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COVER NOTE

from: Presidency
to: Delegations
Subject: "Totalitarian regimes' heritage in hate crimes"
Summary seminar conclusions

Delegations will find attached the summary seminar conclusions from the seminar "Totalitarian regimes' heritage in hate crimes", organized by the Lithuanian Presidency, and held in Vilnius on 18 October 2013.

Encl.:



EU2013.LT

“Totalitarian regimes’ heritage in hate crimes”

Summary seminar conclusions

The seminar “**Totalitarian regimes’ heritage in hate crimes**” organized by the Lithuanian Presidency of the Council of the European Union was held in Vilnius, Lithuania, on 18 October 2013. About 60 experts, including representatives of governments of the Member States, totalitarianism remembrance centres, the Platform of European Memory and Conscience, the European Network Remembrance and Solidarity, the Heritage Foundation, members of Lithuanian and EU Parliament, law practitioners, university professors took part in the event. The objective of the conference was to discuss the linkage between hate crimes and crimes committed by totalitarian regimes.

Dr. Juozas Bernatonis, Minister of Justice of Lithuania, pointed out that EU must fight the acute problem of hate crime. Ms. Sandra Kalniete, Member of the European Parliament, noted that xenophobic, anti-democratic political parties are gaining electoral support in different EU Member States and people are sometimes not aware that this can lead to intolerance and violation of the right to be different, to have a freedom of thought and speech. Mr. Emanuelis Zingeris, Chairman of the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania, stressed that the remembrance and commemoration of crimes committed by totalitarian regimes is not a political question anymore, which is an achievement. Presentations made during the seminar addressed national and European practice of remembrance of totalitarian regimes, and challenges in countering hate crime. The current legal framework and future policies in this field were discussed. Research findings on the rights of the victims and the effects of the prohibition of the Holocaust denial were presented. Historical memories regarding the Communist and Nazi regimes were shared and discussed among the participants. It was noted by many speakers that totalitarian regimes which relied on discriminatory policies and hate should never be accepted again in democratic societies and more should be done to prevent their possible resurgence.

A more detailed report from the seminar is set out in the annex.

SEMINAR

“TOTALITARIAN REGIMES’ HERITAGE IN HATE CRIMES”

VILNIUS, 18 OCTOBER 2013

REPORT

1. OPENING SESSION

The Minister of Justice of the Republic of Lithuania **Dr. Juozas Bernatonis** highlighted that hate crimes are a burning issue in the EU which must be solved. EU is enlarging and its responsibility in ensuring human rights and freedoms is increasing. Fundamental rights today are one of the priorities in the EU politics. The EU Charter of Fundamental Rights prohibits any discrimination, so Member States must make all the efforts to fight crimes motivated by racism, xenophobia or religious intolerance.

Sandra Kalniete named the EP activities in spreading the knowledge about totalitarian regimes (book presentations, film screenings, various performances). The stories of the past must be told to understand the present and to better shape the future. The society must understand the specific features when the democracy begins to deviate from normal democratic development. Xenophobic, anti-democratic political parties are gaining electoral support in a number of Member States. People who support such politicians are not aware that this can lead to intolerance and violation of the right to be different, to have the freedom of thought and speech. Intolerance is at the basis of all totalitarian regimes. In 2009 EP adopted an important resolution on European conscience and totalitarianism which noted that “*Europe will not be united unless it is able to form a common view of its history, recognize its Nazism, Stalinism and Fascist and Communist regimes as a common legacy*”. In order to strengthen the tolerance of society, public awareness of totalitarian regimes must be raised. The past can be relevant for EU policies today. As Hannah Arendt states in her book “The Origins of Totalitarianism”, “*Totalitarian solutions may well survive the fall of totalitarian regimes in the form of strong temptations which will come up whenever it seems impossible to alleviate political, social, or economic misery in a manner worthy of man*”.

Emanuelis Zingeris talked about the politicians' attitude towards totalitarian past. He stated that the remembrance and commemoration of crimes committed by totalitarian regimes is not a political question anymore. This is a victory. The message about totalitarian crimes must be forwarded to the younger generations. We must unite our efforts to note parallels between Nazism and Communism, while remembering their separateness.

