

# Discussion Paper

**Discussion  
Paper  
6/2014**

**ANDREW SMITH**

**Drawing the line in  
Bosnia and Herzegovina:  
The advocacy of hatred  
constituting incitement to  
hostility, discrimination,  
and violence**



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# Drawing the line in Bosnia and Herzegovina

The advocacy of hatred constituting  
incitement to hostility, discrimination,  
and violence

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Andrew Smith



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

Sarajevo, 2014

Title:

Drawing the line in Bosnia and Herzegovina: The advocacy of hatred constituting incitement to hostility, discrimination, and violence

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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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www.analitika.ba

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Disclaimer: The views and opinions expressed in this publication are solely the authors' own and do not necessarily reflect the views and opinions of either Analitika – Center for Social Research or the donor of the publication.

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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# 1.

## Introduction

In this paper, ARTICLE 19 assesses the extent to which the criminal legal framework within Bosnia and Herzegovina (BiH) complies with its obligations under the International Covenant on Civil and Political Rights to protect and promote the right to freedom of expression while prohibiting the “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (“incitement” or “the advocacy of hatred that constitutes incitement”).

Prohibitions on incitement in each of the four BiH criminal codes are poorly formulated and conflate a number of distinct issues. Key components of incitement, such as the need for “advocacy of hatred”, are overlooked and not included as essential elements of criminal offences. One consequence of this the blurring of the line between expression that should be prohibited and other forms of protected speech, including the right to offend others or denigrate national symbols and objects. At the same time, incitement is conflated with other forms of bias-motivated crimes, such as torture or property damage.

Despite national, ethnic and religious tensions within BiH remaining very high, criminal prohibitions on incitement have not been enforced to sanction the most harmful forms of expression in the country. Absent specific provision for recognising bias-motivation in the commission of any criminal offence (prior to 2010 bias motivation was only recognised within a limited category of offences under each code), the incitement provisions have instead been used to prosecute bias motivated crimes where there was no advocacy of hatred or expression central to the case. Since reforms to the criminal codes in 2010 have provided alternative provisions for prosecutors to punish a broader range of bias-motivated crimes that are not incitement, there is now a strong case for reforming the incitement provisions so that they specifically address the most severe forms of harmful expression, while according adequate protection to fundamental rights.

The analysis arrives at a series of recommendations to reform the criminal codes in BiH so that they comply international standards. We encourage all relevant stakeholders to initiate a national debate on this issue, and for any reforms to be treated as an opportunity for not only reshaping the criminal law but assessing where alternative prohibitions and positive policy measures may more effectively promote tolerance and protect the right to freedom of expression.



## 2.

# International and Regional Standards

## 2.1 International standards

The ICCPR guarantees the right to freedom of expression in Article 19,<sup>1</sup> which “embraces even expression that may be regarded as deeply offensive”,<sup>2</sup> including expression that is prejudicial. While fundamental, the right is not absolute and may be limited in narrow circumstances. Any limitations must conform to the three-part test set out in Article 19(3) of the ICCPR, and be:

- Provided by law: a law or regulation must be formulated precisely and enacted to enable an individual to regulate his/her conduct accordingly.<sup>3</sup>
- Pursue a specified legitimate aim: protection of the rights or reputations of others,<sup>4</sup> and national security or of public order, or of public health or morals.
- Necessary and proportionate: the State must demonstrate in a “specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>5</sup>

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<sup>1</sup> Article 19 of the ICCPR reads: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or of public order, or of public health or morals.

<sup>2</sup> Human Rights Committee, General Comment No. 34, Article 19 Freedoms of Opinion and Expression (Art 19), CCPR/C/GC/34 (Human Rights Committee, September 12, 2011), para. 11.

<sup>3</sup> See, for example: Human Rights Committee, *Leonardus Johannes Maria de Groot v. The Netherlands*, Communication No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (Human Rights Committee, July 14, 1995).

<sup>4</sup> The term “others” in this context has been held by the Human Rights Committee to relate to other persons individually or as members of a community. See: Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (Human Rights Committee, October 26, 2000).

<sup>5</sup> Human Rights Committee, *Hak-Chul Shin v. Republic of Korea*, Communication No. 926/2000 (Human Rights Committee, March 16, 2004).

Additionally, Article 20(2) of the ICCPR obliges states to “prohibit by law” “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>6</sup> The term “prohibit by law” does not require criminalisation; indeed, the Human Rights Committee’s (HR Committee) have interpreted it to require States to “provide appropriate sanctions” for violations.<sup>7</sup>

Moreover, it is only in respect of speech indicated in Article 20(2) of the ICCPR that States are *required* to prohibit expression.<sup>8</sup> This is distinct from Article 19(3), which narrowly prescribes the circumstances under which states are *permitted* to restrict the right to freedom of expression.<sup>9</sup> In this respect Article 20(2) constitutes the *lex specialis*, providing an *additional* rather than a *substitutive* obligation on States. Any restriction pursuant to Article 20(2) of the ICCPR must also comply with the three-part test under Article 19(3).<sup>10</sup> Limitations on “incitement” are ordinarily framed as pursuing the legitimate aim of “protecting the rights of others”, for example the right to life (Article 6) and the right to non-discrimination (Article 2(1) and Article 26), but any restriction must be necessary and proportionate for achieving those aims.

