

PROSECUTION OF HATE CRIME AND HATE SPEECH IN BOSNIA AND HERZEGOVINA

Marija Lučić-Čatić, PhD¹

Muamer Kavazović, PhD

Edita Hasković, PhD

Faculty of Criminal Justice and Security Studies, University of Sarajevo
Bosnia and Herzegovina

WHY IS ADEQUATE RESPONSE TO HATE SPEECH IN B&H ESSENTIAL?

In recent years, the prevalence of hate speech and hate crimes has become an increasing concern across European societies because of their poisonous effects on the very foundation of the society. Those phenomena threaten individual rights, human dignity, and equality, strengthen tensions between social groups, disturb public peace and public order, and endanger peaceful reconciliation of the communities (Bayer *et al.*, 2020).

In the Western Balkans (WBs), hateful narratives are particularly threatening because the dynamics of hate speech in the WBs are complex and multifaceted. Even though, hate speech mainly targets members of vulnerable and/or minority groups, in the WBs it is also used to fuel the old tensions between the different ethnic, national and religious groups. It is present in everyday life, in political debate and in media (Lučić-Čatić, 2023). When or if (ab)used by political figures, it “*directly normalises and reinforces hatred and violence in society*” and can lead to reciprocal radicalisation (European Parliament Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe). Inadequate response on hate speech and hate crime directly affects peace building, transitional justice and good neighbouring relationships in the WBs region and can disturb WBs EU accession processes.

In the Bosnia and Herzegovina (hereinafter: B&H) hate speech and hate crimes are particularly dangerous because of their substantial potential to increase the existing tensions and negatively affect the trust building process as well as genuine recovery of the whole society from the past conflicts. Namely, the legacy of the war in the nineties of the last century, the lack of consensus on the narratives of the past, the existing fragmentation of the society, the dominance of collective identities, constant disagreements between ethno-national political elites, the media propagating intolerance and hatred, etc. fuel occurrence of hate speech and hate crime and halt democratic processes and B&H’s path to a fully democratic and functioning society (Sokol, 2020: 4; Lalić, 2014; Šinković, 2022). The manifestation of hatred is evident in all areas of B&H’s reality. Sports events, especially football matches represent a kind of the arena for the expression of national animosity. Hate messages and acts may be found in politics, on the web, sports events, in the cultural landscape, in urban and rural, ethnically homogeneous, and heterogeneous environments (Blagojević, 2010; Palmiotto *et al.*, 2012; Sokol, 2020; Brković *et al.* 2022).

¹ mlucic@fkn.unsa.ba



This omnipresence of hatred leads to its normalization to a very significant extent (Resilience, 2021). Unfortunately, this normality is not only a question of public opinion since the current legislation and judiciary practice show similar attitude (Lučić-Čatić, *et al.*, 2016).

Considering the role that hate speech played in the dissolution of the former Yugoslavia and war in B&H, the significance that ethnocentric rhetoric and aggressive nationalism now poses to the peace and security in B&H should not be underestimated (De Sanctis, 2004). Present historical antagonisms of multinational and multi-confessional society, social polarization and fragmentation, the legacy of the war with its objective and subjective consequences makes B&H's society particularly sensitive to hate speech and incitement to hatred. Even though many years have passed since conflict, its influence on the symbolic level does not descend (Lalić, 2014). The fact that high level of hate speech is based on ethnicity, related to religion, politics and 90s war, indicates that B&H society has not moved far from the post-war narratives and that is still a very suitable social environment for incitement to hatred and even radicalization (Gračanica, 2022).

Hate speech is inevitable part of media discourse as well as politics. B&H's media are often generators of hate speech and hateful narratives where hate narratives are not isolated cases of specific individuals but rather results of devised campaigns that use different methods, such as biased reporting, mis/disinformation and spread of fear. The mainstream media in B&H are the sources and disseminators of hate narratives towards specific groups and individuals, which are further popularized through user-generated comments (Sokol, 2021). Even when the mainstream media does not produce hate speech narratives on its own, they become a means for transferring them (Londo, 2021). Namely, a deeply ethnically divided society, where the media either lacks political independence, promoting the narratives of powerful actors, or where critical independent media is seen as an enemy of the system, is a fertile ground for hatred and its devastating effects (Gračanica, 2022).

The situation is additionally complicated by the presence of hate speech in political discourse since it normalizes and reinforce hatred and violence in society (European Parliament Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe). As stated in the results of Resilience' research Hate Narratives in the Western Balkans and Turkey (2020: 20): *'In many cases, hate narratives are clearly politically orchestrated, and mainly disseminated through media affiliated with the leading political parties. While the hate narratives identified in the research are not new, they have now been normalized to a very significant extent. Rather than being consistently condemned, they are often instrumentalized for political campaigns and increasingly seen as a regular part of public discussion.'* Hate speech and hateful narratives are used to mobilize support for nationalist and exclusionary ideologies targeting specific ethnic or religious groups and to dehumanize and delegitimize these groups, making them vulnerable to discrimination and violence. This phenomenon leads to the perpetuation of discrimination and violence against targeted groups, and it can also radicalize society in a manner that can lead to violent extremism, since the usage of hate speech is a frequent starting point for radicalization (Buljubašić, *et al.*, 2021).