2. **PRESENTATIONS**

Pavel Tychtl, Directorate-General for Communication, European Commission

The presentation focused on 2 aspects: European policy in the area of the legacy of totalitarian regimes and legal issues, EU law in the area of totalitarian crimes.

The "Europe for Citizens" Programme (hereinafter – Programme), and specifically the part which deals with the memory and remembrance, was presented. Unity of the EU Member States must come through the common understanding of different historical heritage. It is not enough to have a common market, common freedoms. To be a citizen of Europe means to know the history of the whole Europe. In the last 7 years more than 200 projects were funded, a number of meetings were organized under the Programme. Historians, memorial institutions, museums, teachers took place in those meetings. In the future, the budget for the Remembrance from the total Programme revenues will be increased to up to 20 percent.

In 2012 the Commission, at the request from the Council, issued a report on the memory of the crimes committed by totalitarian regimes in Europe. Different practices of the Member States in dealing with the legacies of totalitarian crimes have been evaluated. It is still the basis for the Commission's reflection in this area. The second important document is the upcoming report on the Framework Decision on Racism and Xenophobia. Based on this reflection the Commission could propose a legal instrument, but such instrument must be adopted by the unanimous decision of the Council.

Dr. Jogchum Vrielink, Institute for Constitutional Law, Faculty of Law, University of Leuven

Research findings on the empirical effects of Belgian legislation regarding racist hate speech and Holocaust denial were presented.

There are two main laws in Belgium dealing with these types of hate speech: 1) Antiracism Act (1981) which contains two basic provisions: a prohibition of incitement to hatred, violence and discrimination and a prohibition of dissemination of ideas based on racial superiority or hatred; 2) Holocaust Denial Act (1995) which prohibits denial, gross minimization, attempt to justify the Nazi-genocide. Prosecutions and convictions under these laws vary from far reaching types of Nazi propaganda to sending ‘jokes’ with racist implications by email, and everything in between.

Effect of the legislation on victims/plaintiffs. The main purpose of the legislation, regarding victims of hate speech, is to alleviate the harm done. In practice, this is rarely attained. The complaints procedure often end up in disappointment and *additional* harm. Because time and means are limited, a lot of cases are dropped or not actively pursued. Only in about 2 percent of all cases, legal proceedings are initiated. The frustration, on the part of the plaintiffs, when a case is closed and nothing is done with it, is often so great, that it leads to ‘secondary victimization’. However, even in the cases which do lead to a court case and a conviction, the aim of alleviating the harm is usually not reached. This is due *inter alia* to the fact that the role of the plaintiff in criminal procedure is rather limited, so the plaintiff often feels unheard in the procedure. Also, there usually is dissatisfaction with the type of sanction imposed on the perpetrator.

Effect of the legislation on defendants/perpetrators. The legislative aim regarding the perpetrators is to dissuade people from engaging in such activities in the future as well as to effect a mentality change. Regarding the actual effects, a distinction can be made between two types of perpetrators. The first type can be designated as ‘offenders by conviction’. Neither the dissuasive effect nor the change of mentality occurs with this type of perpetrators. On the contrary, such people often welcome the prosecution, because they are keen to get the media attention that usually accompanies this. Another type of perpetrators are the so-called ‘incidentalists’. Such defendants do not belong to any organized ‘racist’ groups, and the expressions for which they are prosecuted are not part of an underlying body of ideas: their motivations are more contextual (for example emailing jokes with racist undertones; distributing a magazine containing an article denying the Holocaust etc.). The dissuasive effect of the legislation does occur in such cases. However, it also results in chilling effects, i.e. in legitimate forms of expression being restricted for fear of being prosecuted again. At the same time these people are sometimes approached by individuals from radical groups, when it becomes known that they are being prosecuted (risk of radicalization).

