

**Observations re hate crimes and racism manifestations in Ukraine – “No Borders” Project, Social Action Centre (Ukraine)**

Warsaw, OSCE Human Dimension Implementation Meeting – September 26 – October 7, 2011

October 4, 2011, plenary session № 13: “Tolerance and non-discrimination II: Review of the implementation of commitments on promotion of mutual respect and understanding”.

**Ukrainian legislation and practice towards prohibition and effective persecution of racism, bias motivated crimes and racial and ethnic discrimination remains almost nonexistent and totally inefficient.**

Currently, the Criminal Code of Ukraine remains a primary locus of the prohibition of discrimination in Ukraine' legal system for many years on. The Criminal Code of Ukraine was slightly altered through the adoption of the Law “On Amendments to the Criminal Code of Ukraine concerning the Liability for Crimes Motivated by Racial, National [inter-ethnic] or religious Intolerance” on 5 November 2009. Relevant amendments enhanced the punishment provided for by the Article 161 and slightly changed its disposition. The amendments left unaffected the content of Article 67(1)(3) that identifies racial, national and religious enmity as aggravating circumstances to every crime defined by the Criminal Code and has previously attracted criticism from international and local experts for its lack of usability.

On the other hand the Law of 05.11.2009 introduced a range novel points into some provisions of the Criminal Code that have a potential of providing better, though still insufficient, protection against racially motivated violence and bodily harm. The amendments recognised a “motive of racial, inter-ethnic or religious bigotry” as a specific aggravating circumstance for the following offences: manslaughter (Article 115), intentional grave bodily harm (Article 121), intentional bodily harm of medium gravity (Article 122), battery and tormenting (Article 126), torture (Article 127) and threat of homicide (Article 129). As opposed to Article 67, if it ever was applied, these amendments allow to choose of the set of stricter punishments than those provided for the same crime unaccompanied by specific aggravating circumstances.

Although listing of a motive of racial, inter-ethnic or religious bigotry as a circumstance specifically aggravating certain types of crimes may only be regarded as a positive step towards better protection of individuals from all forms of racial discrimination, these measures by far may not be regarded as sufficient. In fact, despite this slight positive changes Ukrainian legislation still fails to implement international human rights standard of the prohibition of discrimination and to offer adequate protection to its victims.

Ukrainian legislation is lacking effective legislative framework to ban all form of legislation. This is also lacking a definition of discrimination and its forms. However, as long as discrimination per se constitutes a criminal offence no perpetrator of discrimination in any form may be brought to liability other than in accordance with the procedure established by the Criminal Procedure Code by virtue of Article 58 of the Constitution of Ukraine. This makes it impossible to for the victim to claim damages using civil remedies unless the actor of discrimination has been found guilty for committing a crime proscribed by Article 161 of the Criminal Procedure Code.

According to the Criminal Procedure Code of Ukraine, except for cases classified under Articles 126, 127(1), 356, victims play only minor role in institution of criminal proceedings and assume wider procedural rights only after the case was passed to the court by the prosecutor. Thus, prohibition of discrimination instead of serving as remedy for victims of discrimination in practice serves as a barrier to obtaining redress, because on the one hand institution of the criminal case under Article 161 entirely depends of the virtually absent political will of the authorities, and on the other recourse to civil remedies is impossible without the exhaustion of the criminal.

In theory the same approach as it is based on the Constitutional Provision is applicable to all other types of proceedings including administrative where cases against actions of failure to act may be

brought by individuals. However, according to the Article 9 of the Code on Administrative Legal Proceedings administrative courts must examine whether the decisions of authorities that are being challenged were not discriminatory either in purpose or effect. In practice administrative courts sometimes consider discrimination claims on the merit. However, there are no adequate or clear procedural standards that such courts would rely on to establish whether actions or omissions of authorities were discriminatory. This may be the reason why discrimination claims even when they are examined by administrative courts are usually dismissed by them on purely formal grounds.

