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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his visit to Ukraine

Comments by the State*

* The present document is being issued without formal editing.

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A. Security Service of Ukraine

Incidents and unlawful manifestations related to obstruction by members of informal structures of a ring-wing orientation to holding public events of representatives of the LGBT community, based on rejection of relevant ideas that contradict the religious and cultural traditions of Ukraine, are occasionally fixed in Ukraine. The indicated structures are small in number and do not have a decisive influence on the social and political situation in the country. Law enforcement authorities (primarily the National Police), in accordance with their powers, are taking measures aimed at localizing the illegal activities and preventing violence

B. Ministry of Social Policy of Ukraine

Proposal to add to paragraph 10 of the Report:

«The notion “gender equality” is defined in the Article 1 of the Law of Ukraine “On Ensuring Equal Rights and Opportunities of Women and Men” (i.e. Equal legal status of women and men, and equal ways of implementation, which provide equal representation of individuals of any sex in all areas of society). In accordance with the Ministry of Social Policy of Ukraine’s Order No 86 of 7 February 2020 the Manual on the integration of gender approaches into government regulations was approved. The Manual specifies definitions of “gender” (socially entrenched roles, behavior, activity and specific features, which are perceived as masculine/feminine by the community), “gender analysis” (studying of differences between women and men in terms of conditions, needs, levels of participation, access to resources and management, parts in making decisions etc., which are determined by established gender roles (norms, expected behaviors, activity, specific features, which are perceived as masculine/feminine).»

C. National Police of Ukraine

In order to ensure proper oversight of the investigation of the hate crimes, including SOGI, the National Police of Ukraine monitors the Unified Register of the pre-trial investigations in criminal proceedings initiated on the facts of racial, national, religious intolerance, as well as analyses and verifies the information regarding hate crimes covered in mass media.

By a letter from the Central Investigation Department of 03.02.2020 to the leadership of the Directorates General of the National Police in Kyiv, regions, the Autonomous Republic of Crimea and in the city of Sevastopol, it has been pointed out that while considering reports on criminal offenses based on race, nationality, religious beliefs, disability and on other grounds, as well as offenses, indicating possible motives for committing crimes of this category, and while providing legal qualifications of such acts, it is necessary to mandatory take into account recommendations set out in paragraph 11 of the Concluding Observations on the seventh periodic report of Ukraine adopted by the UN Human Rights Committee at its 108th session (July 8-26, 2013) regarding the prosecution of perpetrators in accordance with Art. 161 of the Criminal Code of Ukraine.

Also, when establishing facts of the commission of criminal offenses that may indicate violation of the equal rights of citizens depending on their race, nationality and other grounds (probable motives) the National Police shall, if necessary, send an instruction to the investigating departments of the Directorate General of the National Police to conduct, during investigation of the criminal proceedings, verification of the version of commission of a crime motivated by intolerance.

It should be noted that criminal proceedings of this category, in which a decision was made to drop them on the basis of Art. 284 of the Code of Criminal Procedure of Ukraine, are mandatory examined in the Central Investigation Department.

Also, if necessary, letters are sent to the relevant regional prosecutor's offices concerning verification of the validity of the decisions made and consideration of nullification of such decisions.

It is necessary to point out that it is characteristic of the investigation of violent crimes motivated by intolerance that such a penal qualification of the actions of a suspected person is not always possible at the stage of the start of a pre-trial investigation. It is possible only from the moment the suspect is identified, that is, from the moment of notification of the suspicion, since the motive of the crime is an element of the subjective side of the crime, the proof of which is practically impossible without the suspect.

At the same time, we inform that the Central Investigation Department does not provide for and does not keep records of criminal proceedings for certain categories of criminal offenses committed against LGBTI representatives in the temporarily occupied territories of Ukraine.

However, in case the National Police receives statements and reports of violations of the rights of citizens on the grounds of sexual orientation, including those that took place in the temporarily occupied territories of the Crimean peninsula, Donetsk and Luhansk regions, such facts must be registered in the Unified Register of the pre-trial investigations in accordance with the provisions of Article 214 of the Code of Criminal Procedure of Ukraine.

Further investigation by the National Police investigators of those or other criminal offenses committed in the temporarily occupied territories is carried out on the general basis of the criminal procedural legislation taking into account the current situation in the occupied territories.

We also inform that the National Police officers are constantly taking measures to avert and prevent violence against LGBTI representatives by extreme right-wing groups, homophobic and transphobic crimes, harassment or attacks on LGBTI representatives, disruptions or prevention of LGBTI activities, public meetings, educational and memorial events, as well as private meetings targeted at a specific audience.

Thus, in the proceedings of the Investigative Department of the Directorate General of the National Police in Vinnytsia region there are materials of criminal proceedings, the information about which was included in the Unified Register of the Pre-trial Investigations on February 1, 2020 No. 12020020000000046 on the grounds of a criminal offense under Part 3 of Article 171 of the Criminal Code of Ukraine and No. 12020020000000045 on the grounds of a criminal offense under Part 2 of Article 296 of the Criminal Code of Ukraine, on the fact of obstruction of a training for bloggers and journalists on media coverage of certain topics related to sexual minorities, which took place on February 1, 2020 in the premises of the Podillya Hotel in Vinnytsia.

