

Discussion Paper

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Paper
3/2014**

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**Criminal Law
Framework for
Processing
Hate Crimes**

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Bosna i Hercegovina
Federacija Bosne i Hercegovine
UDRUŽENJE TUŽILACA/TUŽITELJA
FEDERACIJE BiH
SARAJEVO

Sarajevo, 2014

Title:
Criminal Law Framework for Processing Hate Crimes

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Editors:
Edin Hodžić and Amra Mehmedić

Published by: Analitika – Center for Social Research

Year: 2014

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Publisher Address:
Kaptol 5, 71000 Sarajevo, Bosnia and Herzegovina
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This publication is prepared as part of the project “Prosecuting hate: Towards adoption and implementation of EU standards and best practices in combating hate crimes in BiH”, implemented by the Association of Prosecutors of Federation BiH and Analitika, with the support of the Royal Norwegian Embassy in Bosnia and Herzegovina.



NORWEGIAN EMBASSY

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Introduction¹

Analysing the criminal law framework for processing a certain type of criminal offence presupposes that this criminal offence differs from other criminal offences by one or more characteristics and that this specificity has implications for the application of certain general institutes of criminal law (substantive and procedural). With hate crimes, this distinctive characteristic is the particular motive for their commission. This paper deals with the significance of this special characteristic for the processing of hate crimes understood as per the changes and amendments to the Criminal Code of Republika Srpska (hereinafter: CC RS), the Criminal Code of the Brčko District of Bosnia and Herzegovina (hereinafter: CC BD BiH) 2010 and the Draft Law on Changes and Amendments to the Criminal Code of the Federation of Bosnia and Herzegovina (hereinafter: CC FBiH), June 2013.

¹ The views expressed in this paper are not the views of the Supreme Court of the Federation of Bosnia and Herzegovina, but only the author's views solely based on the analysis of relevant provisions of criminal codes and criminal procedure codes.

1.

Hate Crimes - Motive as the Relevant Specificity

Hate crimes are criminal offences where the motive for commission is based, in whole or in part, on presumed or real differences in ethnic or national origin, language or script, religious belief, race, colour, sex, sexual orientation, political or other beliefs, social origin, status, age, health condition or other characteristics², or rather crimes committed on the grounds of another person's race, colour, religion, nationality or ethnicity, disability, sex, sexual orientation or gender identity³. Hate crimes, therefore, are considered to include criminal offences stipulated by (criminal) law that are committed out of hatred, understood in terms also stipulated by law. Their additional characteristic is precisely the special motive for commission, due to which criminal codes stipulate special rules for penal measures, i.e. sanctioning of perpetrators. Motive is otherwise, in most criminal offences, an irrelevant circumstance and is, therefore, not required to be proven in criminal proceedings.

This paper deals with the significance of the special motive only for the processing of hate crimes understood as described above. Although criminal legislation in Bosnia and Herzegovina (hereinafter: BiH) covers certain criminal offences (for example, inciting national, racial or religious hatred, hostility or discord, or preventing the return of refugees or displaced persons) that presume bias towards the other as the motive for their commission, they are not considered hate crimes in terms of the provisions pertaining to hate crimes in the CC RS and CC BD BiH, or in the Draft Law on Changes and Amendments to CC FBiH. For that reason, and because their processing does not impose the same kinds of issues as processing hate crimes, this paper will not deal with the above criminal offences.

Only the substantive and procedural law issues that seem particularly pertinent in the initial stages of applying criminal law provisions on hate crimes will be the

² "Zakon o izmjenama i dopunama Krivičnog zakona Republike Srpske" [Law on Changes and Amendments to the Criminal Code of Republika Srpska], *Official Gazette of Republika Srpska* 73/10, Article 31; "Zakon o izmjenama i dopunama Krivičnog zakona Brčko Distrikta Bosne i Hercegovine" [Law on Changes and Amendments to the Criminal Code of the Brčko District of Bosnia and Herzegovina], *Official Gazette of the Brčko District of Bosnia and Herzegovina* 21/10, Article 1.

³ "Prijedlog Zakona o izmjenama i dopunama Krivičnog zakona Federacije Bosne i Hercegovine" [Draft Law on Changes and Amendments to the Criminal Code of the Federation of Bosnia and Herzegovina], (Sarajevo: Parliament of the Federation of Bosnia and Herzegovina, June 2013), Article 1.

subject of this paper. Namely, the very application of these provisions of substantive law raises certain issues that practitioners ought to be made aware of. Apart from that, introducing provisions on hate crimes into criminal codes and stipulating special rules for punishing their perpetrators has not been accompanied by amendments to procedural laws that would explicitly resolve some basic procedural issues regarding the criminal prosecution of perpetrators of hate crimes. These issues include, for instance, the obligation of the prosecutor to prosecute the perpetrator for committing a hate crime whenever there is sufficient evidence and the required contents of basic procedural acts (indictment and judgement) in criminal proceedings for hate crimes. These issues, along with others that will be discussed later, may prove contentious in practice until relevant case law can be developed. Given that procedural laws have not undergone changes that would pertain to the processing of hate crimes, the processing of hate crimes must be conducted within the framework of existing provisions of procedural law in order to ensure compliance with the basic procedural principles in light of the specific nature of hate crimes. Failure to comply could lead to serious negative procedural repercussions for the efficient processing of hate crimes.