The Government of Ukraine managed to recognise in 2008 that there were several case of hate crimes in Ukraine, but never fully acknowledge the scale of the problem, nor recognized the fact of right-wing activists and groups freely acting in the country without punishment. Just a few of hate crimes were prosecuted under Article 161 of the Criminal Code. Thus, 3 incidents that occurred in 2006 were classified under this Article, 2 in 2007, 6 in 2008 and 1 in 2009. Most of these cases concerned hate speech and just 3 of them were about hate crime.

On 17 April 2008, the Darnitsky District Court of Kyiv convicted four suspects of murdering Kunon Mievi Godi in October 2006. One attacker was found guilty of first degree murder and incitement of ethnic hatred (article 115, part 2, and article 161) and was sentenced to eleven years in prison, while other was convicted solely of incitement of ethnic hatred, receiving a four and a half year sentence. The other two avoided prosecution: one of them was a minor, and the other testified as a witness.

On May 6, 2008, four youngsters were convicted of premeditated murder of a 31-year-old Korean citizen Kang Jong Von, which occurred on April 23, 2007. Each defendant was sentenced to thirteen years of imprisonment under Articles 115 and 161 combined, and the four of them together were ordered to pay moral damage to Von's family.

On April 17, 2008, the Podolsky District Court of Kyiv sentenced 18-year-old skinhead to three years in prison for attacking a Japanese tourist on October 27, 2007.

These were first cases since 1992 in which Article 161 was used to punish racist motivation behind violent crimes. These cases, however, were rather exceptional and due recognition of the racist motive behind those incidents was only due to either substantial public outcry or international pressure on Ukrainian authorities.

But majority of violent crimes motivated by racism, however, have continued to be classified by the authorities with no regard to the possible racist motivation. According to the results of the monitoring by civil society organisations the actual number of incidents of racist violence may not even be put in comparison with the alarmingly small number of violent attacks that were classified under Article 161 during the period of last three years. It is also noted that in majority of such cases, provided that they were reported to the police, racist motivation was dismissed from the outset and not even investigated by law enforcement authorities. According to the report by Diversity Initiative and V. Likhachev of Eurasian Jewish Congress, the number of racist crimes, recorded by NGO monitors during the period of 2008 – 2011 **was the following:**

- ✓ In 2008, 86 people were attacked, 4 of them were murdered.
- ✓ In 2009, reportedly, there were 37 hate crime victims, none of the incidents resulted in the victim's death.
- ✓ In 2010, there were 14 incidents identified, none of them had fatal consequences.
- ✓ In 2011, there were 24 incidents identified, none of them had fatal consequences.

**In light of the above stated, we would like to stress on the following recommendations to the Ukrainian State that urgently need to be implemented:**

- ✓ Reform relevant legislative framework to ensure access to redress for victims of all kinds of racial discrimination. In particular in consultations with civil society organisations and relevant experts: 1) develop a comprehensive anti-discrimination legislation that would contain precise definition of discrimination, its clear comprehensive interpretation and standards of identification; 2) review criminal, civil and administrative law remedies to ensure that victims of racial discrimination have enforceable right to redress of pecuniary and moral damage they might have suffered as a result of any form of racial discrimination.
- ✓ Take measures to effectively ban activities of organisations propagating and inciting racial discrimination. Adequately respond to infringement of minorities' right to dignity, security of a person, private and family life by private parties and as well as the authorities.
- ✓ Reform and re-establish institutional framework necessary for effective implementation of the right any person under Ukraine's jurisdiction not to be discriminated against on the ground of race, colour of skin, ethnicity or nationality.
- ✓ Further intensify its human rights training for the police, prosecutors, border-guards, staff of temporary detention facilities of undocumented migrants and refugees and judiciary as well as facilitate the reporting of cases of police abuse of Roma and other persons of different ethnic origin, effectively investigate complaints and bring those found guilty of such acts to justice, provide adequate protection and compensation to victims.
- ✓ Take measures to eliminate hate speech particularly by government officials and politicians against non-citizens of African, Central and South-East Asian and Caucasus origin including in the context of measures aimed at migration management.

#### **Recommendations to OSCE:**

- ✓ Monitor Ukraine's fulfillment of its obligations and its development of national legislation to meet human rights standards in the field. Provide Ukraine with expert assistance and education, first of all to law enforcement structures to increase their capability to effectively counteract to hate crimes and spread of hate propaganda.