корисна робота з прогресивної кодифікації міжнародного права, що завершилася ухваленням комплексних міжнародних договорів з різних галузей міжнародного права. Не можна знецінювати такі досягнення міжнародного права, як деколонізація, поява нових галузей і розширення просторових меж дії його норм. Не буде перебільшенням сказати, що міжнародне право в силу своєї особливої значущості для підтримання міжнародного миру і порядку є однією з найвищих соціальних цінностей (Мережко А. А. История международно-правовых учений. – К.: Таксон, 2006. – С. 46). Традиційні для міжнародного права ціннісні аспекти проявляються в значущості його як регулятора міждержавних відносин. Кінцевий підсумок такого регулювання – свобода всіх суб'єктів на основі принципу рівності.

N. Dryomina-Voloc
LL.M, PhD
Senior Researcher, Research Institute,
the National Academy of Public Prosecutor's Office of Ukraine

CRIMINALIZATION OF RACIAL DISCRIMINATION: INTERNATIONAL AND COMPARATIVE LEGAL ASPECTS

While social processes gain a global scale, the necessity of uniformed mechanisms of crime counteraction is recognized by state officials, lawyers, scholars and society members worldwide. The legal element of the complex system of criminal prosecution – the basis of law enforcement and judiciary – is greatly dependent of each state's legal tradition and history. When the main distinctive qualifying characteristic of the crime is *mens rea* element – motive, the terms and their interpretation cause wide enforcement discrepancy varying from country to country. The discriminative conduct, leading to different types of responsibility, reach the status of a crime when, according to native criminal theory, becomes socially dangerous. But is it possible to distinguish when discrimination is dangerous enough to be prosecuted by the criminal law? Violent acts, which embrace physical injuries, murders, damage of property, etc., committed on the basis of prejudice or hatred – are they discrimination or a separate category of unlawful conduct?

These questions arise when analyzing the criminal legislation of different states on the subject. The main distinction between the majority of Western European and American states, Commonwealth countries and post-Soviet legal systems is that the latter try to criminalize all possible forms of discrimination or «inequality» (e. g. «Violating equality of citizens depending on their ethnicity or nationality or on their attitude to religion» – Art. 161 of the Ukrainian Criminal Code), which all, nevertheless, result in an ineffective system of prosecution of such crimes. In the former states in the list, the discrimination leads to civil (primarily financial) responsibility.

In spite of all the differences in applying criminal justice to discrimination, the definition of hate crime was introduced into the criminal law of some states of the U. S. and several countries in Western and Central Europe. Hatred can act as a special qualification feature and/or

aggravating circumstance (Ukraine, Russia, USA, UK.). In countries, which did not accept the formal legal qualification of such crimes as «hate crimes», court practice takes into account the motive of hatred, causing a more severe punishment (Greece, Germany, Switzerland) (2008 Hate Crime Survey: Framework Of Criminal Law. Human Rights First: 30th Anniversary. – Available at: http://www. humanrightsfirst. org/discrimination/reports. aspx? s=framework-of-criminal-law&p=index).

The OSCE Office for Democratic Institutions and Human Rights emphasizes that the existence of the motive is obligatory for bringing indictment of committing a hate crime. The proof of the existence of discriminatory motive depends on the specific circumstances of the case. For example, the motive may be evident when the nature of the act is a clear manifestation of intolerance, or mixed, when prejudice attached to a profit-motivated crime.

In the U. S. case law, a number of courts have adopted the requirement that the bias motive be a «substantial factor» behind the offence. The substantial motive requirement, however, does not exclude the possibility of multiple motives. In other countries, by contrast, the bias motive is required to be dominant. The danger of such a requirement is that it is very difficult, in respect of mixed motives, to calculate exact proportions or percentages. In Canada, a study found that police forces employed widely different standards when it came to classifying offences as hate crimes. The largest police force in Toronto used an «exclusive definition,» whereby only acts based solely on a victim's protected characteristic were classified as hate crimes. Other police agencies defined hate crimes as ones where the act was motivated in whole or part by bias (ODIHR. Hate Crime Laws: A Practical Guide. – Available at: http://www. osce. org/odihr/36426. – 2009. – P. 54).