All the aforesaid reveals exceptional danger that normalization, wrong perception, and inadequate judicial response to hate speech and hate crime present in B&H's context. It is recognized that across the region, and in B&H, there is hesitancy within the judiciary to process hate speech and to consider the hate towards particular social groups as an exacerbating factor in criminal offences (Hrvatinić, *et al.*, 2021). In B&H current legislation enables prosecution of both, hate crime and hate speech but with certain overlaps in provisions that can lead to misunderstanding of concepts of hate crime and hate speech and consequently to inadequate judicial response to those harmful behaviors.

CONCEPTUAL DEFINITIONS OF “HATE SPEECH” AND “HATE CRIME”

Despite the frequent usage of terms hate speech and hate crime there are no universally accepted definitions of those phenomenon. Because of that, of their nature, and existing legal provisions they are often misunderstood and overlapped even though they signify different legal concepts of damaging behavior and they do not raise the same apprehensions for the right to freedom of expression (Responding to Hate Speech against LGBT people, 2013).

Experts and practitioners on international level have offered variety of hate speech definitions and most states have passed provisions and/or laws prohibiting it, with a slight difference when determining what is being prohibited (Weber, 2009). Namely, hate speech covers many forms of expressions which advocate, incite, promote, or justify hatred, violence and discrimination against a person or group of persons for a variety of reasons (Guillén-Nieto, 2023).

Operational definition is offered by the Council of Europe's Recommendation of the European Commission against Racism and Intolerance (hereinafter: ECRI) that defined hate speech as: *'advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of race color, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status'*. This definition is additionally enhanced by provisions of ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination and ECRI General Policy Recommendation N°6 on Combating the dissemination of racist, xenophobic and antisemitic materiel via the internet.

Furthermore, the newest definition is offered by Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech where: *"For the purposes of this recommendation, hate speech is understood as all types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as "race", colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation."*

The term is frequently used by European Court of Human Right in its decisions, but Court has never offered its definition. In some of its judgments the Court states that *"all forms of expression which spread, incites, promote or justify hatred based on intolerance (including religious intolerance) are hate speech."* (Gündüz v. Turkey).

This shortage of definition at international level mirrors in all national legislations. Consequentially, there are too narrow or unreasonably broad definitions, definitions that are not distinguished from provisions for hate crime etc.²

The similar situation on international and all national levels is present regarding the definition of hate crime. Its legal definition varies around the world (Lučić-Čatić *et al*, 2013). Basically, hate crime is a criminal offence where the perpetrator targets the victim in whole or in part out of a bias motive (Responding to Hate Speech against LGBT people, 2013).

² This situation is present in B&H legal system as will be discussed later.



Useful working definition of hate crime, in line with OSCE Ministerial Council Decision No. 9/09, is offered by Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (hereinafter: ODIHR) which states that “*hate crimes are criminal acts committed with a bias motive*” and that they always comprise two elements. The first element is the criminal offence³, and the second element is the motivation⁴ (OSCE/ODIHR, 2022: 15.). Furthermore, the most common legal approach of criminalising hate crimes is penalty enhancements, which are sometimes referred to as “aggravating sentencing clauses” or “aggravating circumstances clauses”. In essence, the penalty is increased for a base offence when it is committed with a bias motive. In most laws it is done by adding the element of hate in the definition of particular crime(s) and/or by prescribing hate as a compulsory aggravating circumstance/reason for higher penalties (Kolaković-Bojović, Đukanović, 2023).

Bearing in mind those definitions it is important to stress out that hate crime does not always involve hate speech and hate speech in and of itself is not always a hate crime (Lučić-Čatić *et al*, 2016).

LEGAL PROVISIONS ON “HATE SPEECH” AND “HATE CRIME” IN B&H LEGISLATION

The prohibition of hate speech in B&H is not fully regulated or aligned with international standards. The criminal legislation criminalizes public incitement to hatred, discord and hostility regarding different groups of protected characteristics in different criminal codes (hereinafter: CCs) which is aggravated form of a hate speech.

CCs of B&H and Federation of B&H (hereinafter: FB&H) criminalizes public incitement to national, racial and religious hatred, discord and hostility. According to these laws, whoever publicly incites or inflames national, racial or religious hatred, discord or hostility among the constituent peoples and others who live in the respected area, shall be punished by imprisonment (CC of B&H - Article 145a; CC of FB&H - Article 163).

