MURDER OF HUMAN RIGHTS DEFENDER, VITALI SAFAROV CASE DETAILS AND LEGAL ASSESSMENT

2019

Human Rights Center continues defending legal interests of the assignee of the brutally murdered human rights defender, Vitali Safarov in the court; he was killed on September 30, 2018 in Tbilisi.

On June 10, 2019, the Tbilisi City Court announced the judgment on the criminal case, according to which the judge found the defendants guilty of only group murder and did not determine the sign of ethnic intolerance in their action.

Human Rights Center believes that the court judgment does not meet the standards established under the Article 259 Part I of the Criminal Code of Georgia (CCG). In order to establish correct judicial practice with regard to similar cases, it is essential that the higher instance of the court eradicated the miscarriages in the judgment.

The analytic document prepared by Human Rights Center aims to review the details of Vitali Safarov's case, draw particular attention to legal miscarriages, evaluate the court judgment and elaborate recommendations to respective bodies.

1. GENERAL CONTEXT

Hate motivated crimes are one of the key challenges in the State of Georgia. Recent facts clearly demonstrate the increasing threat of hate motivated crimes in the society. However, the State fails to respond this tendency with adequate preventive mechanisms and reacts only to concrete facts which is often ineffective and incomprehensive.

Astonishing murder of human rights defender Vitali Safarov once again proved the existence of real threat for the society coming from the neo-Nazi/fascist groups. The threat is fostered by the lack of political will of the State to address the problem as well as inactivity of the State to clearly respond to the offensive activities and messages of the ultra right extremist and nationalist groups. In some cases, dissemination of the hate speech by high political officials, politicians and religious figures also create problems as well as clearly discriminative discourse of some media sources.

State does not have systemic policy to prevent discriminative crimes and only tries to react to incidents. Unfortunately, the Government is unable to support and strengthen the ideas supporting equality even with their statements. Weak policy of the state complicates construction of inclusive, equality-based and peace-oriented society[1]. In the view of poor social policy and inevitable rise of the social-economic inequality in the country, we expect further increase of similar crimes that is particularly dangerous because there are no long-term preventive policy to address the problem; furthermore there is no proactive repressive mechanism, that is important to defend and realize the human rights in the society.

The state avoids implementation of its duties and does not react adequately to unlawful and violent activities of similar groups. The aggression and intolerance of these groups mostly target culturally non-dominant minority groups and people with liberal views. The practice of ineffective response policy towards hate motivated crimes threaten the public order, encourage similar groups and supports polarization of the society as well as establishment of xenophobic, racial, homophobic and other hates.

It is essential that the state implemented not only its negative but also positive obligations and realized its role. At the same time, alongside the creation of adequate legal

1 See the statement – 'No to Phobia!' Civil Platform Requests to Qualify the Murder of Vitaly Safarov as Organized Crime http://humanrights.ge/index.php?a=main&pid=19792&lang=eng

mechanisms and implementation of legal norms, it is necessary to make official statements in support of tolerance and equality, to conduct awareness raising campaigns and apply other mechanisms with which the Government will promote the construction of democratic society and establishment of safe, tolerant political environment.

2. LEGAL ASSESSMENT OF VITALI SAFAROV'S CASE

Recent alarming facts and incidents prove the reality of the threat of hate motivated violence in Georgia[2]. The murder of Vitali Safarov was the clear demonstration of this dangerous tendency.

On September 30, 2018, human rights defender Vitali Safarov, 25, was killed in Duma street, Tbilisi. He worked for the Center for Participation and Development (CPD) and for years he was actively engaged in organizing youth camps and different projects on tolerance and against racism, xenophobia and discrimination.

On the same day, the Ministry of Internal Affairs of Georgia started investigation under the Article 108 of the Criminal Code of Georgia, which refers to intentional murder. Soon, the police arrested two suspects: Giorgi Sokhadze, who was charged under the Article 108 of the CCG and Avtandil Kandelakishvili, who was charged for not reporting the law enforcement bodies about the crime punishable under the Article 376 of the CCG.

