the cases where the police forces do not recognize the discriminatory nature of the reported crime and, consequently, do not record it or investigate it as such.

This may happen for various reasons:

> lack of recognition of the so-called "bias indicators", that is of the clues that allow detecting the discriminatory motivation of the crime (which will be discussed in greater detail below);
> lack of awareness / appropriate training in relation to this phenomenon;
> shortage of resources.

Finally, the risk of escalation derives from the social acceptance of discrimination against some minority groups (phenomenon of the "normalization of hate") that favours the increase of hate crimes. As a matter of fact, wherever low-level discriminatory conducts are accepted by society since not perceived as offensive – but rather interpreted as jokes or episodes of "gang spirit" – and therefore not properly combated, there is a high risk of escalation: from bias motivated attitudes and behaviour to real acts of discrimination (in accessing public services, at work, etc.) up to more serious criminal conduct (vandalism, desecration of sacred places, threats, assaults). This concept is illustrated in the so-called ***Pyramid of hate***[1] developed by the Anti-Defamation League. (Adl)[2].



1. *https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf (adaptation of the so-called "Allport's Scale of Prejudice").*
2. *https://www.adl.org.*

3. Hate speech

It is easier to break the atom than to destroy prejudice.

EINSTEIN

If there is no legal definition of hate crime at national level, there is not even a definition of hate speech at international level.

According to Recommendation (97)20 of the Committee of Ministers of the Council of Europe, "the term hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin". A further definition can be deduced[3] from Framework Decision 2008/913/JHA[4], stating that hate speech is "any conduct publicly inciting to violence or hatred directed against a group of persons or a member of such a group by reference to race, color, religion, descent or national or ethnic origin".

When addressing the issue of "hate speech", of crucial importance is the need to achieve a balance between the principles provided for by the national legal system, specifically by Articles 2 (recognition of inviolable rights) and 3 (equal social dignity before the law) of the Italian Constitution, and the right to free expression included in Article 21 of the same text.

In this connection, close attention should be paid to the principle established by the Italian Court of Cassation, in line with the indications of the European Court of Human Rights, according to which "in case of conflict between the right to free expression and equal dignity of citizens, the latter should prevail only if conducts occur that may jeopardize this fundamental principle" (Court Ruling 36906/2015).

In any case, the legal instrument used to counter hate speech is Article 604 bis of the Criminal Code (introduced by Section 3 of Law 654/75), "Propaganda and incitement to crime on the grounds of racial, ethnic and religious discrimination", which will be dealt with more in detail in the section devoted to legislation.

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Hate speech on line

The expansion of the Net and the advent of social networks have made communication increasingly rapid, thanks to easily accessible technology allowing information to be instantly and globally disseminated. The Internet also provides fertile ground for hate speech, forcing all actors involved – public institutions, including the police, civil society organizations and individual users – to take on new challenges.

According to some authors[5], online hate has specific characteristics and may be:

1. **permanent over time:**
   hate speech usually stays online for a long time. The longer it is accessible, the higher the risk of possible damage being caused;
2. **itinerant and recurring:**
   the architecture of web platforms affects content distribution, which may be itinerant and recurring. Content that has been removed may in fact re-ap-

3. In the context of the "Code of conduct to counter all illegal forms of inciting to hatred online" that will be mentioned later.
4. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.
5. Gagliardone I., Danit G., Alves T. e Martinez G., Combattre les discours de haine sur internet, Organisation des Nations Unies pour l'éducation, la science et la culture, 2015, quoted in: "Hate Speech conoscerlo e contrastarlo. Guida breve per combattere i discorsi d'odio on line." (Amnesty International – Italian Section, 2019).

pear under a different name and/or title on the same platform or elsewhere (it is no coincidence that it is said the Web does not forget);

3. **associated with the idea of anonymity and impunity:**
   the proliferation of expressions of hate is favoured by the idea of anonymity and impunity associated with the use of the Net and by the way users interact with social networks. Hate speech authors rarely think about the consequences of their own actions and do not realize how their hate messages impact on people's real lives. A number of studies highlight that the so-called "keyboard warriors" do not tend to show such feelings of hatred when they are offline.

The very nature of the Web clearly shows that hate speech online cannot be countered by individual countries but needs, instead, an international approach.

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At EU level, significant progress has recently been made, including, for example, the signing in May 2016 of a "Code of conduct on countering illegal hate speech online" by the European Commission, Facebook, Microsoft, Twitter and You Tube[6] . By signing this code, "IT companies" have committed themselves to promptly reacting to and combating the forms of racist and xenophobic hatred that are reported to them. The purpose is to provide a more adequate response to users reporting such content and ensure greater transparency concerning the notifications and deletions made, also thanks to the creation of a network of "trusted flaggers" providing quality notices.

As mentioned earlier, the Code defines hate speech ("Illegal hate speech") on the basis of Framework Decision 2008/913/JHA.

In June 2016, the European Commission set up the "High Level Group on combating racism, xenophobia and other forms of intolerance" (in which OSCAD participates with its own representatives). A Sub-group was set up on countering hate speech online and providing for a specific mechanism to monitor the implementation of the Code of conduct, with particular reference to the percentage and time limits for illegal content removal. This activity has resulted in constant progress being made over the last three years (2016-2019).

At national level, considerable difficulties have been encountered in the fight against content that is deemed to entail a criminal conduct under the above-mentioned legislation (Article 604 bis of the Criminal Code). In many cases, servers hosting social networks (or websites) on which illegal content is posted are based in countries, such as the United States, where the so-called "crimes of opinion"[7] - including hate speech - are not punished. This discourages the use of "international letters rogatory", a long and expensive process designed to acquire the necessary evidence abroad. Experience has in fact shown that these requests are usually rejected by the judicial authorities of the afore-said countries.

