

**8th IAP European Regional Conference
Hate Crime
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OSCE

1. I am legal adviser at the Office of Democratic Institutions and Human Rights, which is part of the Organisation for Security and Co-operation. I work in the Tolerance and Non-Discrimination Programme, and hate crime is one of our areas of work. I'm going to talk today about hate crime from an international perspective. I will look in particular at the aspects that will affect how legislation is developed, and how prosecutors apply that legislation.

2. But first, for those of you who are unfamiliar with the OSCE, I will briefly give you an overview of our work.

3. The OSCE is the world's largest regional security organization with 56 participating States which span the geographical area from Vancouver to Vladivostok. It is recognised under Chapter VII of the UN Charter.

4. The OSCE take *a comprehensive view of security*. This means that our vision of security includes not just political/military issues, but also the social, economic and 'human' dimensions. The human dimension includes such issues as human rights, rule of law, and, indeed Tolerance and non-Discrimination.

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5. The Tolerance programme has what appears to be an impossibly wide mandate. We are tasked to assist *all* 56 participating states to combat *all forms* of racism, xenophobia, anti-Semitism and discrimination; in reality we do focus on certain areas so as not to duplicate the work of other specialist international bodies. And since hate crimes are not the focus of any other international governmental organizations, we have focussed on this to a large extent.

6. Because our participating states are so geographically spread, we can see certain patterns and common challenges, and we report on these annually in our hate crime report. You can find the most recent report on the display. Of course, we have a very wide geographical spread, so we are not restricted to the EU. We have recently, for instance, been in discussion about training Law Enforcement officers on hate crime in Russia, and prosecutors in Azerbaijan later this year. While we bring international experience of hate crime, and facilitate activities, we rely on the lawyers who are working everyday in those countries as the real experts. That is one reason I am particularly delighted to be here with all you practising prosecutors, who are intimately acquainted with the law and procedure of your country, and why I will be using this opportunity to ask for your help.

7. But before we come to that, let us turn back to the questions of what is

8. First, a note on terminology. The phrase hate crime refers to acts that are commonly criminal but which have a hostile motivation. I am not talking about acts of discrimination which carry a criminal penalty. These are quite common in Europe

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but, unlike hate crimes, they would not normally be crimes in the absence of the discrimination.

9. I am also not going to include crimes of offensive or insulting speech. Although speech is the most prevalent and often the most high profile issue in many countries, it is the issue where states are most divergent in their laws. Except for speech which directly and imminently threatens violence, there is no other commonly accepted line as to what speech should be prohibited by law. So, excluding hate speech, and acts of discrimination, we are left with the specific area of crimes which are motivated by hostility, or where the victim is selected because of their membership of a protected group.

10. In working in this area, the biggest challenge for us is the lack of awareness of hate crimes. Most states don't recognise the concept, nor do they collect information or data in sufficient detail to evaluate the nature and extent of the problem. According to the most recent data, we know that 5 of the 27 EU states collect **no data** on hate crimes¹ while 10 members states have **limited** data collection and 10 have **good** data. Only two (Finland and the UK) have comprehensive data collection.

11. In states which collect data, it often relates only to racist or xenophobic crimes, and does not differentiate between different groups within that category. It is, for instance useful to know what the patterns are in anti-Semitic attacks, or attacks against Roma. But both would come under 'racist' crime. This lack of data makes it difficult to

¹ Fundamental Rights Agency Report on Racism and Xenophobia in the member States of the EU 2007 report, p14.

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1. Draw clear conclusions on trends in hate crime;
2. Allocate resources in the criminal justice system where it is needed;
3. Reassure vulnerable communities that the state is responding appropriately; and
4. Systematically to compare and learn from the experience of different jurisdictions.

It is particularly important for police prosecutors and judges to be aware if there is an upsurge of a particular type of crime, as it will affect how individual perpetrators are dealt with.

12. But we see that things are changing; in recent years international concern has been growing about hate crimes. In April 2007 the EU Ministers of Justice agreed on a new framework decision to combat racist and xenophobic crime; the detailed wording is still being negotiated. However, it seems that this will, *inter alia* require that states have legislation making racist and xenophobic motivation an aggravating circumstance in sentencing. We believe this could, like the directives in the field of anti-discrimination law, trigger a more wholesale evaluation of hate crime laws in EU countries. In the long run, it could be a significant step towards a more harmonised approach to the issue.

