

It is expedient to abolish the requirement for state registration of the municipal charters. After all, they are acts of representative bodies of local self-government, to which it is always possible to apply the provisions of Part 2 of Art. 144 of the Constitution of Ukraine that «decisions of local governments on the grounds of their inconsistency with the Constitution or laws of Ukraine are suspended in the manner prescribed by law with a simultaneous appeal to the court».

To conclude, one have to mention, that the EU members do not have such a requirement in their legislation – including France, Poland, Romania, Bulgaria, Spain, Italy, Portugal, other countries.

Ключові слова: муніципальні стандарти, європейські муніципальні стандарти, статути територіальних громад, право на місцеве самоврядування, місцева демократія, місцеве самоврядування.

Ключевые слова: муниципальные стандарты, европейские муниципальные стандарты, право на местное самоуправление, местная демократия, местное самоуправление.

Key words: municipal standards, European municipal standards, municipal charters, right to local self-government, local democracy, local self-government.

CORNELIUS NOLEN

*Organization for Security and Co-operation in Europe,
Monitoring officer Special Monitoring Mission to Ukraine*

HATE SPEECH AND HATE CRIMES IN THE COVID-19 ERA

In March of 2021, the UN Special Rapporteur on Minority Issues reported that since the beginning of the COVID-19 era the world faces a *veritable tsunami of hatred and xenophobia*. He said a treaty was needed to regulate hate speech in social media, and this must in particular focus on the most prevalent and harmful forms of hate – and that was hate against minorities. He said «we at the United Nations and in many countries may be failing in not naming and tackling this evil.» While the scourge of COVID-19 is being addressed and may be under control within a year, the SR said, «The disease of minds shows no signs of weakening.» On the contrary, he said hate speech in social media is spreading and strengthening.

There is no treaty, but is there an international normative framework? This issue was discussed by human rights experts from international organizations during an on-line roundtable on 1 April 2021. Summarizing international law, a representative of the United Nations Human Rights Monitoring Mission in Ukraine (OHCHR) stated that first there is a need to distinguish hate speech and hate crime. According to the UN, the starting point must be full respect of freedom of expression (the «oxygen of democracy») is safeguarded. Free speech is protected in a wide range of international instruments, including the International Convention on the

Elimination of All Forms of Racial Discrimination. As the Special Rapporteur emphasized in his 2019 report, the content of speech might for many be offensive, controversial, unpopular or disturbing, but freedom of expression protects the right to express such information and ideas. Nevertheless, as a matter of fundamental principle, restrictions on any form of expression must remain an exception, allowable only in cases that fall into one of three categories acknowledged in international human rights law:

(i) States must criminalize expression that constitutes incitement to genocide;

(ii) States have an obligation to prohibit by law, *though not necessarily to criminalize*, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;

(iii) Finally, freedom of expression may only be restricted as provided by law and as necessary for respect of the rights or reputations of others or for the protection of national security, public order, or public health or morals. These are narrowly defined exceptions, and the state bears the burden to demonstrate that limitations must meet these conditions: legality, legitimacy, and necessity and proportionality.

Hate crimes are criminal acts committed with a bias motive. It is this *motive* that makes hate crimes different from other crimes. This means that the perpetrator intentionally chose the target of the crime because of some protected characteristic. The target may be one or more people, or it may be property associated with a group that shares a particular characteristic, such as «race», language, religion, ethnicity, nationality, or any other similar common factor. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. Hate crimes always require a base offence to have occurred. If there is no base offence, there is no hate crime. For example, a rock concert featuring songs glorifying violent fascism or the Holocaust would be hate speech, and in some States would be a crime, but it is not a hate crime because there is no criminal base offence. The first essential element of a hate crime is missing.

The UN expert informed that, at the international level, some instruments specifically call on states to criminalize certain acts. For example, Article 4 of Convention on the Elimination of Racial Discrimination provides that it should be an offence to «disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin». The European Court of Human Rights has handed down very clear judgments, and essentially held that states have positive obligations under the ECHR to investigate the potential racial motivation of crimes. In *Nachova and Others v. Bulgaria*, the Court held that there was a duty to investigate possible racist motives behind acts of violence by state authorities, and that Bulgaria's failure to do so constituted a, of the non-discrimination provision in Article 14 of the Convention. While the Court has not demanded the introduction of specific legislation against hate crime, it has explicitly recognized that hate crimes require a criminal justice response

proportionate to the harm caused. These principles were applied in *Secic v. Croatia*, for example, which concerned a case involving an attack by skinheads on a Roma man. There, the Court reiterated «...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».