6. Instagram, Google, Snapchat and Dailymotion have joined the Code at a later time.

7. The first Amendment of the US Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

4. Victims

*by Elisabetta Mancini**

> *"I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel".*
>
> MAYA ANGELOU

One specific characteristic of hate crimes is a particular vulnerability of victims.

The typical needs of victims of any type of crime (protection, information, listening, reassurance) acquire particular features in case of hate crimes as they affect a peculiar aspect of the offended person's identity.

Hate crimes are often not exactly perceived as real offences in the social context. They remain hidden, are trivialized, regarded as jokes and sometimes the same victims do not recognize themselves as such, although they are humiliated in their dignity. This kind of victims, more than others, feel ashamed, guilty and lonely; due to these emotions, they may appear reticent and less collaborative. Police operators must know how to go beyond what they say or do not say, and be capable of understanding that behind anger and aggression there is often a great fear.

Frequently victims are foreigners, unaware of Italian procedures and may be frightened by the possible retaliation resulting from making public the details of the crime suffered.

The police officers' ordinary cultural baggage and experience, adequate in most cases, cannot suffice: they must acquire precise information on the victims' traditions as well as on their religious and ethnic environment, because an inopportune word or a misinterpreted humorous remark may raise barriers between persons having different backgrounds.

In such cases, more than ever, prejudices and stereotypes are the most insidious enemies of police officers, who must set aside their beliefs and be ready to welcome and understand the harmed party, freeing themselves from cultural superstructures that could affect their opinion. Never minimize, never trivialize, never express moral judgments that could compromise the relationship with the victim.

The aim is to create a trustworthy and respectful relationship. This does not mean that the operator's approach shall be passive where, on the contrary, there is a need to listen actively and, as always, verify the information provided by the victim.

From a regulatory point of view, the rights of crime victims, included hate crime victims, have been enshrined into Italian legislation, by Legislative Decree 212/2015 transposing Directive 2012/29/EU (so called "Victims' Directive"). This has revolutionized our criminal justice system, as, till then, the process was centered on the balance of powers between prosecution and defense, on the figures of Judge, State Prosecutor and defendant with the interests of the victim being confined to compensation of damages.

All victims are granted specific rights, implying corresponding obligations, which in brief give voice to their needs to receive information, have an active role, be respected, protected, heard, helped in accessing justice, financially compensated and psychologically supported.

In particular, as regards the aspects of interest of the judicial police, victims have the right to get information, in a language they understand, about the procedures for filing a complaint/report, their role in the investigations and trial, the status of the proceedings, the modalities to obtain translation/interpretation into their language of the procedural documents, the possibility to be granted legal counseling and aid and to benefit of protection measures, the procedures to report violations of their rights and to obtain reimbursement of expenses (Article 90 bis of Italian Criminal Procedure Code - CPC).

In case of criminal offences committed with violence against the person, victims can ask to be informed about the release of the accused or convicted person or the termination of pre-trial measures imposed on them and must be promptly informed about their escape from custody or from pre-trial detention measures (Article 90 ter CPC).

Victims of hate crimes belong to the category of "particularly vulnerable" victims, as set out by Article 90 quater of Italian Criminal Procedure Code, which provides that "a state of particular vulnerability in a victim may be inferred, other than from age and any physical infirmity or psychic deficiency, from the type of crime, and the procedures and circumstances of the

case in question. In order to assess vulnerability, it will be taken into account whether the case involves a violent offence against the person or a racial hate crime, if it relates to organized crime or terrorism, including on an international level, or human trafficking, if it occurred as a result of discrimination, and if the victim is emotionally, psychologically or economically dependent on the offender (Article 90 quater CPC)".

Some parts of the law (state of infirmity or deficiency of the victim, crime motivated by racial hate, or discrimination) permit, in fact, to include among particularly vulnerable victims, people with disabilities, victims of ethnic and racial motivated crimes and, more in general, all victims of discrimination-based crimes (as for example those motivated by homophobia and transphobia).

This status results in a strengthened protection during the special evidentiary hearing, the trial phase and also before, during preliminary investigations, where the audiovisual recording of the statements of particularly vulnerable victims is always permitted (Article 134 CPC) and the judicial police can avail themselves of psychologists' support regardless of the age of the victim, who shall not be repeatedly called to the stand, unless absolutely necessary, and will have no contacts with the suspect during the hearing (Article 351 par.1 ter CPC).

However, it would be reductive to confine the tasks of police operators to the enforcement of new rules protecting victims, although acknowledging their extraordinary importance in ensuring a standard of civilization to the needs of some of the weakest fringes of society.

Having overcome the preconceived opinion according to which assistance to victims is an exclusive task of psychologists and social assistants and police forces must only guarantee that perpetrators be brought to justice, today each police operator is trained to prevent the secondary victimization phenomena that can worsen the psychological pain of those who already feel frustrated for the crime suffered.

Police operators know that wherever they meet victims - in offices, houses and streets – the quality of their approach will be crucial for the cooperation of victims in investigations and their capacity to recover themselves.

The community as a whole requires such closeness from police forces. Violent phenomena, like hate crimes, generate, not only in the victims but also in the society witnessing them, deep feelings of insecurity increased by the virality of digital communication. Victims' pain and citizens' fear require acknowledgement by all institutional representatives of the State, as abandonment and indifference can have devastating effects on individuals and communities.

Dealing with victimology therefore means to establish a deep contact with the needs of society and to prevent most serious pains and troubles, as set forth by the most modern theories aiming at anticipating risks on the basis of the new predictive policing patterns.