This paper discusses primarily, but not exclusively, those issues of substantive and procedural law relating to hatred as motive for the commission of a criminal offence likely to be frequently raised in appeal proceedings. In the interest of efficiency, these issues should be taken into account from the very beginning of criminal prosecution against the perpetrators of hate crimes. This paper will not deal exclusively with the normative analysis of the existing criminal law framework for processing hate crimes, since this has already been covered by other publications on this subject,⁴ but also with certain (due to the lack of relevant case law, mostly presumed) aspects of the functioning of these criminal law provisions in criminal proceedings.

⁴ See: OSCE Mission to Bosnia and Herzegovina, *Borba protiv krivičnih djela počinjenih iz mržnje: Analiza incidenta motiviranih predrasudama u Bosni i Hercegovini, sa preporukama* [Tackling Hate Crimes: An analysis of bias-motivated incidents in Bosnia and Herzegovina with recommendations], (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2012); OSCE/ODIHR, *Razumijevanje krivičnih djela počinjenih iz mržnje: Priručnik za Bosnu i Hercegovinu* [Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina], (Warsaw: OSCE/ODIHR, 2010); OSCE Mission to Bosnia and Herzegovina, *Zakoni o krivičnim djelima počinjenim iz mržnje: praktični vodič* [Hate Crime Laws: A Practical Guide], (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2009).

2.

Relevant Legal Provisions on Hate Crimes

Criminal legislation in the whole of BiH is currently not equally equipped to combat hate crimes. During 2010, changes and amendments were introduced into the criminal codes of Republika Srpska (hereinafter: RS) and the Brčko District of Bosnia and Herzegovina (hereinafter: BD BiH) that largely brought these laws in compliance with international standards for the criminal prosecution of hate crimes. In the Federation of Bosnia and Herzegovina (hereinafter: FBiH) changes to the criminal code are yet to be introduced.

The 2010 changes and amendments to the CC RS and CC BD BiH introduced the notion of hate crimes into criminal legislation and established special rules for punishing these offences. Thus, Article 15 of the Law on Changes and Amendments to the CC RS 2010 stipulates adding a provision to Article 37, paragraph 3 of the Code, whereby in cases of criminal offences motivated by hatred, as stipulated in Article 147, paragraph 25 of the Code, the court is to take this as an aggravating circumstance for sanction determination purposes, provided that an aggravated sentence is foreseen for qualified forms of the criminal offence in question. Article 31 of this Law introduces a new paragraph 25 into Article 147 of the CC RS, which establishes hatred as a motive for the commission of a criminal offence stipulated in the Code based in whole or in part on differences in real or presumed ethnicity or nationality, language or script, religious beliefs, race, colour, sex, sexual orientation, political or other beliefs, social origin, status, age, health condition or other characteristics, or based on a relation to persons with any of these different characteristics. Identical legal provisions were also introduced into the CC BD BiH in 2010. Therefore, according to these laws, apart from the motive of hatred being a qualifying circumstance for certain criminal offences, based on which special aggravated forms of these offences have been stipulated and accompanied by the stipulation of aggravated sentences, hatred as a motive for the commission of a criminal offence is also a special required aggravating circumstance in cases where the law does not stipulate an aggravated sentence for a qualified form of the criminal offence committed out of hatred.

The Draft Law on Changes and Amendments to the CC FBiH from June 2013 introduces the notion of hate crimes into the criminal legislation of FBiH. A hate crime is defined as any criminal offence committed on the grounds of race, colour, religion, nationality or ethnicity, disability, sex, sexual orientation or gender identity of the other person. The Draft Law foresees a few so-called protected characteristics that may be grounds for bias-motivated crimes and does not point

out that a criminal offence committed due to these differences will be considered a hate crime, irrespective of whether the differences are real or presumed, whether the act was committed in whole or in part due to these differences or due to a relation to persons with some of the above different characteristics. The Draft Law foresees that the above motive for the commission of a criminal offence shall be considered an aggravating circumstance if the law does not explicitly stipulate an aggravated sentence. However, the Draft Law does not foresee appropriate changes to qualified forms of certain criminal offences where a special motive for their commission is a qualifying circumstance. Therefore, instead of the motive of hatred being a qualifying circumstance, in terms stipulated by the Draft Law, the CC FBiH will continue to stipulate an aggravated sentence only if the basic criminal offence is committed on the grounds of the above distinguishing characteristics. Thus the qualified forms of the criminal offences of murder from Article 166, paragraph 2, point c) of the CC FBiH and grievous bodily harm from Article 177, paragraph 4 of the CC FBiH shall be established only if these offences are committed on the grounds of racial, national or religious difference (and not, for example, on the grounds of the sexual orientation of the victim, which shall be considered an aggravating circumstance only for sentencing purposes). The qualified form of the criminal offence of rape from Article 203, paragraph 4 of the CC FBiH shall still be established only if the offence was committed due to ethnic, national, racial, religious, or linguistic bias against the victim, but not for any other differing characteristic under the notion of a hate crime, and the same is true of the qualified form of the criminal offence of damaging another's property from Article 293, paragraph 3 of the CC FBiH, if the offence is committed because of differences in ethnicity or nationality, race, religion, sex or language (therefore, just like rape, but also including characteristics not stipulated as protected characteristics under the provision determining the meaning of the notion of hate crimes).