Dr. Harald Wydra, St Catherine's College, University of Cambridge

The connection between totalitarianism and democracy was presented. Totalitarianism and democracy should not be seen as absolute opposites. Totalitarianism did not exist before the big wave of democratization. There are examples of states which tried to construct a democratic framework but became totalitarian powers. Democracy is ambivalent. Phenomenon of hate speech comes from the ambivalence of free speech. E.g. the Internet is the most ambivalent source of free speech. Democracy is based on two imaginaries: *a constitutional imaginary* – that constitution should limit powers, prohibiting the state to influence individual lives too much; and a *power imaginary* – a temptation of strong power to be without control. The example of this is torture for the sake of security, and humanitarian intervention. Thus, there exists a strong link between democracy and totalitarianism. When we use democratic definitions like human rights, we need to verify that such definitions are used under the same criteria. Even within Europe the criteria are not always the same and we still have an invisible mental barrier of the Iron curtain which has not yet completely fallen down.

Albin Dearing, Freedoms and Justice Department, European Union Agency for Fundamental Rights

The presentation on “Crimes committed under totalitarian rule from the perspective of victims’ rights” was delivered. Two basic victims’ rights must be taken into account. Firstly, it is the protection by criminal law which must be not only theoretical, but it must also work well in practice. Secondly, the victim must have a right to be acknowledged as a person who has the same rights and whose rights are taken seriously. Hate crime is a particular severe form of discrimination, an offence committed with a discriminatory motive. A person is victimized because he is seen as belonging to a category protected under Article 21 of the Charter of Fundamental Rights of the EU, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Totalitarian regimes enforced a certain moral concept, which by definition was discriminatory, because there cannot be a single moral concept which would fit all. For this reason under totalitarian regimes hate crimes were committed to a wide extent.

Victims of hate crimes undergo a few phases. The first phase is when victims need to regain a feeling of basic physical security. Once it is done, victims start to construct the memory: to understand what happened to them. If that is accomplished, the third phase starts, i.e. seeking justice. Victims want to see that the society acknowledges them as persons whose rights have been violated. Victims try to understand their experience and what that experience has done to them. Victims must be protected from not falling out of the society. Everyone can become a victim of a crime, but no one has to remain one.

Today we live in the society which is dealing with the transition of justice: from totalitarian rule to the democratic rule and the rule of law. The first lesson that must be learned in the transition of justice is to avoid impunity. Victims of crime must be taken seriously, and their rights must be understood. This is why we must be critical of the mediation process, and of broad amnesties.

The second question presented was the criminalization of negation of totalitarian crimes in Europe. Proper approach to criminalize the denial, trivialization of totalitarian regimes must be established to avoid the disrespect for victims. Legislative differentiation should be made between simple demonstrations or ignorance of totalitarian memory and a purposive speech against such memory (see the case of ECHR on 8th May 2007, *Faber v. Hungary*). While the first category should not be criminalized, the second category should be strictly prohibited. Public incitement against a particular group in the society as well as threatening, intimidating people must be punishable.

Dr. Neela Winkelmann, Managing Director, Platform of European Memory and Conscience

The presentation addressed killings along the Iron curtain and the right to justice. The Platform on the Memory and Consciousness has a project to count the Iron curtain victims. According to the documents, approximately 421-1000 people have been killed on the East – West German border, more than 320 people have been killed in Czechoslovakia, more than 400 in Romania, approximately 1500 in Bulgaria. The victims were not only citizens of the occupied territories: Czechoslovaks, Polish, Hungarians but also citizens of Austria and West Germany.

The Communist regime in Czechoslovakia cancelled the validity of all the travel documents. Travel to the West was allowed only under the permission of the State Security. It was a criminal act to attempt to leave the country. A decree stating how and when civilians can and must be shot was issued and remained in force until the collapse of the Communist regime. Such legislation contradicted international conventions adopted later. Despite ratification of human rights treaties rights were seriously and intentionally violated.

Escapees were held to be enemies of the state, saboteurs, and spies. Whoever entered the Iron curtain zone, automatically was an enemy. There was a written order that the people killed at the border should be buried in anonymous graves and no relatives should ever be informed.

Those people who issued the orders are known today but instances of prosecution and conviction are relatively few. There is a gap between the policy and its implementation and the right of a fair trial of the citizens of EU who suffered at the iron curtain is grossly violated. There is an important case of the Strasbourg court where the judges has said that such crimes should be classified as crimes against humanity (see case of *Streletz, Kessler and Krenz v. Germany*, 22 March 2011). If we accept that these killings are international crimes, there should be no statutory limitations for investigating these crimes and it should be a moral obligation of the international community to investigate them.