The initial qualification of the crime by the investigative bodies was disputed and unconvincing for the eyewitnesses of the crime and the family members of Vitali Safarov. This doubt was soon confirmed by the video uploaded in the social network, which was recorded by surveillance camera of the nearby located café Subway. The video clearly shows direct participation of the both defendants in the murder – the person charged for not reporting the crime was holding the victim and hitting him with the brass knuckles. All these facts demonstrate that the group crime was committed. The witness statements, videos from surveillance cameras, two weapons of the crime and wounds on the victim's body proved the same. Therefore, the person charged for not reporting, should have been charged for the direct participation in the intentional murder from the beginning. In this light, Human Rights Center and the Center for Participation and Development demanded

[2] See the statement – Platform "No to Phobia" about the International Day against Homophobia, Transphobia and Biphobia http://humanrights.ge/index.php?a=main&pid=19858&lang=eng

to change the qualification of the criminal charges from Article 108 into Article 109 of the CCG[3].

Besides group crime, the eyewitnesses indicated the hate motive of the crime from the very beginning. The staff members of the bar, where the conflict started, claimed that the alleged perpetrators were members of the neo-Nazi group and spoke about their constant hate-motivated activities, persecution of foreigners and causing public disorder that were never adequately addressed by police. As for the argument, which ended up with murder, the eyewitnesses stated that it started based on ethnic and language grounds and the offences committed by the defendants were determined with it.

Lack of adequate reaction to hate motivated crimes from the side of police is alarming as the weakness of the criminal law policy and non-persistent approach to similar crimes contributed to the enhanced activities of xenophobic and fascist groups and increased hatred that imposes particular responsibility over the State and the officials of respective bodies. At the same time, the particular role of imposing this responsibility over the state is discussed in the notification 4/91 of March 16, 1993 with regard to the case *L.K v. The Netherlands*, which referred to threat made by private individuals against L.K based on racial grounds and insufficient reaction of the government bodies to the applicant's complaint. The Committee on the Elimination of All Forms of Discrimination stated, inter alia, that the state was obliged to carefully and timely investigate the cases related to charges of racial discrimination and violence[4].

In accordance to the case law of the ECtHR, in order to avoid the mistakes with regard to crime motives, the investigator shall pay attention to the "change of the motive because of newly discovered evidence," because, it may not be visible in the beginning that the crime was committed based on hate motive but it may become evident at a later stages of the investigation. Also, initially we may have evidence that the crime was not committed based on the hate motive but later the motive may be determined. In case of newly discovered evidence, the data shall be updated[5].

Based on multiple petitions of Human Rights Center and joint advocacy of the civil society organizations, on October 31, 2018, in the process of investigation, based on the resolution

[3] See the joint statement of HRC and CPD - Investigation into the murder of the human rights defender Vitaly Saparov is ongoing with wrong qualification http://humanrights.ge/index.php?a=main&pid=19703&lang=eng

[4] See the ruling of the European Court of Human Rights on the case L.K. against the Netherlands https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-192437%22]}

[5] See the rulings of the ECtHR on the cases: M.C. and A.C. v. Romania, Identoba and Others V. Georgia and Angelova and Iliev v. Bulgaria.

of the prosecutor, the charge brought against Giorgi Sokhadze was re-qualified into the intentional murder committed based on religious, national or ethnic intolerance, which is punishable under the Article 109 Part II – "d" of the CCG. However, regardless the petitions, the second defendant was still accused of not reporting the crime.

Recently established practice, according to which the investigation is never launched with the respective qualification over the group crimes, became the topic of criticism from the side of human rights organizations. Many petitions were made towards the prosecutor's office to request impartial investigation of the case and to change the qualification of the charge into group crime considering all obtained evidence and witness testimonies[6]. Human Rights Center believed that ignoring abovementioned circumstance from the side of investigative bodies hindered effective, comprehensive and impartial investigation of the case. Consequently, the organization requested to consider the element of group crime when bringing charges against the defendants.

On April 8, 2019, the HRC petitioned the Tbilisi Prosecutor's Office and requested impartial and comprehensive investigation into the case considering the evidence and witness statements into it, which proved active participation of both defendants in the act of murder. The ECtHR indicates at the responsibility of the state to comprehensively execute its obligation in the case:

> *Mutatis mutandis, İlhan v. Turkey ([GC], no. 22277/93, Paragraph 63, ECHR2000-VII,* which reads, that "*the State shall act based on its own initiative when it learns about the incident. The State had to conduct the necessary investigation without a specific, formal complaint from himself or his family.*[1]"

Finally, on April 17, 2019, the Tbilisi Prosecutor's Office notified Human Rights Center that the request was satisfied and both Avtandil Kandelakishvili and Giorgi Sokhadze were charged under the Article 109 Part II – "d" and "e" of the CCG which refers to the intentional murder committed with aggravating circumstances by a group based on national intolerance.