Although changes and amendments to the CC RS and CC BD BiH were made at roughly the same time, there are certain differences in what these laws stipulate about qualified forms of certain criminal offences where the motive of hatred is a qualifying circumstance. Thus, the CC RS foresees qualified forms of the criminal offence of aggravated murder (Article 149), grievous bodily injury (Article 156), rape (Article 193), aggravated theft (Article 232), robbery (Article 233), theft by robbery (Article 234), and damaging another's property (Article 249), if they are committed out of hatred, while the CC BD BiH foresees qualified forms of the criminal offence of murder (Article 163), grievous bodily harm (Article 169), rape (Article 200), aggravated theft (Article 281), theft by robbery (Article 282), robbery (Article 283), damaging another's property (Article 287), causing a state of general danger (Article 317), destroying or damaging important commercial or public facilities (Article 318), damaging safety equipment at work (Article 319) and unlawful and improper construction (Article 320), if these offences are committed out of hatred. The CC BD BiH, therefore, foresees a wider range of criminal offences where the hatred motive is a qualifying circumstance due to which the law stipulates aggravated

forms of these offences and foresees aggravated sentences in comparison to the basic forms of these criminal offences.

It is interesting that both the CC RS and CC BD BiH connect the notion of a hate crime exclusively to criminal offences stipulated in these respective codes. The notion of hate crime does not, therefore, pertain to criminal offences covered by so-called special criminal legislation. Since criminal offences covered by special criminal legislation may be committed out of hatred, this means that, according to law, any bias motive behind these offences is not, necessarily an aggravating circumstance for the purpose of sentencing. Since it is difficult to find a rational explanation for this difference, we could conclude that it is an omission on the part of the legislator to bring criminal offences stipulated by other laws under this provision. On the other hand, the Draft Law on Changes and Amendments to the CC FBiH from June 2013 does not limit the notion of a hate crime to only those criminal offences stipulated by the Criminal Code itself.

From the criminal law perspective, it is significant that the provisions on hate crimes introduced into the CC RS and CC BD BiH, as opposed to those covered by the Draft Law on Changes and Amendments to CC FBiH from June 2013, do not contain an exhaustive list of protected characteristics that may be grounds for the bias motive of the perpetrator. This legal solution has its criminal policy justification because it enables aggravated sentences for perpetrators of hate crimes even in cases when the bias motive is not based on characteristics expressly stipulated by law. However, this legal solution may also give rise to legal uncertainty. In any case, charges for hate crimes in cases where they are motivated by bias towards a difference not expressly stipulated by the relevant legal provision, as well as convictions for such crimes, will require special justifications from both the prosecutor and the court about why the case in question is a hate crime. In order to prevent arbitrariness, the position that a characteristic not expressly listed in the relevant legal provision as a motive for the commission of a criminal offence nonetheless makes that criminal offence a hate crime, must be based on an analysis of the common points shared by that characteristic and the characteristics expressly protected by the relevant legal provision. Therefore, the expressly protected characteristics should be used to define a framework within which it is possible to determine other characteristics that may be the basis of a perpetrator's bias motive. The starting point for defining this framework could be that the characteristics expressly protected by law are those that define the identity of a person, on the basis of which that person identifies himself / herself and is identified with other persons that share the same characteristic. It should be noted, however, that these other characteristics need not be designative of "minority". It is sufficient that they represent the grounds for different identities.

Until changes and amendments are introduced to the the CC FBiH, the commission of hate crimes, or bias motivated crimes, in cases when the bias motive is not a required element of the criminal offence, are to be assessed in line with the general sentencing provisions. Even after changes and amendments are introduced, the commission of the criminal offence will have to be assessed in this

way due to differences that remain outside the scope of the hate crime provision in the Draft Law on Changes and Amendments to the CC FBiH (for example, the commission of a criminal offence due to a difference in political beliefs). So, the Draft Law on Changes and Amendments to the CC FBiH does not foresee changes to qualified forms of individual bias-motivated criminal offences so as to stipulate hatred as a qualifying circumstance. Therefore, legal definitions of qualified forms of individual criminal offences where the commission of the offence due to differences (stipulated or not stipulated by the definition of a hate crime) is stipulated as a qualifying circumstance will remain in place. In the case of these criminal offences, their commission on the basis of a difference not explicitly stated in the legal definition of the qualified form of that criminal offence will be considered an aggravating circumstance exclusively on the basis of the special provision on aggravated sentences for hate crimes (if it is a difference foreseen by the special provision on hate crimes) or on the basis of the general sentencing provision (if the difference falls outside the scope of the special provision on hate crimes).

3.

The Relation between Legal Provisions on Sentences for Hate Crimes and General Sentencing Rules

Criminal law provisions on hate crimes contained in the CC RS and CC BD, as well as those in the Draft Law on Changes and Amendments to CC FBiH, depart somewhat from the general criminal law rules on sentencing. For the purposes of their practical application, it is therefore necessary to consider the relation of these provisions to general sentencing rules.

Even though they depart somewhat from the general sentencing rules, provisions whereby the court shall, according to these laws, consider the hatred motive for the commission of crimes as an aggravating circumstance and determine an aggravated sentence, unless the law stipulates an aggravated sentence for the qualified form of the criminal offence in question,⁵ are included in CC RS and CC BD BiH under the Article “General Rules on Sentencing”⁶. According to the general sentencing provision contained in paragraph 1 of the relevant articles of the CC RS and CC BD BiH, and also contained in CC FBiH⁷, the court shall take into account all the circumstances bearing on the length of the sentence. The provision also contains circumstances that the court shall particularly take into account for sentencing purposes. These include the motive for the commission of the offence in question.