Those two CCs are limited to the prohibition of inciting and inflaming hatred on national, racial and religious grounds, but not on the grounds of skin color, gender, sexual orientation, disability and other grounds (Blažević 2019).

Furthermore, by the Decision Enacting the Law on Amendments to the CC of B&H, the High Representative in B&H amended Article 145a of the CC of B&H with new provisions. These provisions prohibit public condoning, denial, gross diminution or attempts to justify the crimes of genocide, crimes against humanity and war crimes established by final judgments,⁵ directed against a group of persons or a member of a group determined by race, color, religion, background or national or ethnic origin, in a manner that could incite violence or hatred directed against such a group of persons or a member of such a group (Article 145a, 3).⁶ Also, these amendments criminalized public incitement

3 The act must be an offence recognized by ordinary criminal law. Since there are small variations in legal provisions from country to country, there are some divergences in the kind of conduct that amounts to a crime (OSCE/ODIHR, 2022: 15.).

4 The criminal act must be committed with a bias motive. Therefore, to qualify as hate crime, the committed crime needs to target one or more members of, or the property associated with, a group that shares a common characteristic. These characteristics are referred to as protected characteristics (OSCE/ODIHR, 2022: 15.).

5 By a final judgment in accordance with the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 or the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal or the Court of Bosnia and Herzegovina (CC of B&H - Article 145a, 3).

6 Until this amendment only the CC of FB&H criminalized inciting and inflaming national, racial and religious hatred, discord or intolerance by publicly denying or justifying genocide, crimes against humanity or war crimes established by a final decision of the International Court of Justice. International Criminal Tribunal for the former Yugoslavia or a



to violence or hatred directed against a group of persons or a member of a group determined by race, color, religion, origin, or national or ethnic origin (Article 145a, 2). Higher sentencing is proscribed if those acts are committed in a manner that makes leaflets, pictures or other materials available to the public or distributed to them (Article 145a, 4), if the offence is carried out in a manner likely to disturb public peace and order or which is threatening, abusive or insulting (Article 145a, 5), or if the perpetrator is an official or responsible person or employed in an institution of authority or any body financed through public budget. Besides that, giving a recognition, award, memorial, any kind of memento, or any privilege or similar to a person sentenced by a final judgement for genocide, crimes against humanity or a war crime, or naming a public object such as a street, square, park, bridge, an institution, building, municipality or a city or similar, or registering a brand, after or under a name of a person sentenced by a final judgement for genocide, crimes against humanity or a war crime is criminalized (Article 145a, 6).

Regarding those amendments it is important to stress out that those changes do not prohibit all condoning, denial, gross trivialization or attempts to justify crimes of genocide, crimes against humanity or war crimes, but only in the situations when it is directed against a group of persons or a member of a group defined by reference to race, color, religion, descent or national or ethnic origin, when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Gačanica 2021).

Unlike those provisions the CCs of Republika Srpska (hereinafter: RS) and Brčko District of B&H (hereinafter: BDB&H) prescribes a punishment of imprisonment for whoever, by using the press, radio, television, a computer system or a social network, at a public gathering or at a public area or otherwise publicly calls for, incites or inflames or makes available to the public leaflets, images or any other materials that call for violence or hatred against a certain person or groups on account of their national, racial or religious or ethnic affiliation, skin color, sex, sexual orientation, disability, gender identity, origin or other properties (CC of RS, Article 359, 1; CC of BDB&H, Article 355a, 1).

Furthermore, all those provisions prescribed qualified form of incitement when it is committed by employing duress and abuse, jeopardizing safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, or desecrating monuments or graves that can overlap with the construct of hate crime.

Beside those provisions there are other provisions in CCs that can be used to sanction hate speech⁷ as well as the other laws such as the Law on Prohibition of Discrimination of B&H,⁸ the Law on Gender Equality in B&H,⁹ the Law on Freedom of Religion and the Legal Status of Churches and Religious

domestic court (CC of FB&H - Articles 163, 5).

7 The CC of FB&H (Article 363.) and CC of DB of B&H (Article 357.) criminalize usage of inciting or animosity language that obviously calls for or incites to violence or national or ethnical conflicts, and thereby brings public peace and order into danger. The CC of RS (Article 363.), criminalize behaviour such as shouting of slogans or carrying placards at a sporting event or public gathering aiming to provoke national, racial, religious or some other kind of hatred or intolerance based on some discriminatory grounds, which resulted in violence or a physical altercation with participants.

8 Law on Prohibition of Discrimination of B&H in Article 2 defines discrimination and its grounds from race and colour to sexual orientation.

9 Law on Gender Equality in B&H in Article 3 defines discrimination on the basis of gender.



Communities in B&H,¹⁰ Election Law of B&H,¹¹ Code of the Communications Regulatory Agency,¹² laws on the protection of public order and peace, cantonal laws on information,¹³ cantonal laws on public assembly etc.