According to the assessment of Human Rights Center, regardless 6-month long expectation, finally the Tbilisi Prosecutor's Office made lawfully correct and well-grounded decision which could assist the court to pass impartial and fair decision over the case. In this regard, it is essential to refer to the OSCE guidelines, which state that hate

[6] See the address of the platform No to Phobia: http://humanrights.ge/index.php?a=main&pid=19792&lang=eng and the statement of the HRHT http://humanrights.ge/index.php?a=main&pid=19839&lang=eng

crimes can be tackled effectively only where police, prosecution and courts work together, and not only at the operational level, but also at the policy level[7]. At the same time, presence of the unified definition of the crime only promotes success of similar cooperation.

Human Rights Center endorses the precedent decision of the Tbilisi Prosecutor's Office. At the same time it is important to make this case a divide between past malicious practice and establishment of the new standards for effective investigation of hate motivated criminal cases in future. Adequate and sensitive approach of the state in the process of investigation will serve prevention of the crimes, ensure effectiveness of investigation and punishment and implementation of just policy.

At the same time, the investigative bodies must pay particular attention to alleged hate motive of crimes in the process of initial interrogation of case parties in concrete cases, particularly in cases where presence of special groups is evident (ethnic or religious minorities, LGBTIQ community members or other vulnerable groups), in order to ensure full and comprehensive investigation and determination of objective truth over the case. All forms of hate motivated crimes have common peculiarities and character, among them is grave injuries of the victims and emotional experience; apart to that, the crime does not target only concrete individuals but the group of people which the victim belongs to. Thus, extraordinary character of these crimes requires particular approach of the respective bodies and obliges the state to have common vision/policy.

During the court hearings, the defense side claimed the absence of hate motive in initial interrogation over Vitali Safarov's murder case, though it could become the basis to have doubts about the investigation. Human Rights Center calls on the Ministry of Internal Affairs to ensure comprehensive investigation in all cases and pay particular attention to the presence of abovementioned motives in them, which also serves implementation of the goals of the criminal law policy.

[7] See OSCE Prosecuting hate crimes. A practical guide, p. 17-18, http://www.osce.org/odihr/prosecutorsguide?download=true;

3. COURT JUDGMENT

On April 16, 2019, the Tbilisi City Court started hearing of Vitali Safarov's murder case. Before the hearing, the CPD organized peaceful solidarity action in support of Vitali Safarov's family in the yard of the court. The participants protested racism, xenophobia and violence. At the proceeding, regardless the solicitation of the defense side to change imprisonment into 10 000 GEL bail as compulsory measure for Avtandil Kandelakishvili and to release Giorgi Sokhadze, the Tbilisi City Court left both defendants in preliminary imprisonment.

The evidence examined at the subsequent court hearings, the testimonies of interrogated witnesses, including the testimony of the direct participant of the incident, a friend of the defendants, N.Sh, basically confirmed the accuracy of the state prosecution and demonstrated presence of the hate motive in the action that ended up with the death of the most passive participant of the conflict – Vitali Safarov. Witness Z.M. and other witnesses proved the same in their testimonies, who clearly stated that the action of the defendants was reaction to the ethnic background of Safarov and both of them made anti-Semitist statements during the conflict.

After the court finished substantial examination of the case, on June 10, 2019, the Tbilisi City Court passed verdict. The Judge found the defendants Giorgi Sokhadze and Avtandil Kandelakishvili guilty under the Article 109 Part 2 –"e" of the CCG, which refers to the intentional murder by a group of people. As for the Article 109 Part 2 –"d" of the CCG, the court removed the charges under that article from both defendants.

According to Human Rights Center, the judge made basically correct verification of the group character of the crime as many evidence in the case proved active participation of both defendants in the crime. Consequently, we did not observe irrelevant legal norm or problem of verification in this part of the judgment.

In parallel to that, the decision of the judge about removing the charges under the Article 109 part 2 –"d" from the decision is groundless.

In her judgment, the judge states that "in order to aggravate the charge under the Article 109 Part 2 – "d" of the CCG the national belonging shall be the only motive of the crime; a person shall murder the victim only based on this motive without other pre-conditions."