However, although the general sentencing provision obliges the court to take into account all circumstances bearing on the severity of the sentence, particularly those explicitly stated in the provision, it does not stipulate an explicit obligation of the court to consider certain motives for the commission of the criminal offence

⁵ “Krivični zakon Republike Srpske” [Criminal Code of Republika Srpska], *Official Gazette of Republika Srpska* 49/03, 108/04, 37/06, 70/06, 73/10 and 1/12, Article 37, para. 3; “Krivični zakon Brčko Distrikta Bosne i Hercegovine” [Criminal Code of the Brčko District of Bosnia and Herzegovina], *Official Gazette of the Brčko District of Bosnia and Herzegovina* 47/11 and 9/13, Article 49, para. 2.

⁶ “Criminal Code of Republika Srpska,” Article 37; “Criminal Code of the Brčko District of BiH,” Article 49.

⁷ “Krivični zakon Federacije Bosne i Hercegovine” [Criminal Code of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of Bosnia and Herzegovina* 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 and 42/11.

as aggravating circumstances. Namely, the general sentencing provision does not determine which motives are to be deemed aggravating and which mitigating circumstances, i.e. it does not distinguish socially acceptable from socially unacceptable motives. For that reason, it could be said that the provision obliging the court in the case of hate crimes to hold this as an aggravating circumstance and impose a more severe sentence is a special provision on sentencing for hate crimes. In that sense, it should not be an integral part of the provisions containing general rules on sentencing, because although each criminal offence stipulated in the criminal code may be committed out of hatred, this provision pertains solely to hate crimes, that is to say, only to crimes committed out of a special type of motive.

Given that it is a special sentencing provision for hate crimes, in terms of that circumstance as the motive for the commission of the criminal offence, it has primacy over the general sentencing provision. As opposed to the CC RS and CC BD BiH, in the Draft Law on Changes and Amendments to the CC FBiH, the provision on the commission of hate crimes as an aggravating circumstance is contained within the same provision determining the notion of hate crimes.

Although the special sentencing provision for hate crimes obliges the court to consider the motive of hatred as an aggravating circumstance when establishing a hate crime, and (in the CC RS and CC BD BiH) impose a more severe sentence on the perpetrator, the criminal code does not contain criteria pertaining to this or any other circumstance bearing on the severity of the sentence that the court could use in determining the degree of severity of the sentence that should be imposed on the perpetrator due to this particular motive for the commission of the offence. Given that the special value of the goods or interest that are the object of protection of a certain group of criminal offences (for example, life and body, cultural goods or property) has been highlighted in the legally stipulated punishment for the corresponding criminal offence, it is evident that the value of the object of protection of the corresponding criminal offence cannot be the basis for determining the degree of severity of the sentence to be imposed on the perpetrator. In view of the circumstances that the court is obliged to take into account in line with the general sentencing provision, it is evident that when assessing the significance of hatred as the motive for the commission of the criminal offence, the court cannot assess circumstances included under other aggravating circumstances – for example, intensity of injury or endangerment of protected goods, conduct of the perpetrator following the commission of the criminal offence, previous conduct of the perpetrator, circumstances surrounding the commission of the offence, etc.

When assessing the degree of severity of the sentence to be imposed on the perpetrator of a hate crime, only the circumstances related to the motive of hatred and its consequences should be taken into account. Special provisions on hate crimes were introduced into the legislation not only to increase protection for persons or objects directly exposed to attacks, but also to increase protection for all that represents their identity, due to which and in connection with which social cohesion itself was also exposed to attack. Therefore, when determining

sentences for hate crimes, the consequences of the committed criminal offence on the victim should be taken into account, and given that the victim was targeted on account of belonging to a certain group, the consequences for the group sharing the protected characteristics, as well as the consequences for overall social relations should also be taken into account. They will often depend on both the time and the place of the commission of the offence, historical context, but also on the specific circumstances and events under which the offence was committed. Also, the protected characteristics mentioned in the provisions defining hate crimes beg the question of whether all of them have equal value and, accordingly, whether some forms of the bias motive require a more severe sentencing response than others. Although for a significant number of citizens, all the forms of bias envisaged by the cited provisions probably do not carry the same weight or threat, the type of bias that formed the motive for the commission of the offence should not constitute a basis for determining the severity of the sentence imposed on the perpetrator. The purpose of special sentencing for hate crimes is to prevent bias-motivated criminal offences against others, and therefore, every protected characteristic deserves equal protection. This interpretation is supported by the fact that both the CC RS and CC BD BiH stipulate the same sentence when the motive of hatred is a qualifying circumstance, irrespective of the type of bias motive for the commission of the offence.

4.

Liability of Legal Persons for Hate Crimes

Criminal prosecution of legal persons for hate crimes is also possible in BiH. The current legislation in BiH, which came into force in 2003, stipulates the liability of legal persons for all criminal offences foreseen by the criminal legislation in BiH.