**Police Senior Officer*

5. Bias indicators

Indifference is more guilty than violence itself. It is the moral apathy of those who turn away from others: it also happens today with racism and other horrors of the world.

LILIANA SEGRE

Indicators of prejudice (internationally known as 'bias indicators') are facts and circumstances that can lead to posit that a hate crime – that is a crime motivated by the offender's prejudice against the victim due to his/her protected characteristics (either real or presumed by the offender) – has been committed.

ODIHR, the Office for Democratic Institutions and Human Rights, defines bias indicators as "objective

facts, circumstances, or patterns attending a criminal act(s), which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias."

This definition per se explains why they are so important for investigative purposes: they are the facts and circumstances that can allow investigators to detect the discriminatory motivations behind the offender's selection of that particular target (i.e., his/her motive).

Consequently, their inclusion in the case file will allow the judicial authority (prosecutors or judges) to establish whether the incident should be prosecuted as a hate crime (applying, for example, the aggravating circumstances set down in Article 604ter of the Italian criminal code).

The importance of bias indicators – as well as the need for an accurate analysis of the overall context in which the incident has occurred, – are clearly stressed in some rulings handed down by the Italian Court of Cassation (Cass. 434/99 and Cass. 16328/12). They state that, in order to establish the discriminatory motive of an offense, **the existence or non-existence of a specific indicator is not a critical factor** and that it is necessary to analyze the whole context. Clearly, this is possible only if the criminal police investigation – carried out with great care and competence – has identified and gathered all elements to be analyzed, without neglecting any clue.

The main bias indicators are the following:

> **victim/witness perception:** how victims (or witnesses) perceive the crime they experience (or witness) is an important indicator that should prompt investigators to look for further objective clues aimed at establishing the discriminatory motive for the crime;

> **disparaging comments, gestures, written statements, drawings, symbols and graffiti:** the perpetrators of hate crimes frequently want to make clear their bias, non-acceptance or hate (as a matter of fact, hate crimes are also known as message crimes, i.e. crimes which convey a message);

> **differences between perpetrators and victims based on ethnicity, religion or other factors (for example, sexual orientation)** are important indicators, mainly – but not necessarily – when the victims belong (or are perceived to belong) to so-called minority groups;

> **links with so-called organized hate groups** (i.e. groups involved in hate crimes or hate speech) **or their members:** maybe, the offender is not a member of any such group but may share its ideology or violent methods;

> **location:** the crime has been committed close to a place of worship (a synagogue, a mosque, a church) or a place mainly frequented by people prone to discrimination (LGTBI persons, migrants);

> **date, timing:** the offence has been committed on a day of significance for a certain community, such as

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an anniversary or a religious holiday;

> **patterns/frequent previous crimes or incidents:** the crime is similar to other incidents that have occurred over a certain time span; a criminal pattern or a serial behavior can be observed;

> **nature of the attack:** in hate crimes, the degree of violence tends to be particularly high and is often accompanied by serious injuries or degrading treatment which are usually made public by the offender him/herself on the Web;

> **lack of other motives:** sometimes there aren't apparent motives for the crime. The victim and the suspect are not acquaintances and any quarrel that may have triggered the attack appears to be just an excuse; there is no economic motivation. In these cases, discrimination could be the only possible motive.

The symbols of hate

As mentioned above, hate symbols are among the most significant indicators of bias-motivated crimes.

Therefore, it is appropriate to dwell on this subject bearing some circumstances in mind.

The first and probably most important one is the fact that some symbols are not easily recognizable. It is the case of symbols linked to specific realities (such as Ku Klux Klan and white supremacist symbols in the USA) that until a few years ago were virtually unknown in our country but now are being increasingly used in new contexts due to the so-called globalization of hate[8] which has been facilitated, among other things, by the massive use of IT by radicalized individuals and groups.

8. A topic dealt with, for example, in "The internationalization of White Supremacy" by the US Anti-Defamation League – ADL (*https://www.adl.org/media/13538/download*).

You can also come across images which are the results of the more or less substantial alteration of traditional symbols or of more or less ingenious ways to disguise images, symbols and insignia aimed at spreading hate speech for the purposes of circumventing the law.

In fact, it has been observed that international rightwing extremism has started replacing traditional symbols with new ones. By avoiding the use of widely stigmatized symbols, they succeed in making their messages more easily deliverable through traditional media.

This is the case in Germany – and more and more frequently in Italy, too – where neo-Nazi groups show the flags of the German Empire, the so-called Second Reich (1871-1918), next to (or instead of) those of the Third Reich.

In other cases, their aim is just the opposite, i.e. to

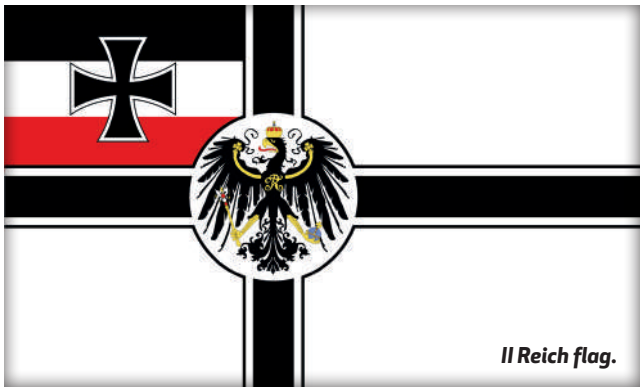
STORMFRONT: THE FRONTLINE OF SHAME

Blacklists of Italian Jews, footage denying the Holocaust and exalting the Third Reich, documents aimed at demonstrating the existence of an imaginary Jewish conspiracy are just some of the contents of the Italian section of www.stormfront.org, a website administered in the USA by members of the white-supremacist far right and defined by many as the largest online hate forum in the world. Many of its followers were the subject of a complex investigation carried out by the Italian Postal Police Service and Rome's Special Branch, Digos.