At the end we can conclude that, as visible from presented laws and codes, the regulation of hate speech is not uniform within B&H's legal system and that those regulation are not in line with international standards.

Regarding the hate crime CCs of Entities and BDB&H proscribe hatred as aggravating factors for a wide range of qualified criminal offences.¹⁴ Offences of this type differ from one jurisdiction to another mainly by different legislative techniques and possible sanctions.

Namely, "hatred" as an aggravating circumstance is clearly defined in CC BDB&H in sentencing all crimes, while CC of RS (Article 52, 3) and CC of FB&H (Article 2,11) defines "committing acts of hatred" as an aggravating factor. The CC BDB&H (Article 2, 37) in basic terms defines the meaning of „hatred" as a motive for committing a crime, while the CC of RS (Article, 123,21) and CC of FB&H (Article 2,11) defines the meaning of "hate crime." These legal solutions imperatively require that courts consider hatred as an aggravating circumstance in all criminal cases.

Finally, it is important to stress out that existing provisions in CCs in B&H enable possibility that same act (criminal offence) can be prosecuted as hate crime as well as hate speech (incitement to hatred) that can lead to inadequate judicial responses to both phenomena.

10 Law on Freedom of Religion and the Legal Status of Churches and Religious Communities in Bosnia and Herzegovina in Article 5 prohibits discrimination on the basis of religion or belief, as well as activities or acts aimed at inciting religious hatred against any church or religious community and its members (c), and inciting, condoning or calling for religious intolerance and hatred (g), but without prescribing any sanctions. Therefore, the protection must be achieved through channels of criminal law.

11 The Election Law of BiH in the Article 19.9, paragraph j prescribes a fine for political subjects who use language which could provoke or incite someone to violence or spreading of hatred, or publish or use pictures, symbols, audio and video recordings, SMS text messages, internet messages or other materials that can have such an effect. In the Article 16.14, paragraph 3 this law also prohibits the conduct of an election campaign by way of electronic and printed media where the contents are stereotypical and offensive against men and/or women or which encourages any stereotype and offensive behaviour on the grounds of gender or any humiliating attitude against the members of different genders.

12 Code in the Article 4, paragraph 1 states that it is prohibited to humiliate, intimidate or incite hatred, violence or discrimination against a person or group on the grounds of sex, race, ethnicity, nationality, religion or belief, disability, special needs, age, sexual orientation, social origin or on the basis of any other circumstance which has the purpose or consequence of preventing or endangering any person's recognition, enjoyment or exercise on an equal basis of their rights and freedoms. In the same article, paragraph 2 is stated that radio and television broadcasters shall not create a clear and immediate risk of inciting hatred, violence or discrimination against a person or group on these grounds, or which may be interpreted by the public as incitement to hatred, violence, disorder and unrest, or which could provoke or incite crimes.

13 Some of those laws state that public information shall not directly or indirectly encourage racial, national or religious hatred and intolerance, but they do not prescribe penalties.

14 Due to the jurisdiction of the Court of B&H (it has no jurisdiction over murder, grievous bodily harm, rape, serious theft, robbery, aggravated robbery, and causing general danger) it is logical that this provision as well as the absence of a definition of "hatred" are not included in CCB&H. See more in: Lučić-Čatić, M., Bajrić, A. (2013). *Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni i Hercegovini: Perspektiva tužitelja*. Sarajevo: Analitika

PROSECUTION OF “HATE SPEECH” AND “HATE CRIME” IN JUDICIAL PRACTICE IN B&H

Methodology

Given the fact that existing legal provisions in B&H can lead to inadequate responses on the occurrences of hate speech and hate crime we conducted research of approaches of B&H's judiciary in solving those crimes through critical analyzes of existing case law in all four jurisdictions in B&H between 2012 and 2022 with absolute sample of hate crime and hate speech court cases.¹⁵

Analysis was conducted by using the six elements test - the Rabat Plan of Action and Article 19¹⁶ aiming to establish threshold of criminal liability on a case-by-case basis. Finally, the authors tried to determine the extent of inadequate application of the existing legal framework by prosecutors and judges.

The questioned sample was consisted of 47 cases in total. Eight were cases of hate crime and 39 cases of a hate speech.¹⁷

Rabat Plan of Action and Article 19

Bearing in mind problems in interpreting and implementing international obligations regarding prohibition all advocacy that constitutes incitement to discrimination, hostility or violence (“incitement to hatred”), as mandated by Article 20(2) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR), the Office of the United Nations High Commissioner for Human Rights (hereinafter: OHCHR) adopted a document “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

Namely, article 20, paragraph 2 of the ICCPR states that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. Therefore, article 20 requires a high threshold because limitation of freedom of expression must remain an exception. The Rabat Plan of Action suggests that each of the six parts of the following threshold test needs to be fulfilled for a statement to amount to a criminal offence:

These elements (and sub-elements) are:¹⁸

- Context of the expression;

15 The sample is created according to evidence of the OSCE Mission in B&H presented on Hate monitors and in accordance with their records absolute sample is achieved. Based on the records from Hate monitors we sent a request to the respective prosecutor's offices and courts for access to cases.