Since even when it comes to the liability of legal persons for criminal offences, the perpetrator of the criminal offence is a natural person,⁸ the legal person is liable for a hate crime if the natural person committed the hate crime as defined in the criminal codes, if the natural person committed the crime in the name, for the account or benefit of the legal person, and if at least one of the four alternatively stipulated possible forms of contribution of managing or supervisory bodies of the legal person to the commission of the crime has been established. In determining the capacity of domestic criminal legislation to respond to hate crimes as pertains to the liability of legal persons for criminal offences, we should certainly keep in mind that this liability does not require that the natural person – the perpetrator of the crime – be in the position of a responsible officer within the legal person. In fact, the perpetrator need not even be a member of the legal person in question. It is sufficient that the crime be committed in the name, for the account or benefit of the legal person and that the commission of the crime by the natural person include a certain legally stipulated form of contribution from managing or supervisory bodies of the legal person. Apart from that, given that a finding on the actions of the perpetrator being in the name, for the account or benefit of the legal person does not require a formal authorisation for such actions, that a factual authorisation will suffice, and that managing or supervisory bodies of the legal person need not be

⁸ The grounds for the liability of legal persons for criminal offences are stipulated in “Criminal Code of the Federation of BiH,” Article 128; “Criminal Code of Republika Srpska,” Article 127; and “Criminal Code of the Brčko District of BiH,” Article 128 respectively:

“For a criminal offence that the perpetrator has perpetrated in the name of, for the account of or for the benefit of the legal person, the legal person shall be liable:

- a) When the purpose of the criminal offence is arising from the conclusion, order or permission of the managerial or supervisory bodies of a legal person; or
- b) When the managerial or supervisory bodies of a legal person have influenced the perpetrator or enabled him to perpetrate the criminal offence; or
- c) When a legal person disposes of illegally acquired material gain or uses objects obtained through the criminal offence; or
- d) When the managerial or supervisory bodies of a legal person have failed to carry out due supervision over the legality of work of the employees.”

only those bodies designated as such by regulations or legal acts, but also those de facto managing the business or activities of the legal person, it is clear that the legal provisions on the liability of legal persons for criminal offences do not constitute an obstacle for the effective prosecution of legal persons for hate crimes.

Certain legally stipulated forms of contribution of managerial or supervisory bodies to the commission of the criminal offence by the perpetrator – a natural person – are particularly suitable for establishing the responsibility of the legal person for the hate crime. These are primarily the forms of contribution present when the purpose of the hate crime committed by the natural person – the perpetrator – arises from a conclusion, order or permission of supervisory or managerial bodies of the legal person, or when managerial or supervisory bodies of the legal person influence the perpetrator, or enable him to commit the criminal offence.

The claim that the adopted concept of liability of legal persons for criminal offences is suitable for their criminal prosecution in cases of hate crimes is supported by a very wide range of legal persons that may be held liable for criminal offences in line with the criminal code and taking into account the limitations stipulated in the special provisions on the liability of legal persons for criminal offences.⁹ All organisational forms of commercial enterprises may be held accountable for criminal offences, as well as all forms of cooperating enterprises, institutions, crediting and other banking institutions and institutions for the insurance of property and persons, other financial institutions, funds, political parties, associations of citizens, and other associations that may acquire funds and use them in the same way as other institutions or bodies that acquire and use funds and that are recognised by law as legal persons.

Although domestic criminal codes do not foresee criminal sanctions of supervision or withholding of public funding for legal persons, which would without a doubt be effective in cases of legal persons responsible for this type of criminal offence,¹⁰ it cannot be said that these codes do not facilitate the effective sanctioning of legal persons for this type of crime. Namely, domestic criminal codes foresee three types of sanctions for legal persons responsible for criminal offences – monetary fines, confiscation of property and suspension of legal personhood, as well as security measures – publication of the judgement, prohibition from performing certain activities and confiscation of assets. These criminal sanctions can be used to successfully respond to hate crimes of which legal persons are convicted.

⁹ “Criminal Code of the Federation of BiH,” Article 2, para. 11 and Article 126, para. 1; “Criminal Code of Republika Srpska,” Article 147, para. 7 and Article 125, para. 1; “Criminal Code of the Brčko District of BiH,” Article 2, para. 13 and Article 126, para. 1.

¹⁰ The sanctions against legal persons are foreseen in Council of the European Union, “Council Framework Decision No. 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law,” *Official Journal of the European Union* L 328/55 (Brussels: Council of the European Union, December 6, 2008), Article 6, para. 1, points a) and d).

5.

Prosecutor's Obligation to Criminally Prosecute Perpetrators of Hate Crimes

The legal provisions on hate crimes distinguish between two groups of these criminal offences. The first group includes those criminal offences where the commission of the crime out of hatred (or only because of a protected characteristic¹¹) is a special qualifying circumstance on the basis of which the law stipulates a special, aggravated form of the basic criminal offence with a legally stipulated aggravated sentence that is more severe than that stipulated for the basic form of the criminal offence in question. The other group may be made up of all other criminal offences if committed out of hatred (understood as per the relevant provisions), and in that case, the court is obliged to take the motive of hatred into account and impose a more severe sentence. So, in the first group, the commission of the offence out of hatred is a qualifying circumstance, that is to say, an element of the legal description of the criminal offence. In the second group, the commission of the criminal offence out of hatred is not a legal element of that criminal offence, but a required aggravating circumstance as explicitly stipulated by law.

This difference has significant procedural implications related to the obligation of the prosecutor to undertake criminal prosecution of the perpetrator. Given that in line with the principle of legality of criminal prosecution, the prosecutor is obliged to undertake criminal prosecution if there is evidence of a criminal offence, unless stipulated otherwise,¹² it is clear that the prosecutor is always obliged to undertake criminal prosecution when there is evidence that a criminal offence has

¹¹ For the criminal offences of murder in "Criminal Code of the Federation of BiH," Article 166, para. 2, point c), grievous bodily injury in Article 177, para. 4, rape in Article 203, para. 4 and damaging another's property from Article 293, para. 3.