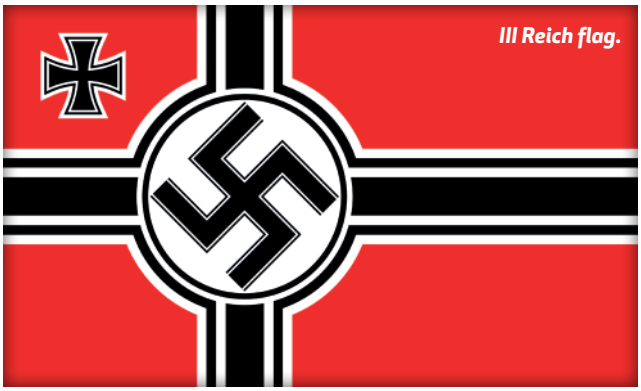
The investigation, consisting of two separate lines of inquiry, led to the identification and arrest of four founders of the virtual community and to charges being pressed against 50 users accused of spreading ide- >>

reveal their ideology or their affiliation to a limited circle of associates or sympathizers, without the general public becoming aware of it.

An example is the dice tattoo containing the figures 1, 4 and 8 which evoke the code 14-88. The number 14 stands for the 14 words by David Lane, the US white supremacist: "We must secure the existence of our people and a future for white children", whereas the number 88 stands both for David Lane's "88 precepts" aimed at safeguarding the su-



II Reich flag.



III Reich flag.

>> ologies based on white supremacy and ethnic/racial hatred and of inciting to commit discriminatory and violent crimes for ethnic/racial motives (Article 3 of Law 654/1975, now Article 604bis of the Italian criminal code).

The fact that the servers were in the USA made the investigation complicated. In fact, as mentioned in the section on hate speech online, the USA – in keeping with the First Amendment – does not punish what we call "crimes of opinion" and consequently rejects all MLAT-requests for digital evidence of hate speech.

Therefore, the suspects were identified by accurately monitoring open sources (Osint – Opens Source Intelligence) and by using software developed by cyber terrorism investigators that was crucial for making sense of the digital evidence collected.

Digos and Postal Police Service operators searched dozens of houses in various Italian cities and seized digital devices, documents and neo-Nazi and supremacist material as well as cutting weapons and objects that could be used to attack.

The Court of Cassation decision concerning the first line of inquiry upheld both the prosecution's case and the sentences pronounced against the four main defendants: two years and six months' jail for the ideologist of the group and two years and two months' jail for the others. The website can no longer be reached from Italy following an order issued by the Judiciary after the convictions.

premacy of the Aryan race and for the "Heil Hitler" salute, where 8 indicates the letter H.

Anyway, law enforcement operators need to be vigilant and to have a trained eye in order to be able to recognize these cryptic symbols.

Since their number is significant and the purpose of this section is to stimulate the curiosity and professional interest of law enforcement operators, we suggest that you visit this page of the US Anti-Defamation League website – *https://www.adl.org/hate-symbols* – for an extensive database of hate symbols.

6. The legal framework

Give me the law and I will give you justice.