16 Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech also offers guidelines for assessment of the severity of hate speech and tools for determining type of liability in each case but since they are similar to those offered in Rabat Plan of Action and Article 19 the authors used only tools offered in Rabat Plan of Action and Article 19.

17 2012: 2 cases (1 hate crime and 1 incitement to hatred); 2013: 7 cases (3 hate crime and 4 incitements to hatred); 2014: 8 cases (all 8 incitements to hatred); 2015: 3 cases (1 hate crime and 2 incitements to hatred); 2016: 1 case (incitements to hatred); 2017: 3 cases (all 3 incitements to hatred); 2018: 4 cases (1 hate crime and 3 incitements to hatred); 2019: 3 cases (1 hate crime and 2 incitements to hatred); 2020: 4 cases (1 hate crime and 3 incitements to hatred); 2021: 11 cases (all 11 incitements to hatred); 2022: 1 case (incitements to hatred);

18 All elements and sub-elements are retrieved from the analysis of Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and Prohibiting incitement to discrimination, hostility or violence – Policy brief (2012) Article 19 and United Nations, Human Rights Office of the High Commissioner: One-pager on “incitement to hatred”. Web site: https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf



- Existence of conflicts within society;
- Existence and history of institutionalized discrimination;
- History of clashes and conflicts;
- Speaker/proponent of the expression;
 - The official position of the speaker;
 - The level of the speaker's authority or influence over the audience;
 - Politicians/prominent members of political parties;
 - Public officials or persons of similar status;
- Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;¹⁹
 - Language used by the speaker;
 - Objectives pursued by the speaker;
 - The scale and repetition of the communication;
- Content of the expression;
 - What was said;
 - Who was targeted (the audience);
 - Who was targeted (the potential victims of discrimination, violence or hostility);
 - How it was said (tone);
 - What form the expression took;
- Extent and magnitude of the expression;
 - The public nature of the expression;
 - The means of dissemination of the expression;
 - The magnitude of the expression.
- Likelihood of the advocated action occurring, including its imminence;
 - Was the speech understood by its audience to be a call to acts of discrimination, violence or hostility?
 - Was the speaker able to influence the audience?
 - Did the audience have the means to resort to the advocated action, and commit acts of discrimination, violence or hostility?
 - Had the targeted victim group suffered or recently been the target of discrimination, violence or hostility?

EXAMPLE OF ANALYSIS

*Case 1*²⁰

Description of a case: After the news that Zoran Milanović, President of Republic of Croatia, left the annually celebration “Bljesak” in Okučani, was published on the Internet portal JABUKA.TV the ac-

¹⁹ Article 19 strongly suggests that incitement under Article 20(2) of the ICCPR or Article 4(a) of the ICERD requires intention on the part of the speaker, as opposed to recklessness or negligence (Policy brief (2012) Article 19).

²⁰ T08 0 KT 0007635 21 (08.07.2021.) i 64 O K 061774 21 Kps (30.08.2021.)



cused, using username “Shadow”, posted following comment: “Who ... (swearword) your mother you traitor, you should be dead you communist ... (swearword).” The comment was public and accessible to the wider social community.

Indictment: Article 163 - Inciting National, Racial or Religious Hatred, Discord or Hostility of a CC of FB&H

Six-part test:

- *Context of the expression;*
- B&H has well known history of conflicts between people of different nationalities and the municipality where this case happened presumable victims are *de facto* minority.²¹
- *Speaker/proponent of the expression;*
Speaker did not have an official position or audience that he could influence. He was not a prominent member of political parties or public official. He did not have prior convictions in general and especially prior convictions for hate crime or hate speech. Furthermore, criminal investigation did not show prior actions related to hate crime or hate speech.
- Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;
The speaker used threatening language and slur without further repetition of the communication.
- Content of the expression;
The expression in a written form and it was threatening and insulting but not directly based on the nationality, race or religion of the presumed victims.
- Extent and magnitude of the expression;
This expression happened in online sphere so there will be further dissemination.
- Likelihood of the advocated action occurring, including its imminence;
From the written expression it is unclear what accused was advocating for.

After a thorough analysis of elements and sub-elements of the incident it is evident that acts (expression) of the accused (speaker) does not reach a threshold that needs to be fulfilled for a statement to constitute a criminal offence of “Inciting National, Racial or Religious Hatred, Discord or Hostility”.