¹² "Zakon o krivičnom postupku Federacije Bosne i Hercegovine" [Criminal Procedure Code of the Federation of Bosnia and Herzegovina], (hereinafter: CPC FBiH), *Official Gazette of the Federation of Bosnia and Herzegovina* 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10 and 8/13, Article 18. The same legal provision is also contained in the "Zakon o krivičnom postupku Republike Srpske" [Criminal Procedure Code of Republika Srpska], (hereinafter: CPC RS), *Official Gazette of Republika Srpska* 53/12, Article 17; "Zakon o krivičnom postupku Brčko Distrikta Bosne i Hercegovine" [Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina], (hereinafter: CPC BD BiH), *Official Gazette of the Brčko District of Bosnia and Herzegovina* 44/10, Article 17.

been committed in which the commission of that offence out of hatred (or only due to a protected characteristic) is legally stipulated as a qualifying circumstance. The commission of the offence out of hatred, in that case, constitutes an element of the legal description of the criminal offence, and provided there is evidence of the offence being committed out of hatred, the prosecutor is obliged to criminally prosecute the perpetrator for the qualified form of the criminal offence.

However, the situation is not quite so clear when it comes to the other group of criminal offences, i.e. those offences where the motivation of hatred is not a legally required element of the criminal offence, but merely a required aggravating circumstance. Given that the principle of legality of criminal prosecution obliges the prosecutor to undertake criminal prosecution when there is evidence of a crime, that is to say, prosecution of a criminal offence stipulated by law, but not of aggravating circumstances accompanying the commission of the offence, the question that arises concerns the basis of the obligation of the prosecutor to criminally prosecute the perpetrator in relation to this other group of hate crimes. This is very significant because the court tries only for what the prosecutor indicts.

In the absence of relevant procedural provisions, the obligation of the prosecutor to criminally prosecute the perpetrator of a hate crime when the bias motive is not an element of the legal description of the criminal offence may be derived from the positive obligation of the state to uphold human rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and stipulated in its Article 1. Given the limited scope of this paper, this position will not be expounded in detail. It should suffice to point out that failing to criminally prosecute a hate crime - even when the bias motive is not a distinct element in the legal description of the criminal offence, in a situation where the criminal code stipulates this circumstance as a required aggravating circumstance for the purpose of sentencing- could constitute a violation of Article 14 of the ECHR (Prohibition of Discrimination) in conjunction with the violation of another human right guaranteed under the ECHR.¹³

¹³ Thus, in the case of *Šečić v. Croatia* (Application No. 40116/02), the European Court for Human Rights, in its Judgement of May 31, 2007, para. 66, stated: "The Court reiterates that 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." In the same Judgement, in paragraph 67, the Court stated: "Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning 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."

6.

Commission of a Criminal Offence out of Hatred as a Required Element of the Indictment

The factual description of the offence in the indictment must include the facts and circumstances establishing that the offence was committed out of hatred. Namely, provisions of the criminal procedure code pertaining to the contents of the indictment explicitly stipulate that the indictment must contain, inter alia, a description of the offence establishing the legally required elements of the criminal offence.¹⁴ Thus, when it comes to an indictment for a criminal offence where the motive of hatred is a qualifying circumstance or legal element of the criminal offence, the factual description of the offence in the indictment must also contain the facts and circumstances establishing that the offence was committed out of hatred. Although the cited legal provision does not stipulate that the description of the offence in the indictment must also contain the facts and circumstances establishing mitigating or aggravating circumstances, this cannot be interpreted to mean that the factual description of the offence in the indictment need not contain the facts and circumstances establishing the motive of hatred in the case of a criminal offence committed out of hatred where that circumstance is not an element of the legal description of the criminal offence in question. Such an interpretation would bring into question some of the basic premises of criminal procedure.

Namely, given the basic principles of criminal procedure and the entirety of criminal procedure rules, it would be difficult to justify the position that the legal provision obliging the court, in the case of a criminal offence committed out of hatred, to take the motive of hatred into account as an aggravating circumstance and impose a more severe sentence unless the law provides for an aggravated sentence for a qualified form of the criminal offence, implies the obligation of the court to determine in each case whether the criminal offence referred to in the indictment was committed out of hatred. The matter to be considered and determined at the main trial is defined, primarily, by the charges contained in the confirmed or trial-amended indictment and then by the positions of the defence in

¹⁴ “CPC FBiH,” Article 242, para. 1, point c); “CPC RS,” Article 242, para. 1, point v); “CPC BD BiH,” Article 227, para. 1, point c).

relation to the charges. The judgement can only pertain to the offence stated in the charges contained in the confirmed or trial-amended indictment.¹⁵ In order for the court to consider and determine at trial whether an offence was committed out of hatred in cases where the motive of hatred is not an element of the legal description of the criminal offence in question, the statement of facts in the indictment must contain the facts and circumstances establishing the prosecutor's claim that the criminal offence in question was committed out of hatred as defined by the cited legal provision.

Provisions on the so-called minimal rights of defence of persons accused of a criminal offence also support the position that the statement of facts in the indictment must contain the facts and circumstances establishing that the offence in question was committed out of hatred even when hatred is not an element of the legal description of the criminal offence. Article 6, paragraph 3, point a) of the ECHR determines that everyone charged with a criminal offence has, inter alia, the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. Domestic criminal procedure codes also mandate informing the accused of the offence with which he is charged and the grounds for suspicion against him, as well as enabling the accused to be heard in relation to all the facts and evidence against him and to present all the facts and evidence in his favour.¹⁶ Therefore, when criminal codes stipulate taking into account the motive of hatred as an aggravating circumstance and imposing a more severe sentence on the perpetrator, the statement of facts in the indictment would have to contain, even when the hatred motive is not an element of the legal description of the criminal offence in question, the facts and circumstances establishing that the criminal offence in question was committed out of hatred. Only under such conditions will the accused be ensured his right to a defence.

