

Discriminatory Crime – Presentation of OSCE-ODIHR¹/IAP practical guide on “*Prosecuting Hate Crime*”, 1st Session of Special Interest Group Meetings (SIGM).

Facilitator: Mr. Thomas Burrows, USA.

Speakers: Mrs. Solveig Wollstad, Sweden and Mr. Sergio Suiama, Brazil.

Discriminatory crime concerned a main aspect of the rule of law; *equality*. The ideal of equality is perhaps most obvious as regards equal obligations and responsibilities, but it should apply just as much to equal protection for every human being.

With this as a starting point, Mr. Burrows pointed out two main goals for the session:

The first goal was to introduce a practical guide – *Prosecuting Hate Crime* – that has been prepared by the OECD in cooperation with the IAP. The report is now available at the IAP web site, and it is relevant both for practical prosecution work and policy work.

The second goal for the session was to discuss obstacles for the prosecution in hate crime cases, and how these obstacles can be overcome.

Mr. Burrows went on to point out and comment on six important questions that the guide deals with:

1. What is a hate crime?

The detailed definition varies between different legal systems, but the essence is crimes that derive from structurally unequal social relationships, bias motivation of the offender, and hatred towards various vulnerable groups.

2. Why is this an important category of crime?

It was underlined that hate crime is particularly destabilizing to society and harming to the individual. It represents a dual offence against human rights: one against the values protected by regular criminal provisions, such as life, freedom and property, and another against equality as a human right itself. This calls for criminal prosecution, but the guide stresses the need for complementary policies, such as public awareness campaigns and a system of monitoring hate crime towards specific groups of the society.

3. What legal framework applies?

Although the legal framework varies significantly between different legal systems, there are relevant international standards that are dealt with in the practical guide.

4. How to build a case?

This is of course a big question, but evidence issues are vital and particularly difficulties concerning evidence of motivation were discussed.

5. What obstacles does the prosecution face in these cases?

Apart from evidential difficulties, there are many obstacles originating from the situation of the victims. Fear of reporting attacks can be related to different concerns

¹ OSCE Office for Democratic Institutions and Human Rights.

such as risk of being deported, of retaliation, of the victims sexual orientation being known, general lack of trust in the authorities and so on.

6. Best practices: how to overcome the obstacles?

The guide highlights the crucial importance of training. We all have our own prejudices and biases, and it is important to identify these. One risk is lack of prosecution in cases where the victim is not perceived as “clean” for example due to homelessness or sexual orientation.

The first speaker, Mrs. Wollstad, presented the so called «Mangs» case or the Malmö shootings. This is a case where serial shooter Peter Mangs was responsible for a string of attacks in Sweden, apparently targeting people with dark skin and non-Swedish appearance. However, Mangs was not convicted of hate crime, as his hate was not restricted to foreign victims but also was directed towards criminals, and not all of his victims were foreign. The case illustrates difficulties the prosecution may face in hate crime cases, particularly the burden of proof regarding bias or hate motivation.

The second speaker, Mr. Suiama, discussed three questions:

1. Why punishing?

Under question no. 2 above I have already included Mr. Siamas’ point that every hate crime represents a dual offence against human rights. As an extension to this Mr. Siamas warned against some prosecutors habit of disregarding the needs and interest of the victims by considering them just a piece of evidence.

2. What must be punished?

It was argued that the criminal justice system should not disregard the discriminatory behaviour that underlines a criminal act even if bias motivation may not be clear. In response it was discussed whether this would be in conflict with the standard requiring proof beyond reasonable doubt or whether it represents strict liability.

Under question no. 2 Mr. Suiama also discussed the nature of hate speech and to what extent it should be prosecuted, pointing to the UN High Commissioner for Human Rights six part threshold test cited in the practical guidelines.

Finally different problems resulting from under inclusion of hate crime legislation and prosecution was discussed, particularly fear of reporting offences and secondary victimization.

3. Punishing how?

The main issue under this headline was pros and cons of victim membership legislation compared to offender motivation legislation. Further it was discussed if it is best to seek development of the law through specifications in the legislation or through practical doctrine. It was underlined that even though much can be achieved through case law development, legislation plays an important role in the communication of values.

The Special Interest Group Meeting on discriminatory crime was very well attended, and this report cannot fully do justice to all aspects of the presentations and the interesting discussion that followed.