



EUROPEAN DISABILITY FORUM WRITTEN SUBMISSION

Dordevic v Croatia, Application No 41526/10

“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”

Article 4 § 3 of the United Nations Convention on the Rights of Persons with Disabilities

Introduction

This written intervention is submitted by the European Disability Forum (EDF) pursuant to the leave granted by the European Court of Human Rights under Article 44(3) of the Rules of Court on 3 February 2011.

This case concerns two Croatian applicants of Serbian origin, the first of whom is a person with severe and multiple disabilities, has been verbally and physically attacked on the account of his disability and Serbian origin by a group of a neighbourhood school pupils over the period of four years. This case is an opportunity for the Court to examine the response to violent crimes against persons with disabilities that, although widespread in many countries, remain misunderstood and, consequently, underreported.

The first part of this submission explores the particularities of the disability hate crime in general and makes references to the resources on the phenomenon provided by the academia and the civil society. The purpose of the first part of the submission is to critically analyse the vulnerability-based approach to the disability hate crime, as opposed to the hostility-based approach which should, in EDF's view, be the starting point of the analysis of the phenomenon of disability hate crime.

The second part of the intervention outlines the relevant articles of the UN Convention on the Rights of Persons with Disabilities, the new international instrument on the rights of persons with disabilities binding on the majority of the Council of Europe Member States.

Definition of hate crime

Although the exact definition of hate crime varies from jurisdiction to jurisdiction, it must always include two elements: (1) it is an offence under criminal law that (2) is committed with a bias motive, i.e the victim is deliberately selected because of hostility provoked by their particular characteristic (such as race, sexual orientation or disability)¹.

¹ "Hate Crimes in the OSCE Region – Incidents and Responses", Annual Report for 2009, Warsaw, November 2010, p 13.

The OSCE/ODIHR resource guide “Preventing and responding to hate crimes” proposes a set of indicators to help identify a hate crime². These include:

- Victim’s perception of the crime. The rule of thumb should be that if a person feels that she has fallen victim of a hate crime, the police should investigate the case on the presumption that it is.
- The conduct of the offender. The perpetrators often voice their prejudice during the act, sending the message to the victim that she is being targeted because of a particular characteristic.
- The characteristic of the victim and the perpetrator. Belonging to a distinct minority is usually the most obvious characteristic, especially if it is easily identifiable (i.e a person with a visible disability).
- The place and time of the act. The criminal acts that regularly happen in or around places commonly associated with members of the attacked minority group (i.e day centre for persons with disabilities) must be scrutinised for hate motive.

It is widely accepted by the hate crime experts that playing down the experiences of disabled victims of hate crime by describing them as “bullying” or “abuse” is very detrimental to the disability community and tends to encourage the behaviour of attackers. The so-called *minor* incidents, such as name calling, writing insulting messages directed at the disabled person, or spitting at them often become more frequent and severe unless dissuasive sanctions are imposed on the offenders³.

Particularities of disability hate crime and challenges of identifying them

The structural exclusion and discrimination against persons with disabilities historically engraved in most societies has relegated them to objects of welfare, rather than holders of rights and obligations on an equal basis with others. This welfare approach to disability has managed to create the image of persons with disabilities as weak, vulnerable, dependent or pitiful. ‘Hateful’, however, is rarely used to describe the society’s sentiments towards its disabled members. This could be one of the reasons why the understanding of disability hate crime lags behind other forms of hate crime, where the link

² “Preventing and responding to hate crimes”, OSCE/ODIHR resource guide for NGOs in the OSCE region, 2009, p 21.

³ Crown Prosecution Service, Disability Hate Crime – Guidance on the distinction between vulnerability and hostility in the context of crimes committed against disabled people, http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime/#a10

between a characteristic and hate is more obvious (i.e persons of ethnic minority or minority sexual orientation are often seen as more likely to be attacked on account of their characteristics). Recognising a hate crime against disabled persons is a challenge for many justice systems.

Vulnerability of persons with disabilities has often been given as the main reason of the many violations of their human rights. However, describing people with disabilities as ‘inherently vulnerable’ and linking the violent crime committed against them to this vulnerability (rather than to the specific fact that they are disabled) is hardly helpful. It perpetuates the image of persons with disabilities as defenceless and susceptible to being attacked. However, as Scope pointedly remarks, “*disabled people, like everyone else, are vulnerable in situations where someone wishes them harm but this vulnerability does not extend to every aspect of their life*”⁴. Using vulnerability of the disabled victim to explain the motivation of a perpetrator of a violent crime may prevent the law enforcement agencies and courts from identifying the actions as a hate crime (which, as explained above, can only be identified as such if an element of hostility is present). Instead, the case (when the authorities deem it serious enough to investigate) is treated as a common criminal offence. This has a number of consequences: the lighter and possibly, not very dissuasive punishment for the offender, continuation of a perception of persons with disabilities as an innately vulnerable group of population and absence of data on disability hate crime.