The requirement that the statement of facts in the indictment contain facts and circumstances establishing that the offence was committed out of hatred, even when this is not an element of the legal description of the criminal offence in question, can also be derived from the legal provision stipulating that in a convicting judgement, the court must state the facts and circumstances that constitute the elements of the criminal offence, as well as those upon which the application of provisions from the criminal code depends (in this case – application of the provision on the commission of the criminal offence out of hatred as a required aggravating circumstance for the purpose of sentencing).¹⁷ This implies

¹⁵ “CPC FBiH,” Article 295, para. 1; “CPC RS,” Article 294, para. 1; “CPC BD BiH,” Article 280, para. 1.

¹⁶ “CPC FBiH,” Article 6, para. 1 and 2; “CPC RS,” Article 6, para. 1 and 2; “CPC BD BiH,” Article 6, para. 1 and 2.

¹⁷ “CPC FBiH,” Article 300, para. 1, point a); “CPC RS,” Article 299, para. 1, point a); “CPC BD BiH,” Article 285, para. 1, point a).

the requirement for the statement of facts in the indictment to contain, apart from the facts and circumstances establishing the legal elements of the criminal offence, the facts and circumstances establishing that the offence in question was committed out of hatred even if the legal provisions pertaining explicitly to the contents of the indictment do not oblige the prosecutor to include the facts and circumstances concerning the motive for the commission of the offence in the statement of facts when that motive is not an element of the legal description of the criminal offence.¹⁸ If such facts and circumstances are left out of the statement of facts in the indictment and are not entered by the court in the statement of facts in the judgement, this necessarily raises the issue of overstepping the indictment. Namely, in such a situation, it would be difficult to avoid the question of whether the accused had been found guilty of something he was not charged with in the statement of facts contained in the indictment, i.e. whether the court had found the accused guilty of something he had not been accused of.

¹⁸ “CPC FBiH,” Article 242, para. 1, point c); “CPC RS,” Article 242, para. 1, point v); “CPC BD BiH,” Article 227, para. 1, point c).

7.

The Court's Role in Determining the Bias Motive for the Commission of the Criminal Offence

The setup of the main trial as a dispute between two parties before the court that is to resolve that dispute does not imply a passive role of the court at the main trial. The final decision on the proposed evidence of each party, that is, what evidence shall be presented at the main trial, lies in the hands of the court. Apart from that, the court is obliged to oversee the process of the presentation of evidence and examination of witnesses at the main trial, ensuring that the presentation of evidence is conducive to determining the truth and that witnesses are protected from harassment and confusion.¹⁹ The judge is also obliged to ensure a many-sided examination of the case,²⁰ so when the charges allege a hate crime, that examination also pertains to the bias motive.

Although this is a general obligation of the court in every criminal case, the special sensitivity of hate crimes and the particular need for their many-sided examination warrant reminding that domestic criminal procedure codes contain provisions stipulating that these codes determine the rules of criminal procedure mandatory for courts, prosecutors, and other participants in criminal procedure acting in criminal matters,²¹ and that these rules should ensure that no innocent person is convicted, that the perpetrator is given a criminal law sanction under the conditions foreseen by the criminal codes and on the basis of a legally defined procedure.²² This means that in the interest of the above, courts are obliged to apply the provision of the criminal procedure code authorising the court itself to order the presentation of certain pieces of evidence.²³ Therefore, when in the case of a charge for a hate crime, the court orders the presentation of certain evidence according

¹⁹ "CPC FBiH," Article 277, para. 3; "CPC RS," Article 277, para. 3; "CPC BD BiH," Article 262, para. 3.

²⁰ "CPC FBiH," Article 254, para. 2; "CPC RS," Article 254, para. 2; "CPC BD BiH," Article 239, para. 2.

²¹ "CPC FBiH," Article 1; "CPC RS," Article 1; "CPC BD BiH," Article 1.

²² "CPC FBiH," Article 2, para. 1; "CPC RS," Article 2, para. 1; "CPC BD BiH," Article 2, para. 1.

²³ "CPC FBiH," Article 276, para. 2, point e); "CPC RS," Article 276, para. 2, point d); "CPC BD BiH," Article 262, para. 2, point e).

to law, this decision cannot be considered as being in favour of the prosecution, or of the defence, and the same is true in the case of any other criminal offence. An order of the court to present evidence at the main trial constitutes an execution of its obligation to act according to the rules stipulated by the criminal procedure code in the interest of a many-sided examination of the case, ensuring that no innocent person be convicted and that the perpetrator be given a sanction under the conditions stipulated by the criminal code.

8.