Dr. Aviezer Tucker, Flawn Academic Center, the University of Texas

The speaker delivered the presentation “Legacies of Totalitarianism”. Justice is its norms, its people and its institutions. The rule of law was inconsistent in totalitarian regimes because the law that should limit the powers did not exist under totalitarian rule. The law was declarative, it was not implemented. There was no need for lawyers under the regime. Hence the implementation of transitional justice after the collapse of the regime was difficult: there were not enough judges and prosecutors.

The power of totalitarian regimes lied in their secrecy, secret police. The secrecy ensured that even after the collapse of the regime, the power of the police would not end. So there is necessity to deal with the secret police not just because of what they did in the past but also of what they might be able to do in the future.

The speaker noted the following features of post-Communist transition: 1) a very narrow scope of trials for leaders and torturers and even narrower scope of convictions; 2) a broad scope lustration of the upper echelons of the Communist Party and the employees and agents of the secret police; 3) correlation of attempts to enforce justice and the level of reform of the secret police itself; 4) cyclical attempts of the Communist party to return to power.

Lastly, the topic of declarative speech was touched upon. Even if a number of people who were prosecuted is minimal, prosecutions have an effect on educating the society. It is very important to state what was right and what was wrong. It should help create new foundations for the society and the state, weaken and replace totalitarian legacies, institutionalized traditions, and personal habits.

Professor Jan Kudrna, Department of Constitutional Law, Law Faculty of Charles University

The speaker presented racial hate crimes in the Czech Republic

Hate crimes consisting of approval, propaganda or condoning of the two totalitarian regimes are virtually invisible. The Nazi symbols are not present in public happenings, probably because of the negative attitude towards Nazism. There are numerous reasons why the Czechs have negative attitude towards Nazism: 1) Czechoslovakia was the first victim of Nazi Germany; 2) Nazism destroyed democracy and a civic society; 3) Czechoslovakia and its society since its beginning took in Jews as their integral part; 4) Czechoslovakia was till its latest days open to anti-Nazi refugees from Germany; 5) the situation of Slavs under the Nazi rule was clear – as subhuman creatures they were determined to be exterminated. Reasons for the negative or indifferent attitude towards Communism are more complex as the Communists ruled in Czechoslovakia for 40 years and, most importantly, the Communism was never clearly defeated like Nazism was.

With the fall of the Communist regime the racially motivated hate crimes appear. The overwhelming majority of such crimes are against the Roma minority. The roots of the conflict are in the social and life-style background. The main goal of the Communist regime was to solve social contradictions and for the Roma people it resulted in social integration. After the fall of the Communist regime the strong social integration effort ended up. New integration and social projects appear rather slowly and social exclusion hits especially hard the weakest groups of the society – not only the Roma people, but also people who are handicapped, etc. Sometimes the division between “us and them”, or “mainstream society and maladjusted” appears in the media.

The solution lies in the social inclusion of the excluded groups and in stressing individual responsibility of all involved people (Roma people, politicians, journalists, the public, etc.).

Lee Edwards, Distinguished Fellow in Conservative Thought, The Heritage Foundation

The connection between international terrorism and the Communist regime was presented by the speaker. Members of the Communist parties were systematically trained as terrorists. The course of instruction covered armed combat, guerrilla warfare. In some cases terrorists' weapons were acquired in the Communist countries. The Communist ideology included seeking expansion of Soviet influence also by undermining, weakening, humiliating the authority of the Western societies. To fight the terrorists' problem, an international treaty on terrorism should be drafted or each nation should develop special anti-terrorist squads. Western nations must ensure that whatever political and legal measures they adopt they should do so in line with constitutional processes of Western democratic societies.