A group of unidentified persons, two of whom were wearing balaclavas, having stormed into the hotel premises, in an unlawful manner impeded the legitimate professional activities of journalists and committed hooligan actions, dousing one of the participants of the training with unidentified substance and showering him with feathers.

A pre-trial investigation into this fact is under way.

It should be also noted that the National Police established cooperation with the organizers of the LGBTI marches to take joint actions aimed at preventing violations of public security and order during their conduct, which, in turn, is positively assessed by the Independent Expert.

As far as the issue of isolated cases of attacks on participants of marchers after their conduct is concerned, we inform you that the perpetrators of unlawful acts against representatives of the LGBTI community have been identified, and the relevant criminal proceedings have been initiated.

We also inform you that the LGBTI march in Kryvyi Rih was canceled by its organizers in connection with the holding of the snap elections of Ukrainian people's deputies.

D. Office of the Prosecutor General

Concerning Sections I, III of the draft report (regarding the functions and tasks of the Prosecutor's Office on issues of protection against violence and discrimination on the grounds of sexual orientation and gender identity).

It is proposed to include in section I of the draft a reference to the Law of Ukraine On ensuring equal rights and opportunities for women and men (hereinafter - the Law). Thus, by Article 8 the Verkhovna Rada of Ukraine is empowered to determine the basic principles of gender policy of the state.

By Article 10 of this Law, the Government of Ukraine is entrusted with the duty to guide and coordinate the activities of ministries and other executive bodies on ensuring gender equality, preventing and combating gender-related violence. Consequently, the task of defining the directions of gender policy is to be addressed by the central executive bodies that formulate the state policy in the corresponding areas, in particular a social one. Within the framework of the implementation of Article 131-1 of the Constitution of Ukraine, the Prosecutor's Office of Ukraine does not perform such tasks.

Concerning Paragraphs A and B of Section V of the draft report.

The organization and activities of the Prosecutor's Office of Ukraine, the status of prosecutors are determined by the Constitution of Ukraine, the Law of Ukraine On the Prosecutor's Office and other laws of Ukraine, valid international treaties, the consent to be bound by which is provided by the Verkhovna Rada of Ukraine. The functions of the Prosecutor's Office of Ukraine are carried out, in particular, on the principles of the rule of law, legality, justice, impartiality and objectivity.

The Procedure for organizing the activities of prosecutors and investigative bodies of the prosecution in criminal proceedings, approved by the Order of the Prosecutor General of Ukraine dated March 28, 2019 No. 51, envisages that heads of prosecutor's offices at all levels, of structural divisions of prosecutor's offices at all levels, their first deputies and deputies in accordance with the distribution of responsibilities and within their powers stipulated by the Code of Criminal Procedure of Ukraine, at least once a month, provide for conducting a study of the state of compliance by the prosecution authorities and other law enforcement agencies, except for the National Anti-Corruption Bureau of Ukraine, with the requirements of Article 214 of the Code of Criminal Procedure of Ukraine regarding the timeliness of entering information into the Unified Register of the pre-trial investigations, completeness and correctness of qualification of criminal offenses according to applications and communications of citizens, materials of law enforcement agencies.

The competence of the prosecution authorities of Ukraine includes supervision of compliance with laws during the pre-trial investigation in the form of a procedural guidance of the pre-trial investigation in the initiated criminal proceedings.

Considering the above, in order to provide a proper assessment of the inactivity of the National Police of Ukraine regarding the unjustified refusal to add information into the Unified Register of the pre-trial investigations it should be indicated, in respect of which specific cases and what individuals the information about crimes was not added.

The employees of the corresponding structural unit of the Office of the Prosecutor General (the Department for Supervision of Compliance with the Laws by the National Police of Ukraine) have repeatedly noted to the regional prosecutors that there must be strict compliance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms during the pre-trial investigation in criminal proceedings, in particular the observance of reasonable time frame of the investigation, ensuring rights and the interests of the parties to criminal proceedings, including representatives of LGBTI.

Concerning paragraph D of section V of the draft report.

Since this report does not contain any specific facts of the commission of crimes in the temporarily occupied territories in Donetsk and Lugansk regions, the Autonomous Republic of Crimea and under conditions of the armed conflict, it is not possible to provide a proper legal assessment of the described situations.

Concerning sections V of the draft report, paragraph “H” of the conclusions and recommendations (on gender identity).

We believe that the proposal of the Independent Expert to include “sexual orientation” and “gender identity” as the constituent elements of Article 161 of the Criminal Code of Ukraine and identify the circumstances aggravating the punishment in Article 67 of the Criminal Code of Ukraine, is unjustified and should be removed.

At present the practice of applying the Criminal Code and the Code of Criminal Procedure of Ukraine by the prosecution authorities is based on the norms enshrined therein and in view of the concept of “gender-related violence” existing in the legislation of Ukraine (Article 161 of the Criminal Code of Ukraine, Article 1 of the Law), “gender based violence” (paragraph 3 of the part 1 of Article 67 of the Criminal Code of Ukraine).

We believe that the relevant changes to the Criminal Code of Ukraine and the Code of Criminal Procedure of Ukraine can be considered only if the term “gender”, which is interpreted as “social, rather than a biological sex” and other derived terminology, is included in the conceptual framework of the legislation of Ukraine. Meanwhile, the inclusion of the new terminology “gender”, “gender identity” into the legislation should also be decided upon in the context of Ukraine’s obligations under international treaties of Ukraine.