Discriminative motive and hatred motive are different in the context of legal, particularly criminal, hate crime counteraction framework. However, the criminal legislation of the majority of the new independent states of the former Soviet Union distinguishes such unique crime as 'violating equality of people depending on their ethnicity, nationality, religion or other characteristic' (different titles in different countries). Generally, based on their broad language, these articles signify the possibility of sentencing any of both discriminative or hatred criminal conduct – legislators do not differentiate discriminative and hatred motives. This is partly explained by the fairly new threat of hate crime, not peculiar to the post-Soviet societies.

This distinct «equality» article in the criminal codes in the majority of post-Soviet legal systems usually coexists with an article, which determines the commission of an offence based on racial, national or religious enmity and hostility as a punishment aggravating circumstance. Moreover, the racial, national, religious or other hatred is determined as a specific qualifying factor in some articles mainly on physical violence (in some criminal legislations).

The conclusion may be drawn that articles in the Criminal Codes of some of the post-Soviet countries criminalizing violation of equality of people must be considered as those prohibiting hate criminal conduct, as implied by their authors. The practice shows that physical assaults on national, ethnic, religious minority representatives not accompanied by restriction of rights in common sense have been qualified as «Violating equality of citizens depending on their ethnicity or nationality or on their attitude to religion» (Art. 161), in conjunction with the relevant article (e. g. severe physical injury) or separately.

Despite the fact of comprehensive criminalization of hatred conduct, the numbers of such acts really committed and those prosecuted under the hate crime/discrimination provisions demonstrate an obvious contradiction. The problem of objective evaluation of the existing legal formula effectiveness derives both from imperfect data collection system and unwillingness – intentional or unconscious – of law enforcement officials to qualify such conduct adequately (usual substitute is hooliganism). One could notice that statistical numbers of racially motivated crime commission and investigation presented by different institutions vary from tens to hundreds. It is certainly not recklessness of law-enforcement agencies responsible for data analysis; the problem exists, besides improper qualification, in unclear criteria for determination of hate crimes, combined with no special work on monitoring hate crime prosecutions. Unwillingness of a victim to complain to law-enforcement body, grounded on reasonable fears, adds to the distorted picture of hate crime commission and prosecution in Ukraine.

Clear standards and guidelines provided to law enforcement officers are extremely important for an effective mechanism of prevention and punishment of hate crimes. As noted in comments on combating racism, racial discrimination and xenophobia by the Office of the United Nations High Commissioner on Refugees, law enforcement officers play a key role in preventing and responding to bias motivated crimes. They are the first and main point of contact for most victims of such crimes. It is necessary to understand that hate crimes are different from similar crimes not motivated by bias, ensuring a thorough investigation of such crimes and bringing perpetrators to justice (Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach United Nations High Commissioner for Refugees (UNHCR) Division of International Protection Geneva. – December 2009. – P. 9 – 10).

The obligation to investigate the hatred motive should be binding by law in the societies with an emerging practice of hate crime counteraction and developing practice of rule of law. Thus, for instance, Ukraine, being a member of the European Convention of Human Rights, and adopting the Law of 2006 on the Implementation and Application of the European Court of Human Rights (Art. 17 «Application of the Convention and the Court») has mediately introduced such an obligation into its legislation, as courts should apply the Convention and the practice of the Court as authority (the Gazette of the Verkhovna Rada of Ukraine of 28.07.2006. – 2006. – № 30. – P. 260).

The recent practice of the European Court of Human Rights shows adherence to obliging states to ensure adequate investigation of hatred motivated crime.

The Grand Chamber endorsed the Chamber's analysis in the present case of the Contracting States' procedural obligation to investigate possible racist motives for acts of violence (*Nachova and Others v. Bulgaria*, 2005-VII, Application Nos. 43577/98, 43579/98. – ECHR Judgment of 06 July 2005. – Para. 145-168; *Secic v. Croatia*, Application No. 40116/02. – ECHR Judgment of 31 May 2007. – Para. 66-69).

In the situation of hate crime escalation in Ukraine documented by numerous international authorities, against the statistical background of its inexistence, further legislation improvement, implementation of the European Court practice, and willful change of the attitude to the problem by the law enforcement is believed to be necessary and urgent.