This interpretation of the norm by the Judge does not meet the real goal of the norm and contradicts the case law of the ECtHR with regard to similar norms.

The Georgian criminal law views the racial, religious, national or ethnic intolerance as one of the qualifying circumstances of the murder that is punishable under the Article 109 Part 2 – "d" of the CCG. The presence of this provision in the law is determined by the Article 14 of the Constitution of Georgia, which guarantees equality of individuals. At the same time, the purpose of the article meets the requirements of the Article 20 of the International Covenant on Civil and Political Rights, according to which, "*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*.[8]"

The essence of this circumstance is the hatred of a victim because of his/her racial, national, ethnic or religious belonging. Committing similar action means that an individual is an enemy of other people with different race or ethnic background that turns into personal conflict. Other motives are not excluded when qualifying the action under this provision, but domination of this motive is necessary. In most cases, similar crimes are intentional.

The fact that the argument started over different topic, cannot exclude other motives at a later stage. Concrete motive acquires particular importance in similar crime, because the law-maker views the murder committed based on intolerance as more dangerous and inadmissible offence. In this particular case, we faced exactly such instance: unless Safarov underlined his ethnic background, the conflict may not have ended up with murder. The same allegation was confirmed by the majority of witnesses. In this light, this motive could not exist before the convicts learned about the ethnicity of the victim. The fact that the argument had started before does not exclude the motive of intolerance of the defendants because the case may be divided in two stages: first – verbal conflict because of cursing Georgia, in which Safarov did not participate at all and in the second episode, after Safarov's ethnicity was disclosed, N.Sh. got aggressive towards him and Safarov became victim of physical assault. Afterwards, the defendants kill Safarov in group without giving him any chance to resist them and start shouting anti-Semitist phrases. N.Sh. also stated that the only motive of the perpetrators' action was Jewish background of Safarov.

There is also unclearness around the factual circumstances which convinced the judge that Safarov, who stumbled and could not answer N. Sh's assault as the defendants claimed at the trial, was killed for self-defense and not because of ethnic intolerance which

[8] See the International Covenant on Civil and Political Rights, Article 20
https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

is proven by direct case evidence. In order to determine the sign of intolerance in the action, it is not necessary that all developments of the conflict were determined with the same motive. For the presence of this aggravating circumstance, it is necessary that racial, religious, national or ethnic intolerance was the main motive of the action itself (murder).

When speaking about the intolerance motive, it is important to note that both defendants knew about Jewish background of the victim before assaulting him. For that reason, the subject of their particular aggression was not the person who started the argument but Vitali Safarov, who did not participate in the conflict at all. Consequently, the aggression towards him from the side of N.Sh, Sokhadze and Kandelakishvili was determined by his ethnic background that was demonstrated in their shouting when killing him – (*"kill him, F... his Jewish mother!"* and *"F… your Jewish mother!"*).

In the judgment the Judge underlined that religious belief and views of the defendants, in this particular case, were not topic of the court judgment. Similar approach to the case, considering its character, is inadmissible.

If we speak about the presence of religious or ethnic grounds and crime committed based on intolerance, the beliefs and views of the defendants should have been important for the court as well. An individual, who does not have similar beliefs preliminarily, cannot execute similar crime because execution of the crime based on ethnic or religious grounds is based upon preliminarily established views of the murderer for what he then commits a crime. In this light, neglecting these circumstances by the court hinders impartial and fair judgment.

The evidence examined at the trials and testimonies of many witnesses clearly confirmed that the defendants belonged to the neo-Nazi group that means sharing anti-Semitist ideology. Although many witnesses mentioned it, when passing the judgment, the judge neglected general views of the defendants about Jewish people.

The weakness of the prosecutor's strategy and insufficient investigation shall be mentioned as well, because they did not present number of videos uploaded in social networks to the court, which demonstrated activities of the defendants in neo-Nazi groups. The investigation did not collect their xenophobic statements from social networks, which were deleted during the ongoing proceedings from their facebook pages. Consequently, mistakes made by the prosecutors while obtaining the evidence and elaborating the court strategy also hindered delivery of impartial and fair judgment on the case.