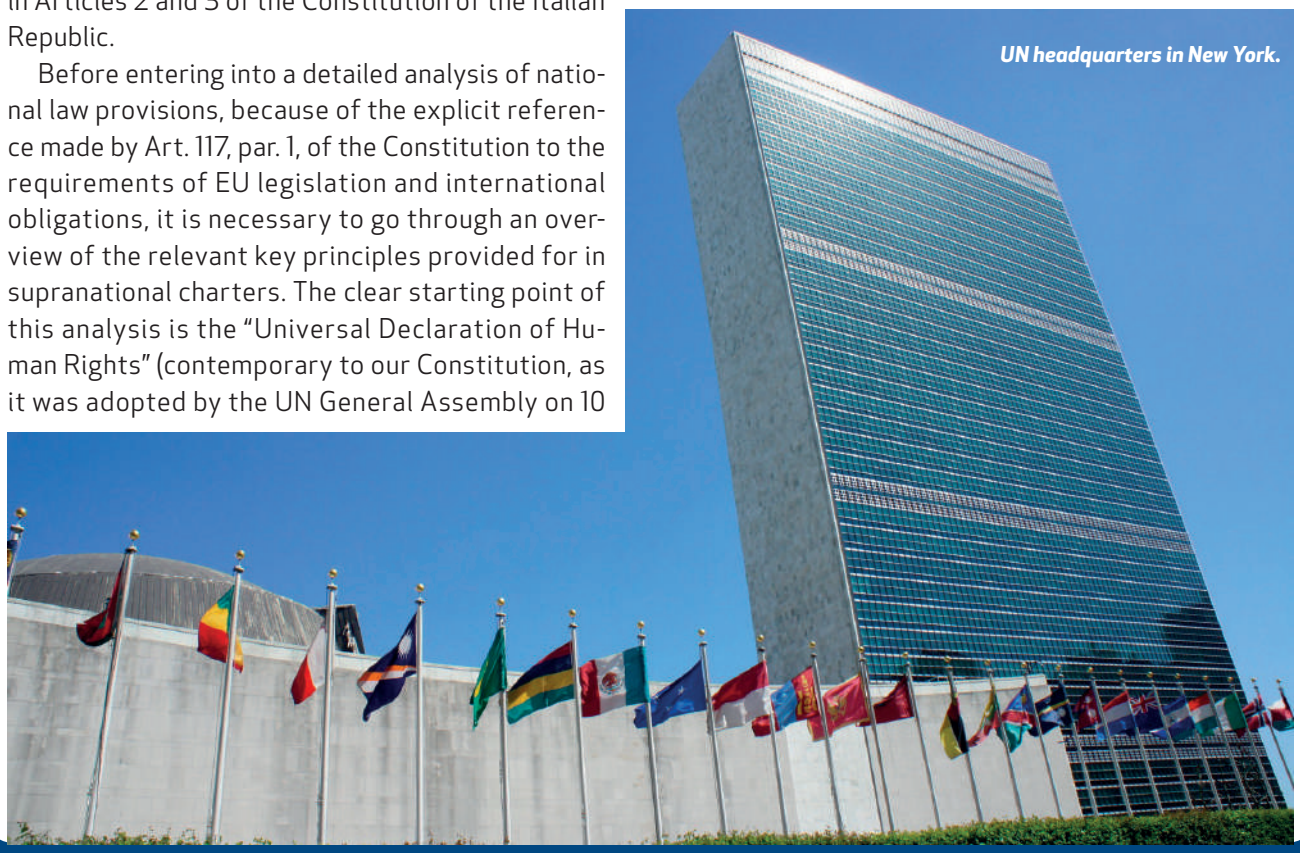
FRANZ LISZT

As highlighted above, the Italian legal system does not provide a definition of hate crime. Nonetheless, it has several rules on the protection of inviolable human rights and on the principles of equal dignity and equality of all human beings, as enshrined in Articles 2 and 3 of the Constitution of the Italian Republic.

Before entering into a detailed analysis of national law provisions, because of the explicit reference made by Art. 117, par. 1, of the Constitution to the requirements of EU legislation and international obligations, it is necessary to go through an overview of the relevant key principles provided for in supranational charters. The clear starting point of this analysis is the "Universal Declaration of Human Rights" (contemporary to our Constitution, as it was adopted by the UN General Assembly on 10 December 1948). Although without binding legal effects, it is universally recognized as having a paradigmatic value. To the extent they are relevant to this analysis, attention should be drawn to the principles contained in the following articles: Art. 1 (All human beings are born free and equal in dignity and rights); Art. 2 (Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, on account of race, color, sex, language, religion, political or other opinion, national or social origin, wealth, birth or other status...); and Art. 3 (Everyone has the right to life, liberty and security of person).

A few years later, in 1950, the Council of Europe's "Convention for the protection of human rights and fundamental freedoms" (ECHR) in Article 14 explicitly provided for the "prohibition of discrimination"[9] with a scope initially limited to the rights and freedoms recognized in the Convention and later gene-

9. The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.



UN headquarters in New York.

ralized through the Additional Protocol n. 12[10] (Rome, 4 November 2000).

Back to the UN system, the treaty to focus on is its first (from a chronological point of view) among the so-called core international human rights instruments[11], namely the "International Convention on the Elimination of All Forms of Racial Discrimination" (ICERD), which was adopted on 21 December 1965.

Italy ratified this Convention by Law 654/1975 (known as "Reale Law") which, as explained below, is the first domestic legislative act specifically aimed at criminalizing racist conduct. Interestingly, it should also be noted that the definition of racial discrimination laid down in Article 1 ICERD has been transposed, almost entirely, into Italian law by Art. 43 of Legislative Decree 286/98 (Consolidated Law on Immigration).

Art. 2 of the "Treaty on European Union" (TEU)[12] includes respect for human dignity and human rights among the founding values of the European Union, while Art. 10[13] of the "Treaty on the Functioning of the European Union" (TFEU) places the fight against discrimination among the Union's priority objectives. The principle of non-discrimination is explicitly provided for in Art. 21[14] of the "EU Charter of Fundamental Rights" (the so-called "Nice Charter", proclaimed on 7 December 2000) which, under the Lisbon Treaty, is as fully legally binding as the Treaties.

With regard to the EU, it is also necessary to mention the "Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law" and the "Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime" (the so-called "Victims Directive") which, as illustrated below, also led to the introduction in the national legal system, respectively, of the crime of denial[15] (current Art. 604bis, third paragraph, criminal code) and of the "condition of particular vulnerability" of the victim (Art. 90quater, code of criminal procedure).

Finally, with reference to the phenomenon of the so-called online hate speech, it is necessary to mention the Additional Protocol[16] to the "Budapest Convention on Cybercrime", which commits States to consider as crimes, whenever carried out through computer systems, the following conducts: the dissemination of racist and xenophobic material, at least in cases in which the material promotes or incites violence (Art. 3); racist and xenophobic threats and insults (Articles 4 and 5); condoning, grossly trivializing, approving of or justifying genocide or crimes against humanity (Art. 6). Italy signed the Protocol in 2011, but has not ratified it yet.

The first piece of legislation introduced in our legal system to deal with racial discrimination, albeit incidentally, is Law 645/1952 (the so-called "Scelba Law"). Being the implementation of the XII transitional and final provision, first paragraph, of the Constitution, it primarily forbids the re-organization, under any form whatsoever, of the dissolved fascist party and, already in its earlier wording, it included racist propaganda among the ways in which the fascist party pursued its antidemocratic aims (Art. 1).[17] Furthermore, under Art. 4, para-

10. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

11. Core International Human Rights Instruments, as defined by UNHCHR.

12. Art. 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

13. Art. 10 TFEU: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

14. Art. 21 (Non-discrimination) par. 1: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

15. As to the legal status of the provision, see note 19.

16. Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

17. Art. 1 Law 645/52: "… there is a reorganization of the dissolved fascist party when an association, a movement or a group of people of no less than five pursue the anti-democratic aims of the fascist party … spreading racist propaganda …".

graph 2 in its current version (amended by the so-called "Mancino Law"), condoning fascism is an aggravated offence when fascist ideas or racist methods are publicly extolled.