Case 2²²

Description of a case: The accused (Muslim) was in his car, passing a house in front of which people of Serbian nationality were sitting. He stopped in front of a house and used a slur toward the victims who were sitting in front of a house and then he drove away. In a few minutes he came back on foot carrying a plastic gun that resembled a lot to a real one, pointed it toward the victims and told them that he will kill them using more slur toward their nationality.

Indictment: Article 163 - Inciting National, Racial or Religious Hatred, Discord or Hostility of a CC of FB&H

21 Even though different ethnic, national, and religious groups in the B&H are not recognised as minority groups by law, in reality they often are, such for example persons returning to some part of the B&H who had left during or due to the war.

22 T04 0 KT 0031630 17 (10.10.2017.) i 43 0 K 151843 17 K (10.01.2018.)



Six-part test:

- Context of the expression;
B&H has well known history of conflicts between people of different nationalities and the municipality where this case happened presumable victims are *de facto* minority.
- *Speaker/proponent of the expression*;
Speaker did not have an official position or audience that he could influence. He was not a prominent member of political parties or public official. He had two prior convictions for a criminal offences of theft (CC of FB&H - Article 286). He did not have prior convictions for hate crime or hate speech and criminal investigation did not show prior actions related to hate crime or hate speech.
- Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;
The speaker used threatening language and slur without further repetition of the communication. He spoke directly to the victims.
- Content of the expression;
The expression was oral form, and it was threatening and insulting based on the nationality of the victims. Only targeted audience was those who were in front of a house.
- Extent and magnitude of the expression;
This expression happened in a public place, but it was a one-time incident without further dissemination.
- Likelihood of the advocated action occurring, including its imminence;
Given the identified extent and magnitude of the expression likelihood of the advocated action occurring was non-existing one.

After a thorough analysis of elements and sub-elements of the incident it is evident that act (expressions) of the accused (speakers) was not “incitement to hatred” but that it was typical acts of hate crime (Endangering Security - CC of FB&H - Article 183. with bias motive).

DISCUSSION AND CONCLUSIONS

Using the six elements test on a case-by-case basis (as presented in the previous analyses of Case 1 and Case 2) we questioned does those cases reach a threshold that needs to be fulfilled for a statement to amount to a criminal offence and in cases where not, does those cases represent cases of a hate crime rather than a cases of incitement to hatred.

After an in-depth analysis of 47 court case in a ten-year period (where 8 were classified as hate crime and 39 as incitements to hatred) we came to the conclusion that approximately 77% of all cases indicted for incitement to hatred do not reach a necessary threshold. Out of those 39 indictments, according to the results of six elements test, 9 are incitements to hatred while the rest of them - 30 are not. Nine of those 30 cases are in fact a different forms of hate crime (criminal act + bias motive) rather than hate speech while the rest of them could represent a violation of some other provisions such as Laws on Public Order and Peace.



Regarding the verdicts of the cases that we found inadequately qualified as incitement to hatred out of the 27 verdict (3 cases are still in process) 20 resulted in conviction and only 7 in acquittal. Out of those 7 that resulted in acquittal one could be trial as a hate crime and the rest of them represent violation of some of previously mentioned regulation of hate speech.

This very high percent of incorrectly qualified cases leads us to the conclusion that most of the practitioners (prosecutors, lawyers, and judges) do not understand the very concept of hate crime and hate speech. Explicitly, existing legal framework offer possibilities for prosecution of the hate crime cases as well as the cases of the incitement to hatred (aggravated forms of hate speech) in different ways and with different legal consequences while the other laws can be used for a hate speech form that do not reach threshold necessary for incitement to hatred. Therefore, limitations and deficiencies in the CCs regarding those issues (previously discussed overlapping) cannot be used as the excuse for those misconceptions that has enormous consequences in B&H's society.

Namely, as previously pointed out B&H is ethnically and religiously heterogeneous, divided, and post-war society where hate speech creates new antagonisms and can lead to another conflict, radicalization, and violent extremism. The role that hate speech played in the dissolution of former Yugoslavia, the magnitude of ethnocentric rhetoric and aggressive nationalism should not be overlooked and therefore inadequate prosecution of incitement to hatred should not be taken lightly. Misapplication of the provision of incitement to hatred for prosecuting cases of a hate speech that does not represent incitement to hatred or that are a hate crime cases, raise the question of legal security and ability of professional to recognize, identify and react on a true case of the incitement to hatred. Adequate legal and social response to hate speech and hate crime has wide repercussions on the entire B&H's society and therefore state must respond on those harmful behaviours in legally correct manner.