The OSCE notes that out of 56 participating States, only 11 currently record data on crimes against persons with disabilities (Belgium, Canada, Cyprus, Finland, France, Georgia, Moldova, Netherlands, United Kingdom and the United States)⁵. This may be the cause and effect of the poor understanding of the phenomenon of disability hate crime against persons with disabilities: the lack of data sends the wrong message that the incidence of violent crime against persons with disabilities is low, and the underreporting of it (or the inadequate response given to the victims by the authorities who fail to recognise the bias-motivated hostility) lead to the decision of the states not to collect data on it.

Two separate studies in the UK have shown that while people with disabilities are four times more likely than their non-disabled peers to be verbally and physically attacked, they are half as likely to report crimes to the police, fearing that they would not be taken seriously⁶. The seriousness of the hate crime against people with disabilities has also been recognised by the Human Rights

⁴ Getting Away with Murder – Disabled people’s experiences of hate crime in the UK, Scope, August 2008, p 34

⁵ Supra nr 1, p 82.

⁶ Nacro, Access All Areas, 2002 and Nacro and Southampton City Council, Community Safety Audit, 2002; Action for Blind People, Report on verbal and physical abuse towards blind and partially sighted people across the UK, January 2008, cited in supra nr 3, at p 19 and 23 respectively.

Commissioner of the Council of Europe who recommended to its Member States to tackle it “through proactive policing and prompt prosecutions”⁷.

The hostile behaviour towards persons with disabilities that provokes violent attacks is inherently discriminatory. The victim is chosen *because* of her visible disability or a non-disabled person’s close association with someone with a disability (or, as it often happens, on the basis of a *perceived* disability or *perceived* association with a disabled person). Two models developed by Frederick Lawrence⁸ are helpful to understand the motivation underlying the hostility of hate crime perpetrators. The *discriminatory selection model* suggests that the selection of the victim is made solely on the basis of her membership of a particular group (i.e persons with disabilities or persons from ethnic minorities), whereas the *racial animus model* goes further and focuses on the reasons for the hostile attitude towards the particular group the victim belongs to. Although both models are equally applicable to disability hate crime, it is interesting to focus specifically on the second one and analyse the reasons for the hostile attitude.

It has been submitted that the fear of persons with visible disabilities whose appearance is seen as ‘disturbing or unpleasant’ is the dominant reason for the violence against persons with disabilities⁹. The disabled people are often seen as inferior or responsible for their own condition that puts the burden on the society as a whole. A number of cases have been reported in Denmark (that does not collect official statistics on violent crimes against disabled people), where the organisations remark that this is a new trend that could have hardly taken place 10 years ago¹⁰. One case reported in Danish media referred to a person with cerebral palsy who was routinely stopped on the street by people he did not know hostilely reproaching him that his very expensive wheelchair was one of the direct causes of high taxes and difficult access to the welfare system of the general population¹¹.

The fear of the “different” can only be nourished if the potential victim is perceived as vulnerable. It is hard to imagine an attack on a person who looks

⁷ Council of Europe Human Rights Commissioner Thomas Hammarberg Viewpoint “Respect and rights-based action instead of charity for people with disabilities”, 20 October 2010, http://www.coe.int/t/commissioner/Viewpoints/081020_en.asp

⁸ Punishing Hate: Bias Crimes Under American Law, cited in “Examining the Boundaries of Hate Crime Law: Disabilities and the “Dilemma of Difference”” by Grattet and Jenness, The Journal of Criminal Law and Criminology, Vol 91, No 3, p 688.

⁹ Cf Grattet and Jenness, *ibid*, p 691.

¹⁰ Kristeligt Dagblad, “People with Disabilities Increasingly Experience Hatred” (Google translation), 20 October 2010, <http://www.kristeligt-dagblad.dk/artikel/384992:Danmark--Handicappede-oplever-stigende-had?all=1..>

¹¹ Kristeligt Dagblad “People with Disabilities can at time become scapegoats” (Google translation), 20 October 2010, <http://www.kristeligt-dagblad.dk/artikel/384981:Danmark--Handicappede-kan-blive-vor-tids-syndebukke>.