During the seminar, an attorney from Helsinki Human Rights Committee of Ukraine assessed the response to hate crimes in Ukraine as unsatisfactory according to international standards. She pointed to two factors: 1) shortcomings of the Ukrainian legislation; and 2) unwillingness and lack of skill on the part of law enforcers to properly respond to hate crimes. The latter, namely the will to investigate, is the key factor.

To prove her point, she brought up the March of Equality in Odesa in August 2020 where several participants and one police officer were injured. The perpetrator who attacked the police was arrested the following day but it took the police several months to start investigating the cases where LGBT activists were victims. Considering the lack of action by the police, the attorney went to court and the investigation judge ruled to open the case. She brought this decision to the police and the case was opened in 2021 but no action followed. The attorney also filed the claim with the Odesa District Administrative Court, asking to recognize the police failure to act to protect civilians at the Equality March.

The Ukrainian legislation has only one article on hate crimes – Article 161 of the Criminal code of Ukraine. The attorney critiqued the Article 161 as poorly structured to the point that it is barely applicable. She noted that crimes motivated by someone's sexual orientation are not directly codified by the statute. The article mentions inciting violence based on three characteristics only – race, religion and ethnicity, and violation of citizens' rights based on a more comprehensive list of characteristics where sexual orientation is nonetheless absent. As a result, law enforcers do consider it possible to apply and enforce this article when sexual minorities are targeted. She further informed that the police say they do not apply Art. 161 because they «cannot get into the perpetrator's mind and discover the criminal intent.» They argue that hate crimes are non-provable. However, the speaker counter-argued that the police are successfully prosecuting hooliganism cases where they have to prove «disrespect for society» another form of intent. She actually believes that *hate* is easier to prove than *disrespect*, especially in case of verbal manifestations, or even posters and banners demonstrating the precise hateful motive. The main reason why these crimes are overlooked by the police is the absence of will and orders coming from above.

There is some statistics given by the division head of the Ministry of Justices' Office of the Agent of Ukraine before the European Court of Human Rights – Ukraine's main liaison to the court in Strasbourg. As of 30 December of 2020, there are 10,400 applications were submitted to the Court against Ukraine. Number of applications against Ukraine has significantly increased because of the conflict in Eastern Ukraine. In 2018 – 3 207, 2019 – 3 991. Total number of pending applications against all CoE countries – 62 000. Basically,

one in six claims submitted to Strasbourg for all of Europe is against the state of Ukraine. Overall judgments delivered by the Court against Ukraine – 1499. There were 20 rulings indicating «no violation» by the state. In 2020 alone, there were 86 adverse decisions and one judgement finding no violation.

Those figures are troubling. What's more troubling is that once all the resources are devoted to adjudicating cases in Strasbourg and a decision is finally rendered, in more than a third of the cases Ukraine has not executed the judgements. There are 589 pending (not executed) cases against Ukraine. There are so many unexecuted decisions relating to Ukraine that the Committee of Ministers, The Council of Europe body that supervises the process of ECHR judgments execution, began to combine cases into three main the groups based on the violations. The main groups of not executed judgements in Ukraine are:

1) **Burmych/Ivanov** – concerns non-execution or delayed execution of domestic judicial decisions by the State. It is a complex, structural problem that requires both administrative and legislative reform. The Ministry informed that there are 14 moratoriums that impede the execution of court decisions against the state.

2) **Merit/Naumenko** – concerns length of judicial and overall domestic proceedings in criminal, civil and administrative cases and lack of effective remedy in this regard; and

3) **Sukachov** – concerns poor material conditions of detention in pre-trial detention facilities and prisons, and also lack of effective remedy in this regard.

In conclusion, the reputation International Human Rights Law bears as «soft law» is only earned because some states, for whatever reason, choose not to enforce them. But states that aspire to a European future would do well to improve both *compliance with* and *defense of* international conventions if their candidacy is to be taken seriously by the international community.

Ключові слова: злочини на ґрунті ненависті, висловлювання ненависті, Конвенція про ліквідацію расової дискримінації, Європейський суд з прав людини, порушення, права людини, рішення, міжнародне право.

Ключевые слова: преступления на почве ненависти, выражение ненависти, Конвенция о ликвидации расовой дискриминации, Европейский суд по правам человека, нарушения, права человека, решения, международное право.

Key words: hate crimes, hate speech, Convention on the Elimination of Racial Discrimination, European Court of Human Rights, violation, human rights, judgements, international law.