Recommendations

Extremely important step in advancing the fight against hate crime and hate speech is sensitization of holders of judicial functions regarding specific nature and numerous influences of those criminal offences. Namely, it is very important that the holders of judicial functions become aware of the importance and negative consequences of hate speech and hate crimes for the individual, the group to which they belong, and for society as a whole. It is necessary to raise awareness of the importance of an adequate response of the judicial system which, just like the committing of the crime itself, have far-reaching consequences.

Furthermore, it is vital to familiarise prosecutors and judges with the Rabat Plan of Action and Article 19 as a threshold test that needs to be fulfilled for a statement to amount to a criminal offence (incitement to hatred) in order to improve current judicial practice.

And finally, since continuous training²³ is the best way to improve the judicial response to hate speech and hate crimes, it is necessary to implement obligatory continuous educational processes for holders of judicial functions and other subjects involved in criminal proceedings on the legal nature of incitement to hatred and hate crimes.

23 During the last decade a lot of trainings (supported by Organization for security and co-operation in Europe, Council of Europe, non-governmental organizations, faculties etc.) for holders of judicial functions and other subjects involved in criminal proceedings on the legal nature of incitement to hatred and hate crimes were available but they were not obligatory and therefore dissemination of needed knowledge stayed limited. Therefore, the authors' recommendation goes in the direction of mandatory trainings.



REFERENCES

- Bayer, J., Bard, P. (2020) *Hate speech and hate crime in the EU and the evaluation of online content regulation approaches*. European Union: European Parliament;
- Blagojević, B. (2010). Kulturno-geografski aspekt istraživanja govora mržnje na javnim površinama, in: *Govor mržnje*, ur. Vejnović, D. Banja Luka: Defendologija, centar za bezbjednosna, sociološka i kriminološka istraživanja. pp. 377-387.;
- Blažević, J. (2019). *Izvješće o pojavama govora mržnje i kaznenih djela učinjenih iz mržnje u Bosni i Hercegovini u razdoblju od lipnja 2018. godine do lipnja 2019. godine*. Sarajevo: Sarajevo Open Centre;
- Brković et al. (2022) *Rozi izvještaj 2022: Godišnji izvještaj o stanju ljudskih prava LGBTI osoba u Bosni i Hercegovini*. Sarajevo: Sarajevski otvoreni centar;
- Buljubašić, M., & Holá, B. (2021). *Historical trauma and radicalization: How can intergenerational transmission of collective traumas contribute to (group) radicalization?* Atlantic Initiative;
- Council of Europe, Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech available here: [https://search.coe.int/cm/#{%22CoEIdentifier%22:\[%220900001680a67955%22\],%22sort%22:\[%22CoEValidationDate%20Descending%22\]}](https://search.coe.int/cm/#{%22CoEIdentifier%22:[%220900001680a67955%22],%22sort%22:[%22CoEValidationDate%20Descending%22]});
- De Sanctis, F. (2014) Značaj procesuiranja govora mržnje u postkonfliktnim državama: lekcije iz Bosne i Hercegovine i lekcije za Bosnu i Hercegovinu, in: *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH*, ed. Hodžić, E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 107-128;
- ECRI General Policy Recommendation N°6 on Combating the dissemination of racist, xenophobic and antisemitic material via the internet available here: <https://rm.coe.int/ecri-general-policy-recommendation-no-6-on-combating-the-dissemination/16808b5a8d>;
- ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination available here: <https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislatio/16808b5aae>;
- ECRI, General Policy Recommendation No. 15 on combating hate speech, p. 3. available here: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.15>;
- European Parliament, European Parliament Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe (2018/2869(RSP)), P8_TA(2018)0428, Strasbourg, 2018.
- Gaćanica, L., Finkeldey, C. (2021). *Calling War Atrocities by their Right Name: Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, The Holocaust, Crimes Against Humanity or War Crimes*. Sarajevo: Forum ZDF;
- Gračanica, L. (2022) *Monitoring report on hate speech in Bosnia and Herzegovina*. Media Diversity Institute, Media Diversity Institute Western Balkans;
- Guillén-Nieto, V. (2023). *Hate Speech: Linguistic Perspectives*. Germany: De Gruyter;
- Gündüz v. Turkey, op. cit, para. 40; Erbakan v. Turkey, op. cit., para. 56.;
- Hrvatini, S. B., Petković, B., Hodžić, S. (2021) *Hate narratives in The Western Balkans and Turkey*. Ljubljana: Peace Institute and SEENPM;
- Kolaković-Bojović, M., Đukanović, A. (2023). *Zločini iz mržnje u Republici Srbiji*, Beograd: Institut za kriminološka i sociološka istraživanja;