13. The European Court of Human Rights has also been considering states obligations in hate crime cases. The first such case was *Nachova v Romania* in 2004. The case involved 2 Roma conscripts who had run away from the army. Military Police pursued them, and the 2 men were shot and killed, although they were unarmed. The police were heard to use racist language. An internal investigation cleared them of any wrongdoing, but the Court came to a very different conclusion.

14. First, the court found that on the facts the death was due to racial motives and was therefore a breach of the right to life under Article 2. Then, the Court noted that there was a violation of the obligation under Article 2 to conduct an effective investigation. Finally, they found a violation of Article 14 in respect of both of these violations. State authorities have the 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. Noting the impact of racist crimes on communities, the court stated that by failing to make a distinction between racist and non-racist crime Romania had breached its obligations under Article 14. Specific approaches to the issue of proof may be needed in cases of alleged discriminatory acts of violence.

15. In *Angelova v Bulgaria* in 2007, the court considered the case of Mr Iliev who in 1996 was killed by a group of 7 racist teenagers. The group was arrested within hours; they made incriminatory statements, admitted disliking Roma, and having committed previous similar attacks. In April 1997 the investigator concluded there was sufficient evidence to convict and the case should go to trial. Yet by 1997, the Bulgarian authorities failed to bring a single one of the suspects to court. The Court was unimpressed and noted that ‘ *when investigation 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 part in the events, failing to do so and treating racially induced violence and brutality on an equal footing with cases that have non-racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.*’

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16. In other words, in some circumstances at least, treating racist crimes exactly like non-racist crimes is discriminatory, because it is a failure to recognise the special nature of racism.

17. Finally, only last week, the court issued judgement in the case of *Stoica v. Romania*. In 2001 police started beating Roma gathered outside a bar in Gulia, while shouting racist remarks. Constantin Stoica, a 14-year-old Roma boy was beaten unconscious. The child was left with a serious disability. The official investigation concluded that it not been proved that Mr. Stoica's injuries were caused by police officials.

18. The case concerned a breach of Article 3. The Court noted that the Government had not shown how Mr. Stoica's injuries could have been caused otherwise than by the treatment inflicted on him by the police officers. This amounted to inhuman and degrading treatment. Additionally the Court held that the Romanian authorities had failed to effectively investigate Mr. Stoica's allegations, in violation of the procedural limb of Article 3.

19. The Court held that the investigation into the incident had failed to address the potential existence of racial animus. All the evidence clearly pointed to the fact that the ill-treatment of Mr. Stoica was racially motivated and hence the burden of proof now lay with the Government to discharge it. Since the latter however failed to adduce evidence suggesting that the impugned ill-treatment was not racially motivated, the Court held that a substantive violation of Article 14 had also taken place.

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20. These recent cases imply that the court's view of equality under Article 14 may be more complex than simple *procedural* equality but also involves *functional* equality. While this has been its approach in other discrimination cases, it is significant the court takes the same approach in hate crime cases. It is especially important to note the Court's comments on the shift in the burden of proof on the state. It is clear that in these cases the state will be held to a very high standard. Decisions made by investigators and prosecutors will be carefully scrutinised by the Court to see if they reach this standard.

21. But despite these developments at the European level we see there are still limitations. For a start, these initiatives recognise only the special status of crimes motivated by hate on certain grounds - essentially racism or xenophobic grounds. Looking to the future it is not clear that the same approach will be taken in cases motivated by hate on the other grounds in Article 14. The Court specifically mentioned the special impact of racism and racial division and society, and did not refer to the other grounds in Article 14. However, there is little justification for limiting this rationale to crimes committed on these grounds. Homophobic hate crimes, for instance show similar features are widespread and also undermine the security of communities. In view of the way the equality principle has been widened in other contexts in the EU and the ECHR, it is reasonable to conclude the court will use the same reasoning and apply Article 14 to other forms of hate crime in the future.

Before I finish, I said I would like your help: as I noted earlier, you are the experts and know the law in your own countries far better than we can. I would like, therefore, to create a network of legal experts who have worked on or are interested

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in working on hate crime issues. The experts would feed in immediately to some of our activities: First, they will be invited to attend roundtables to discuss guidelines on hate crime legislation. Second, they will be involved in preparing, and possibly delivering hate crime training curriculum for prosecutors.

We are looking for prosecutors of all levels of experience and responsibility. Some with training background, some with managerial responsibility and some from active prosecuting level. The most important criterion is that they are experts in their own legal systems and speak English. Anyone who is interested in participating is strongly encouraged to leave their details on the form ... or give me their card.