“different” but appears strong, self-confident and capable of defending herself. The vulnerability of a disabled person is thus not a cause of, but an opportunity for the offender to carry out their attacks¹². This is especially pertinent in cases when the person with a disability is attacked not for the purpose of robbing them of their property, but to humiliate and hurt their persona.

International standards

The specific recognition of disability hate crime is a recent trend, as shown above, and up until fairly recently, there has been a general lack of binding standards on recognising and addressing it. Most international and European standards have focused on other forms of hate crime, leaving out the specificities of disability hate crime.

The UN Convention on the Rights of Persons with Disabilities (CRPD) (entered into force in 2008) is unanimously accepted as the most advanced codification of the human rights of disabled persons, based on the social model of disability. As of February 2011, all but one Council of Europe Member States have signed, and 27 have ratified it, committing to incorporate the Convention provisions into the national law and practice. Furthermore, for the first time in its history, the European Union concluded the CRPD as a regional integration organisation, demonstrating the importance it gives to promoting disability equality in its policies. In 2009, the European Court of Human Rights described it as providing a “*universal consensus on the necessity to protect persons suffering from a disability from discriminatory treatment*”¹³.

The purpose of the CRPD is to “*promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity*”¹⁴. Non-discrimination is one of the general transversal principles of the Convention¹⁵ that is further elaborated in Article 5:

“1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.”

¹² Supra nr 6 (Grattet...).

¹³ Glor v Switzerland, Application No 13444/04, para 53.

¹⁴ CRPD, Article 1, first sentence.

¹⁵ CRPD Article 3(b).

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

[...]"

The significance of this article is twofold:

- firstly, it confirms the entitlement of persons with disabilities to protection and benefit of the law on an equal basis with others. For the State agents, this means the ability to recognise and address disability discrimination, but also sufficient knowledge about disability to be able to apply the law with respect of the needs of the person with a disability. In specific cases, respect of the non-discrimination principle may mean recognising the specific situation of persons with disabilities compared to their non-disabled peers and providing them with reasonable accommodation to ensure equality. In most situations, it will require training of State agents in disability awareness, communication techniques and positive action. Equally important, this will necessitate the significant work to empower the persons with disabilities who should be able to recognise and report discrimination when they feel that their rights have been infringed.
- Additionally, the second paragraph of the article alludes to the obligation of the State to protect persons with disabilities against discrimination on all grounds, be it ethnic origin, age or sexual orientation. This obligation is the result of recognition that persons with disabilities are often victims of multiple discrimination that must be recognised and addressed. Again, meeting this obligation requires extensive training of State agents.

On violence against persons with disabilities, the CRPD contains a number of useful references. It clearly states that no one “*shall be subjected to [...] inhuman or degrading treatment [...]*” and obliges the States Parties to “*take all legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to*” it¹⁶.

The CRPD goes on to state that it is the obligation of the States Parties “*to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages*”¹⁷. Significantly, the Convention recognises the importance of training of those working in the field of administration of justice, including police, to ensuring effective access to justice for persons with disabilities¹⁸. Most importantly, the training on hate

¹⁶ CRPD, Article 15.

¹⁷ CRPD, Article 13.1.

¹⁸ Ibid, paragraph 2.

crime indicators (i.e how to distinguish a hate-motivated attack from an ordinary crime), age factors (i.e specificities of investigating an alleged attack on a minor perpetrated by other minors) and disability awareness is indispensable.

Conclusion

Due to the historical discrimination and exclusion of persons with disabilities, the disability hate crime has not received enough attention from the law-makers and the law enforcement authorities. This has resulted in the failure to recognise the disability hate crime as such, presenting it instead as an ordinary crime or even not calling it crime, going for terms such as “abuse” instead. Underreporting and misunderstanding of the phenomenon of the crime is extremely widespread in many OSCE countries.

At the same time, when unwrapped, the disability hate crime is more common than presumed at first glance and is triggered by hostility directed at persons with disabilities because of their (assumed) disability and the prejudice related to it. The response of the authorities to this phenomenon should shift from reactive to proactive to protect the persons from all violent crime.

Contact

The **European Disability Forum (EDF)** is the European umbrella organisation representing the interests of 65 million persons with disabilities in Europe. The mission of EDF is to ensure disabled people full access to fundamental and human rights through their active involvement in policy development and implementation in Europe. EDF is a member of the Social Platform and works closely to the European institutions, the Council of Europe and the United Nations.

Contact person at the EDF Secretariat: Janina Arsenjeva, janina.arsenjeva@edf-feph.org; Tel +32 2 282 4602

More information about EDF is available on www.edf-feph.org

Should you have any problems in accessing the documentation, please contact the EDF Secretariat. (T: +32-2-282.46.00)