- Lalić, V. (2014) Sociološki aspekti zločina iz mržnje u Bosni i Hercegovini in: *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH*, ed. Hodžić, E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 17-35;
- Londo, I. (2021) *Hate Narratives and disinformation in online media in Albania*. Ljubljana: SEENPM, Peace Institute, Albanian Media Institute;
- Lučić – Ćatić, M. (2023). Taking Stock of Approaches to Counter Hate-Speech in the Western Balkans; Radicalisation Awareness Network;
- Lučić – Ćatić, M., Bajraktarević Pajević, D., Kavazović, M. Bojanić, N. (2016). Hate Crime or Hate Speech: Judiciary practice in Bosnia and Herzegovina, *Thematic Proceedings of the international conference 'Archibald Reiss'*, 421-433.;
- Lučić-Ćatić, M., Bajrić, A. (2013). *Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni i Hercegovini: Perspektiva tužitelja*. Sarajevo: Analitika;
- OSCE Ministerial Council, Decision 9/09;
- OSCE/ODIHR (2022) *Hate Crime Laws: A Practical Guide, 2nd Edition*. Warsaw: OSCE/ODIHR;
- Palmiotto, M. J., Vejnović, D, Lalić, V. (2012). Rad policije na sprječavanju etnički motivisanog nasilja na fudbalskim utakmicama u Bosni i Hercegovini, *Defendologija* 15, br. 32, str. 19-32.;
- Resilience (2021) *Hate Narratives in the Western Balkans and Turkey: Key research findings*. available here: <https://seenpm.org/wp-content/uploads/2021/09/Research-2-PDF.pdf>;
- Responding to Hate Speech against LGBT people (2013): London: Article 19, available here: <https://www.article19.org/data/files/medialibrary/37343/LGBT-Incitement-Paper-30-Sept-AS-FINAL.pdf>
- Šinković, N. (2022) *Media monitoring report of hate speech: a regional overview*. Media Diversity Institute;
- Sokol, A. (2020) *Propaganda, disinformation and hate models of media and communication in Bosnia and Herzegovina*. Ljubljana: SEENPM, Tirana, Peace Institute, Ljubljana and Foundation Mediacentar Sarajevo;
- Sokol, A. (2021) *Hate narratives in the media and user-generated content*. Ljubljana: SEENPM, Peace Institute, Foundation Mediacentar Sarajevo, pp 5., 20.;
- United Nations, Human Rights Council (2013) *Annual report of the United Nations High Commissioner for Human Rights (Annex: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred)*. web site: https://www.ohchr.org/sites/default/files/Rabat_draft_outcome.pdf;
- Weber. A. (2009). *Manual on hate speech*. France: Council of Europe Publishing, available here: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf;

LAWS AND CODES

- Code of Audio-visual Media Services and Radio Media Services, <https://docs.rak.ba//articles/333eb24f-ca18-4ef2-a9ab-8f402e8a4f40.pdf>
- Code of Press and Online Media of BiH, Press Council in Bosnia and Herzegovina, https://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9
- Code on Commercial Communications, <https://www.rak.ba/hr/articles/107>



- Criminal Code of Bosnia and Herzegovina, http://www.sudbih.gov.ba/files/docs/zakoni/ba/krivicni_zakon_3_03_-_bos.pdf.
- Criminal Code of Brčko District of Bosnia and Herzegovina, <https://skupstinabd.ba/3-zakon/ba/Krivic--ni%20zakon%20Brc--ko%20Distrikta%20BiH/05B19-20%20Krivic--ni%20zakon%20-precisce--ni%20tekst.pdf>
- Criminal Code of Republika Srpska, <https://www.paragraf.ba/propisi/republika-srpska/krivicni-zakon-republike-srpske.html>
- Criminal Code of the Federation of Bosnia and Herzegovina, http://www.oss.ba/dokumenti/Krivicni_zakon_FBIH.pdf.
- Decision of the High Representative Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina, Odluka visokog predstavnika kojom se donosi Zakon o dopuni Kaznenog zakona Bosne i Hercegovine | Office of the High Representative (ohr.int)
- Election Law of Bosnia and Herzegovina, https://izbori.ba/Documents/documents/ZAKONI/Izborni_zakon_PRECISCENI_TEKST-bos.pdf
- Law on Amendments to the RS Criminal Code, <https://www.narodnaskupstinars.net/?q=la/akti/usvojeni-zakoni/zakon-o-dopuni-krivi%C4%8Dnog-zakonika-republike-srpske>
- Law on Freedom of Religion and Legal Status of Churches and Religious Communities in Bosnia and Herzegovina, <http://www.mpr.gov.ba/biblioteka/zakoni/bs/ZAKON%20o%20slobodi%20vjere.pdf>
- Law on Gender Equality in Bosnia and Herzegovina, https://arsbih.gov.ba/wp-content/uploads/2014/01/ZoRS_32_10_B.pdf
- Law on Prohibition of Discrimination, <http://www.mhrr.gov.ba/PDF/LjudskaPrava/Zakon%20o%20zabrani%20diskriminacije.pdf>