The first Italian criminal law provision specifically countering racism was introduced in the Italian criminal system later on, by Art. 3 of the above-mentioned Law 654/1975 ratifying the ICERD Convention. The relevant offences, which have been amended several times over the years, are currently defined in Art. 604bis of the criminal code (in compliance with Legislative Decree 21/2018). This provision[18] ("Propaganda and incitement to commit crimes of discrimination based on ethnicity, national origin, and religion") criminalizes all conducts envisaged in Art. 4 ICERD: disseminating ideas based on racial superiority or hatred; inciting to commit or committing racially motivated acts of discrimination or of violence (first paragraph); promoting/directing/participating/supporting racist organizations or groups (second paragraph).

Finally, its third paragraph punishes denialist conduct[19], as provided for by the Framework Decision 2008/913/JHA. However, it is only by means of Law Decree 122/1993 (converted, after amendments, into Law 205/1993, the so-called " Mancino Law") that a full-flegded system to combat racism was introduced, among other things, punishing external manifestations[20] and the display of fascist emblems and symbols (Art. 2); providing for strict rules as to searches and seizures when starting proceedings for crimes of this nature (Art. 5); requiring the precautionary suspension and the dissolution of racist associations/groups (Art. 7) as well as additional penalties for convicted persons (Art. 1); and, in particular, introducing a special aggravating circumstance (increase in the quantum of the penalty of up to half) for all crimes[21] committed for racist motives or to facilitate the activities of racist associations/groups. Such an aggravating circumstance cannot be reduced with possibly concurring mitigating circumstances (except for when the offender is a minor) and, most importantly, is always sufficient for the offence to be prosecuted ex officio (Art. 6). Following Legislative Decree 21/2018, the so-called "Mancino aggravating circumstance" (former Art. 3 of the Law) has become Art. 604ter, criminal code). The following clarifications might prove helpful in overcoming difficulties of interpretation as to the applicability of certain offences covered by Law 645/52 and the Reale-Mancino Laws. According to the Court of Cassation case-law (Cass. I 3791/93; Cass. I 7812/99…), the Scelba Law and Reale-Mancino Laws substantially coincide as to the legal interests they protect (the letter and the rationale of the laws are in keeping with each other), and are in a relationship of subsidiarity. In case of uncertainty as to which of the said provisions is applicable, the Scelba provisions shall apply in case

18. Together with Art. 640ter, it forms the content of Section Ibis (Crimes Against Equality) which was introduced by the already mentioned Legislative Decree 21/2018, within chapter III – Title XII – Book II of the criminal code.

19. Denying, grossly trivializing or condoning the Shoah or genocide, crimes against humanity, and war crimes. There is no agreement among legal theorists as to whether this provision, introduced in the national legal system by Law 115/2016 and amended by Law 167/2017, is to be considered as an aggravating circumstance or as an offence in itself, and currently there is no case-law providing clarifications on this point.

20. For example: Roman salutes or racist chants which are becoming more frequent at sports events.

21. Except, of course, for those sentenced to life imprisonment.

WHO IS COMBATING DISCRIMINATION AND HATE CRIMES IN EUROPE AND IN THE WORLD?

UN-OHCHR: The Office of the High Commissioner for Human Rights (*https://www.ohchr.org/EN/pages/home.aspx*)
It is the United Nations agency that promotes and protects the human rights provided for in the Universal Declaration of Human Rights of 1948. It is headed by the High Commissioner for Human Rights, who co-ordinates human rights activities throughout the UN system and supervises the Human Rights Council.
In 2016, OSCAD participated in a training activity for trainers, intended for Macedonian Government Officials, which was organized by OHCHR in North Macedonia to combat hate speech and hate crimes.

OSCE-ODIHR: Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (*https://www.osce.org/odihr*)
The OSCE-ODIHR provides assistance to participating States and civil society to promote democracy, rule of law, human rights and tolerance and non-discrimination. It sends observers at election time, advises the States in the region on legislation and how to develop and sustain democratic institutions. It conducts training programmes on how to promote and monitor human rights.
Since 2014, OSCAD has started a close collaboration with OSCE-ODIHR. The several initiatives undertaken include the implementation of the TAHCLE (Training against hate crimes for law enforcement) programme for trainers to prevent and combat discrimination-motivated crimes and the preparation of the Public Security Department contribution for the annual hate crime data collection exercise.

CoE: Council of Europe
(*https://www.coe.int/it/web/portal*)
CoE is an international organization created to protect human rights in the continent. All CoE Member States have signed up to the European Convention on Human Rights (ECHR), a treaty designed to protect human rights, democracy and the rule of law.

ECtHR: The European Court of Human Rights (*https://www.echr.coe.int/Pages/home.aspx?p=home*)
It rules on individual or State applications alleging violations of the civil and political rights set out in the ECHR. The judgments of the ECtHR, binding on the countries concerned, have led governments to alter their legislation and administrative practices in a wide range of areas.