Dr. Igor Casu, Centre for the Study of Totalitarianism, Faculty of History and Philosophy, State University of Moldova

The presentation was on the archives and their crucial importance at present. Before 2010 when the archives were disclosed, there was no knowledge about the Communist crimes in Moldova. There was some knowledge about deportations, but nothing was known in terms of the mechanism, and personal files. When the archives were found the evidence showed that about 5,000 persons were shot during the Great Terror in Moldavian Autonomous Republic in 1937-1938. During the first Soviet occupation of Bessarabia, 1940-1941, in Moldavian SSR at least 136 persons of different nationalities were executed. At least 85,000 of people were mobilized for forced labour and sent to industrial enterprises in Ukraine and Russia in 1940-1941. Those who were trying to escape mobilization were sentenced under criminal law.

During the second Soviet occupation, immediately after the war, at least 123,000 persons died of artificial famine during the year 1947-1948. At least 80,000 persons were sent to GULAG in 3 mass deportations in 1941, 1949, and 1951. It was also revealed that under the Communist regime during specific periods, a particular category of people had no chances to survive. If a person was classified under the so called first category, e.g. because of his/her social origin, he/she had to be executed.

Because of the disclosure of archives the evidence of torture, the structure of the ruling forces, deportation mechanisms are known in detail. Disclosure of archives and the information provided to the public (articles in press, special TV programmes) is changing the opinion of the public. Informal surveys show that after the “archive revolution” of the last years a growing number of people in Moldova have a negative attitude towards the Communist past and the present Communist party. Better understanding of totalitarian regimes and their consequences is bound to strengthen democracy.

Rolandas Tilindis, Professional Law Partnership Baltic Legal Solutions Lietuva

The speaker presented findings of a research project on public tolerance, denial or gross trivialization of hate crimes, crimes against humanity, war crimes and genocide from international, European and domestic legal perspective.

Hate crime is not defined in the EU or national legislation. Usually hate crime is understood as crime motivated by person’s true or assumed belonging to a certain social group. In the case of genocide a person is attacked because of his/ her membership in a particular national, ethnic, racial or religious group. In the case of crimes against humanity the reasons for committing the offence are much wider: a person or a group of persons is targeted because of political, racial, nationalistic, ethnic, cultural, religious, gender and other reasons which are prohibited by the international law. Both genocide and crimes against humanity are motivated by hate.

By denial or trivialization of crimes committed under totalitarian rule (i.e. crimes of genocide, war crimes, crimes against humanity) the victims or their relatives are insulted and slandered. Such behaviour instigates hostility and hate against social groups with which the victims of totalitarian regimes are associated. Tolerance of hate crimes rehabilitates the totalitarian rule and creates a background for its repetition. It also divides the society and creates a threat to national safety, democracy, fundamental rights. For these reasons it is necessary to ensure recognition of victims and prosecution of perpetrators of hate crimes.

Radvilė Morkūnaitė-Mikulėnienė, Member of European Parliament, European People's Party political group

The speaker presented the dissemination of historical memory of totalitarian regimes in Europe. Commemoration of historical facts usually ends up in providing dry facts. However there are more acceptable ways to present history: performances, exhibitions, film screening. Every month in the EP an event is dedicated to remember historical past. It is also becoming a tradition to name particular places, halls in the EP building after important historical facts or personalities. In this way the different historical experiences of the EU Member States can be presented to the wider public. This July the zero floor of the EP building was named after the Baltic Way of 1989. There are other examples too.

History must never be forgotten. We should never forget the main purpose for the establishment of the EU – to ensure and maintain peace in Europe. EU is becoming a tool for better common understanding. To achieve this we should know each other's past. Lack of knowledge about different histories of the Member States may lead to a broken dialogue. Recently in Lithuania, a TV channel which broadcasted programmes produced in Russia, showed a film on the events which took place on January 13 1991 in Vilnius when Lithuanians were attacked and killed by the USSR military forces near the TV Tower. The said programme distorted the facts and expressed the view that Lithuanians were attacking each other and Soviet forces were not involved. In reaction Lithuania suspended the broadcasting of such programmes on this channel. The OSCE representative for media freedom stated that any restrictions made against programmes which interpreted historical facts were a violation of media freedom. This statement was received negatively by Lithuanians.

To conclude, more should be done to ensure remembrance of and respect for the victims of totalitarian crimes. History must not divide but unite us.