The European Court of Human Rights noted in many of its rulings that leaving the discriminative motive beyond attention in the course of investigation or prosecution may be evaluated as indirect discrimination from the side of the State. In one of the cases - *Angelova and Iliev v. Bulgaria*, the Court stated in its ruling that *"the Court reiterates that States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life, which must be discharged without discrimination, as required by Article 14 of the Convention. Moreover, 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. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.[1]"*

The judge referred to the ECtHR ruling on the case ***Nachova and Others v. Bulgaria***[9] in her judgment, which was substantially irrelevant to Safarov's case. The case is about the murder of Mr. Angelov and Mr. Petkov on July 19, 1996 by military police officer, who tried to arrest them. Although the Grand Chamber did not determine racist motive in the murder of Mr. Angelov and Mr. Petkov, the context of the mentioned case is absolutely different.

Namely, in this particular case, the State failed to ensure accurate and comprehensive investigation and the European Court of Human Rights was deprived of the possibility to act instead of the constitutional bodies of the state authorities that is investigation and court proceedings as well. Besides that, there was only one witness statement in the case files. It is also understandable that the Court could not rely only on one phrase – "You Dirty Roma" to qualify the charge. At the same time, the Court clearly noted that the State was obliged to conduct investigation with regard to the fact that was not done. The situation about Safarov's case is absolutely different – the unity of the evidence obtained by the state prosecution verified not only the shouting of both defendants but also their ideological belongings and pre-history of racial discrimination facts, as well as the absence

[9] See the ruling of the ECtHR over the case Nachova and Others v. Bulgaria No. 43577/98, judgment of 6 July 2005, para. 160: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22001-69630%22]}

of any threats coming from the victim, declaring his ethnic identity to the perpetrators, cruelty of the murderers – number of wounds, etc.

Besides that, the ECtHR in its one of the most recent rulings *M.C and A.C v. Romania* additionally clarified that in order to identify the discriminative motive, the State shall apply to all instruments available in the national legislation not to consider this action similarly to others, which did not have such motives[10]. Hate crime is a mechanism of power intended to sustain somewhat precarious hierarchies through violence and threats of violence (physical or verbal). It is generally directed toward those whom our society has traditionally stigmatized and marginalized. From this perspective, hate crime is seen as an instrument that defends the gendered and racialized social ordering. In similar crimes, concrete victim has only symbolic meaning and are accidental victims; the action is directed not only towards that particular person but against the group of people, whose member the victim is or considered to be. The hate motivated crimes shall be viewed as message actions, because they are addressed not only at the victim but subordinated group[11]. It, of course, widens the focus and influence of the crimes beyond concrete victim and the members of the concrete group become vulnerable and desperate. It should be underlined that the hate crimes are more painful than the crimes without that motive. Consequently, "hatred" shall be conceptualized in the context of the crime like anticipatory perception that may also originate in the course of the crime. Both policy documents and academic researches unanimously indicate that when identifying the hate crimes, the word "hatred" shall not be perceived with its direct meaning; furthermore, it may mislead the respective state bodies because they may interpret that the defendant shall necessarily hate the victim or group of people, whose member the victim is, before committing the hate motivated crime. However, it is not right definition. Ordinary crime becomes hate crime when the perpetrator selects the victim because of his/her intolerance towards the group whom the victim belongs to. Obviously, it does not exclude "the hatred" as possession of strong negative emotion at the same time.

The judgment of the Tbilisi City Court does not assess the negative social effect of the hate motivated crimes, that may create threats to the establishment of the principles of pluralism and equality in the society as well as undermines democratic and safe environment that is the obligation of the State through constitutional bodies, like the fair judgments of the judiciary authority.

[10] See CASE OF M.C. AND A.C. v. ROMANIA, 12 April 2016, paragraph 11: https://hudoc.echr.coe.int/eng?i=001-161982;
[11] Barbara Perry "In the Name of Hate", 2001, p. 3.

In this light, according to the evaluation of Human Rights Center, the judgment of the Judge Shorena Guntsadze of the Tbilisi City Court was ungrounded with regard to the intolerance motive of the defendants. When determining the content of the action, the judge relied on the statements of all direct witnesses although the testimonies of the same witnesses demonstrated intolerance motive of the murder. However, she did not take it into account.

Justice cannot be achieved unless the court accurately and professionally evaluates the abovementioned crime. HRC continues defending legal interests of the assignee of Vitali Safarov in the higher instance of the court and hopes the Appellate Court will consider all circumstances in the process of examination of the case and make right and professional evaluation of the action. It is important to achieve justice over this case and also to prevent hate motivated crimes and to develop correct case law of the judiciary system in future.