ECRI: European Commission against Racism and Intolerance *(https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/home)*
It is a CoE human rights monitoring body specialized in the fight against racism, xenophobia, anti-Semitism, intolerance and discrimination. It prepares

the democratic institutions are at risk – that is, the conduct threatens the democratic order and its underlying values (see Cass. I 8108/2018); otherwise, the Reale-Mancino provisions shall apply (Cass. III 37390/2007). The criminal provisions highlighted so far punish discrimination offences based on race, ethnicity, national origin and religion[22] but, as outlined above, there are further "protected characteristics" of the victim which might be grounds for discrimination.

As regards "disability" – further to the diverse offences of which it is either a constitutive element or a special aggravating circumstance – Art. 36 of Law 104/1992 is to be noted when it states that, in case of offences pursuant to Art. 527 of the criminal code (indecency), intentional acts under Title XII (against the person) and XIII (against property) of Book II of the criminal code, as well as the offences established by Law 75/1958 (the so-called "Merlin Law": recruiting, forcing into, abetting and exploiting prostitution) are committed against a person who has a physical, mental, or sensory impairment, punishment is increased by from a third to half. In this regard, it should be pointed out that to apply the above mentioned aggravating circumstance, there is no requirement to prove the discrimination motive, that is the offender's hatred or bias towards the victim, but only that the latter is physically, mentally or sensorily impaired, as defined in Art. 3 of the Law. The current criminal legal framework does not cover crimes committed on the grounds of sexual orientation or gender identity. The homophobic/transphobic motivation of a crime has sometimes attracted the appli-

22. As well as based on membership of the so-called "historical linguistic minorities", pursuant to Law 482/1999.

reports and recommendations on this matter to Member States.
OSCAD has cooperated with CoE and ECRI in various circumstances. In particular, it organized a training seminar (2014) and a meeting for international experts in combating discrimination against Roma and Sinti people (2015). In addition, it has often been involved in training activities and thematic seminars by CoE and ECRI.

European Commission
(*https://ec.europa.eu/info/index_it*)
The European Commission is the EU's executive arm. It is the only body responsible for drawing up proposals for new European legislation. Moreover, it implements the decisions of the European Parliament and the Council of the EU. In particular, it proposes new laws, manages EU policies and allocates EU funding; it enforces EU law and represents the EU internationally.
Since 2016, OSCAD has participated in the "EU High Level Group on combating racism, xenophobia and other forms of intolerance" and in all its subgroups: data collection; hate speech online; anti-Semitism; islamophobia, etc..

Fra: European Union Agency for Fundamental Rights *(https://europa.eu/european-union/about-eu/agencies/fra_it)*
FRA is the EU's center of fundamental rights expertise. It is one of the Union agencies set up to provide expert advice to the institutions of the EU and the Member States. It promotes and protects rights of a different nature, which are fundamental in ensuring a dignified life to all EU citizens; the right to non-discrimination; the right to the protection of personal data; the right to access to justice, etc.
From 2014 to 2016, OSCAD participated in the "Working Party on Hate Crime" coordinated by FRA, in its capacity as co-leader of the "Subgroup on Training for public service providers". In this context, it was included in a compendium of national best practices across the EU.

cation of the aggravating circumstance of the "base motives" (Art. 61, paragraph 1, no.1 of the criminal code)[23].

As regards the criminal procedural law, it is important to highlight that the mentioned Legislative Decree 212/2015, implementing the so-called EU "Victims' Directive", introduced Art. 90quater of the code of criminal procedure, thereby codifying the "particular vulnerability" of the crime victim. Under this provision, such a condition has to be inferred, among other things, from the victim's disability or can be recognized in case of racist or discrimination crimes. It is therefore important to underscore that such wording makes it possible, in principle, to consider all hate crime victims, including homophobic/transphobic hate crime victims, as particularly vulnerable victims. The recognition of this status creates a set of important rights for crime victims and specific duties upon the judicial authority and the criminal police. In this regard, the following articles of the code of criminal procedure are extremely important for the criminal police: Articles 90bis[24]; 90ter[25]; 134, par. 4[26]; and 351, par. 1ter.[27]

23. An interesting relevant precedent was set by Naples Court, criminal section VII, sentence n. 17573/2014, which stigmatized the homophobic motivation of an attack by applying the "evil intent" aggravating circumstance.

24. Art. 90bis (Providing information to the victim) The victim has the right to obtain, in a language he or she understands, information on: how to file the complaint/report; his/her role in the investigations and in the trial; the state of the proceedings; the possibility to obtain legal advice and legal aid; the right to interpretation/translation; protection measures; procedures to challenge violations of one's rights, and for obtaining reimbursement of expenses.

25. Art. 90ter (Informing about the offender's escape or release from prison) In the case of crimes committed with violence against the person, the victim may request information on the offender's release from detention or remand and must be promptly informed of the escape from prison of the defendant or convict as well as that the detainee has voluntarily escaped detention.

26. Art. 134 cpp, par. 4 (Methods of recording) If the minutes, drafted fully or in summary form, are considered to be insufficient, an audiovisual recording of the statement given by the particularly vulnerable victim may be added.

27. Art. 351-1ter cpp (Other preliminary statements) Criminal police taking statements from a particularly vulnerable victim are supported by a psychology or psychiatry expert appointed by the prosecutor. In any case, they must ensure that the particularly vulnerable victim does not come into contact with the suspect when giving his/her statements and that he/she is not required to make statements several times except when strictly needed for investigation purposes.

7. OSCAD

Victims of discrimination are prevented from living.

ANTONIO MANGANELLI

The Observatory for Security against Acts of Discrimination ("Oscad") is the interagency operational tool established in 2010 within the Public Security Department by Antonio Manganelli, then Chief of the Italian Police, in order to optimize the activity of law enforcement authorities having general responsibility in the field of the prevention of and responses to discriminatory offences[28].