Judgement Contents for Hate Crime Charges

According to the current criminal legislation of RS and BD BiH, the existence of two types of hate crimes – those where the commission of the offence out of hatred (or only due to a protected characteristic) is a qualifying circumstance and element of the legal description of the criminal offence, and those where the motive of hatred is a required aggravating circumstance for the purpose of sentencing, but not a required element of the criminal offence - does not affect the mandatory contents of the statement of facts in the judgement proclaiming the accused guilty of a hate crime. Irrespective of the type of hate crime, the statement of facts in the judgement pronouncing the accused guilty of such a crime must contain the facts and circumstances establishing that the offence was committed out of hatred. If the case concerns a criminal offence where the motive of hatred is a qualifying circumstance, the contents of the statement of facts ensue from the legal provision stipulating that in its convicting judgement, the court shall state which criminal offence the accused is found guilty of, stating the facts and circumstances constituting the elements of that criminal offence.²⁴ Since a qualifying circumstance is an element of a criminal offence establishing its qualified form, the facts and circumstances establishing that qualifying circumstance must be contained in the statement of facts in the judgement. If the case concerns a criminal offence where the motive of hatred is a required aggravating circumstance, the contents of the statement of facts ensue from the legal provision stipulating that in its convicting judgement, apart from the facts and circumstances constituting the elements of the criminal offence, the court shall also include the facts and circumstances on which the application of a certain provision of the criminal code depends.²⁵ The motive of hatred affects the application of the criminal code provision obliging the court to consider that motive an aggravating circumstance and impose a more severe sentence. It is, therefore, necessary for the statement of facts to include the facts and circumstances establishing that the offence was committed out of hatred even when that is not an element of the legal description of the criminal offence in question.

²⁴ “CPC FBiH,” Article 300, para. 1, point a); “CPC RS,” Article 299, para. 1, point a); “CPC BD BiH,” Article 285, para. 1, point a).

²⁵ Ibid.

Consequently, a judgement pronouncing the accused guilty of a hate crime must contain not just the legal term for the criminal offence, but must also indicate which provisions of the criminal code were applied.²⁶ This means that such a judgement must indicate that criminal code provisions pertaining to hate crimes were applied.

Furthermore, in line with the relevant legal provision,²⁷ the court is obliged to definitely and fully state in reasons for judgement whether it found the motive of hatred proven or not, and for what reasons. The court is also obliged to state which line of reasoning it took to resolve legal issues, especially in deciding to apply certain provisions of the criminal code to the perpetrator and his offence. This means that in the case of a conviction for a hate crime, the court is obliged to state its reasoning when determining the relevant facts and in their legal assessment, as well as when applying provisions of the criminal code pertaining to hate crimes to the accused and his offence. In the case of an acquittal of charges for a hate crime, the court is obliged to state the full and definite reasoning behind a possible finding of no proof of the offence being committed out of hatred.

If a sentence is imposed on the accused, the court must explicitly state in the reasons for judgement the circumstances taken into account for sentencing purposes.²⁸ When it comes to hate crimes where the hatred motive is not a qualifying circumstance, the court must explicitly state in reasons for judgement that the hatred motive was taken as an aggravating circumstance. Such a statement in the reasons for judgement obliges the court to also make it visible in the sentence itself.

The existing provisions of the criminal procedure codes enable, in terms of procedure, the achievement of the social aim of processing hate crimes. The explicit statement of the court included in the judgement on the proven grounds for the explicit charges brought by the prosecutor for a hate crime not only gives a clear judicial response to the prosecutor's application for the punishment of the perpetrator of a hate crime, but sends a clear message to society as a whole about the readiness to ensure the equality of all citizens as one of the basic values of contemporary society.

The analysis in this paper shows the unequal opportunities afforded by substantive criminal legislation in BiH for responding to hate crimes. This characteristic shall remain in place even after changes and amendments are made to the CC FBiH, provided the Draft Law on Changes and Amendments to the CC FBiH of June 2013 is adopted. Namely, the provision in the Draft defining the notion of hate crimes encompasses fewer protected characteristics than the CC RS and CC BD BiH. In addition, it does not foresee the appropriate changes to qualified forms of certain

²⁶ "CPC FBiH," Article 300, para. 1, point b); "CPC RS," Article 299, para. 1, point b); "CPC BD BiH," Article 285, para. 1, point b).

²⁷ "CPC FBiH," Article 305, para. 7; "CPC RS," Article 304, para. 7; "CPC BD BiH," Article 290, para. 7.

²⁸ "CPC FBiH," Article 305, para. 8; "CPC RS," Article 304, para. 8; "CPC BD BiH," Article 290, para. 8.

criminal offences where the qualifying circumstance is based on the crime being committed due to differences in certain characteristics. This will result in an unequal position of victims of hate crimes in FBiH in comparison to those in RS and BD BiH, but also an unequal position of the perpetrators of these crimes. Given the significance of this type of criminal offence, this will soon give rise to the issue of harmonisation of the criminal law framework in BiH for processing hate crimes.

In order to further equip our legislation to respond to hate crimes, it would be useful to examine the legislation pertaining to engagement in certain activities, which should be made to stipulate, for both natural and legal persons, the legal consequences of a conviction for hate crimes. Namely, domestic criminal codes foresee the possibility of laws stipulating legal consequences of convictions for certain criminal offences that may include suspension or forfeiture of certain rights or ineligibility for certain rights, and, inter alia, suspension or prohibition from performing certain activities or holding offices in government bodies, commercial societies, or other legal persons, suspension of employment, or suspension or prohibition from certain titles, occupations or professions, revocation of licences or permits, or ineligibility to apply for licences or permits issued by government bodies, or for a status recognised by government bodies to legal persons convicted of criminal offences and consequently prohibited from working on the basis of a permit, authorisation or concession. Thus, laws regulating a certain sector (for instance education) could foresee legal consequences of a conviction for a hate crime that would include a suspension or prohibition from performing certain activities, titles or duties for a certain time period.

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