The Observatory, set up within the Public Security Department – Central Directorate of Criminal Police -, is presided over by the Deputy Director General of Public Security – Director General of Criminal Police - and is composed of representatives of the National Police, the Carabinieri Corps and the Department offices dealing with the matter[29].

Considering the institutional mission of the Observatory and the distinctive features of hate crimes, the Observatory's main objectives are the following: to facilitate the filing of complaints on hate crimes (in order to combat the phenomenon of under-reporting); to constantly improve monitoring of the phenomenon (to measure its extent and impact more and more accurately); to raise awareness, train and constantly update law enforcement officers' skills (to combat the phenomenon of under-recording).

As stressed above, hate crimes are characterized by the so-called under-reporting i.e. very few complaints are filed compared to the real extent of the phenomenon. For the purpose of combating under-reporting the Observatory receives reports at the e-mail address oscad@dcpc.interno.it, forwards them to the competent National Police or Carabinieri offices and asks for additional information in this respect and/or for targeted interventions; in addition, it facilitates the filing of complaints from victims who do not intend to turn to the police directly.

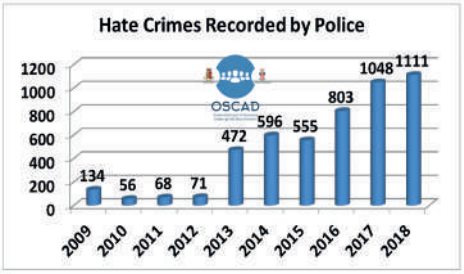
In order to establish measures aimed at preventing and countering any criminal phenomenon it is necessary to measure its extent and impact as accurately as possible. With regard to hate crimes there are difficulties related to their general quantification – a case in point: the interagency database is not structured for statistical purposes but to support law enforcement activities – as well as further specific elements (under-reporting and under-recording along with partial regulatory coverage) which make data collection extremely complex. Nonetheless, the Observatory's great commitment has resulted in significant progress in this field. In fact, the Observatory manages a monitoring system fed by the reports sent by victims, witnesses and associations and by law enforcement authorities or other institutions upon their own initiative. Since 2014 (data related to 2013) the Observatory has been drawing up the report of the Public Security Department for the annual collection of data on hate crimes performed by the OSCE, forwarding the official data of the Investigation System of the Interagency Data Processing Centre on discriminatory offences provided for by the law[30] , namely crimes on grounds of race/ethnicity, nationality and religious belief as well as those committed against members of national linguistic minorities and di-

28. *http://www.interno.gov.it/it/ministero/osservatori/osservatorio-sicurezza-contro-atti-discriminatori-oscad.*

29. More specifically, the Observatory's members are the Director of the General Affairs Office; the Director of the Legal Technical and Litigation Office; the Director of the Crime Analysis Service; the Director of the Staff Unit of the Deputy Director General of National Police (Central Directorate of Criminal Police); the Director of the Service countering Domestic Extremism and Terrorism (Central Directorate of Prevention Police); the Director of the Immigration Service (Central Directorate for Immigration and Border Police); the Director of the Postal and Communications Police Service (Central Directorate of Highway, Railway and Communications Police and Special Units of the National Police); the Director of the Central Crime Prevention Service (Central Crime Prevention Directorate of the National Police); the Director of the Second Department (Carabinieri General Headquarters).

30. Provided for by the Reale Law No 654/75 and by the Mancino Decree-Law No 122/93, converted into Law No 205/93 as amended by Legislative Decree No 21/2018.

Data increment provided to OSCE due to the involvement of OSCAD.



Year	Hate crimes recorded by police
2018	1111
2017	1048
2016	736
2015	555
2014	596
2013	472
2012	71

sabled people (application of the aggravating circumstances provided for by Article 36 of Law No 104/92). Currently, some regulatory and structural constraints make it impossible to identify specific discriminatory purposes (for instance the number of violations related to race, ethnicity, nationality and religion and, with regard to religion, the number of those related to anti-Semitism, islamophobia, anti-Christian hatred and so on). Such data are supplemented with those concerning the Observatory's monitoring of reports received in relation to sexual orientation and gender identity (issues with no ad hoc legislation). In any case, it should be emphasized that due to their heterogeneity the data forwarded to the OSCE do not provide a statistical picture of the phenomenon; as a result, any increase and/or drop cannot be related for sure to a proportional increase and/or drop in the number of hate crimes in Italy. Law enforcement personnel training has always been particularly important for the Observatory since it is essential to raise their awareness, increase their skills and consequently enhance their operational response capacity. To date, in the framework of the various initiatives undertaken by the Observatory in collaboration with some institutions and associations of civil society (Amnesty International, Cospe, Rete Lenford), over 11 thousand officers have attended ad hoc training courses and the same number has participated in online training modules. One of the most significant interinstitutional partnerships has been established with the National Office against Racial Discrimination, set up within the Department for Equal Opportunities of the Italian Presidency of the Council of Ministers to guarantee the right to equal treatment of all people irrespective of race, ethnicity, age, religious belief, sexual orientation, gender identity and/or disability.

Following the signing of a Memorandum of Understanding, since 2011 the Observatory for Security against Acts of Discrimination and the National Office against Racial Discrimination have been working in close cooperation especially for information exchange and training purposes. With regard to collaboration with the communities concerned, special importance should be attached to the one developed with the Union of Italian Jewish Communities resulting, inter alia, in the drawing up of a "Short Guide to Judaism for Police Officers" for the purpose of helping law enforcement officers perform their duties at their best, providing them with an insight into some special characteristics of the Italian Judaism which are essential to interface with people of Jewish faith in the most appropriate and effective way.

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