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<sup>6</sup> By contrast, it should be noted that the Universal Declaration of Human Rights (UDHR) does not *require* states to prohibit any forms of expression. However, the scope of Article 19 of the UDHR is limited by the necessity to secure “due recognition and respect for the rights and freedoms of others” and the “duties everyone holds to the community” (Article 29) and other principles set forth in the UDHR (Article 30). Furthermore, states are required to protect individuals from discrimination, including incitement to discrimination (Article 7). The right to equality is reiterated in Article 2, which provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind” based on a non-exhaustive list of characteristics. General Assembly of UN, Universal Declaration of Human Rights: Adopted and proclaimed by UN General Assembly resolution 217 A (III) of 10 December 1948 (Paris: General Assembly of UN, 1948).

<sup>7</sup> “For Article 20 to become fully effective, there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy,” Office of the High Commissioner for Human Rights (OHCHR), General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20), (OHCHR, July 29, 1983), para. 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> Human Rights Committee, General Comment No. 34, para. 52.

<sup>10</sup> Human Rights Committee, *Malcolm Ross v. Canada*, para. 10.6.

## 2.2 European standards

The European Convention on Human Rights (the ECHR) guarantees the right to freedom of expression in Article 10,<sup>11</sup> which has long been recognised as encompassing speech that “offends, shocks or disturbs”.<sup>12</sup>

The ECHR does have an equivalent provision to Article 20(2) of the ICCPR requiring States to prohibit “incitement”. However, the European Court of Human Rights (“the European Court”) has recognised the necessity of restrictions on certain forms of harmful expression to uphold the objectives of the Convention as a whole.<sup>13</sup> However, particularly strict supervision is exercised in respect of criminal sanctions, and the European Court has frequently found these restrictions to be disproportionate.<sup>14</sup>

While the European Court has not concretely defined “hate speech”, the term has been employed decisively to preclude reliance on Article 10.<sup>15</sup> In its case-by-case approach, the European Court has used alternate and arguably inconsistent methodologies for determining whether restrictions on certain speech are compatible with the ECHR.

Article 17 of the ECHR (prohibition of abuse of rights) has been invoked to preclude applicants from relying on the Article 10 protection for freedom of expression to defend speech “aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention.” The European Court has suggested that for Article 17 to be invoked:

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<sup>11</sup> Article 10 (1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; Article 10 (2), The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Council of Europe, European Convention on Human Rights (Rome: Council of Europe, September 4, 1950).

<sup>12</sup> European Court of Human Rights (ECtHR), *Handyside vs. United Kingdom*, December 7, 1976.

<sup>13</sup> European Court of Human Rights (ECtHR), *Erbakan vs. Turkey*, July 6, 2006, para. 56: “As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.” See also: European Court of Human Rights (ECtHR), *Gündüz vs. Turkey*, December 4, 2003, para. 22.

<sup>14</sup> European Court of Human Rights (ECtHR), *Jersild vs. Denmark*, September 23, 1994, para. 35.

<sup>15</sup> ECtHR, *Gündüz vs. Turkey*, para. 41.

“The aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence to undermine the nation’s democratic and pluralistic political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.”<sup>16</sup>

It has been applied in cases concerning racist and xenophobic forms of expression,<sup>17</sup> and instances of Holocaust denial.<sup>18</sup>

In a parallel series of cases, the European Court has accepted that much harmful expression falls within the scope of the protection of Article 10(1), but may be limited according to the framework provided in Article 10(2). Particular attention is paid in this assessment to a variety of factors, such as the purpose pursued by the speaker,<sup>19</sup> the content of the expression,<sup>20</sup> its context,<sup>21</sup> or form of dissemination, and the potential impact of the expression.<sup>22</sup>

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<sup>16</sup> European Court of Human Rights (ECtHR), *Lehideux and Isorni vs. France*, September 23, 1998, concurring opinion of Judge Jambrek, para 2.

<sup>17</sup> European Court of Human Rights (ECtHR), *Norwood vs. the United Kingdom*, November 16, 2004; ECtHR, *Jersild vs. Denmark* (references to Article 17 concerned the expression of the originators of the expression in issue, who were not party to the complaint); European Court of Human Rights (ECtHR), *Glimmerveen and Hagenback vs. The Netherlands*, October 11, 1979.

<sup>18</sup> European Court of Human Rights (ECtHR), *Garaudy vs. France*, June 24, 2003; European Court of Human Rights (ECtHR), *Honsik vs. Austria*, October 18, 1995; European Court of Human Rights (ECtHR), *Marais vs. France*, 24 June 24, 1996.

<sup>19</sup> ECtHR, *Erbakan vs. Turkey*, para. 55; ECtHR, *Gündüz vs. Turkey*, para. 37; European Court of Human Rights (ECtHR), *Pedersen and Baadsgaard vs. Denmark*, June 19, 2003, para. 76.

<sup>20</sup> European Court of Human Rights (ECtHR), *Incal vs. Turkey*, June 9, 1998, para. 51; European Court of Human Rights (ECtHR), *Féret vs. Belgium*, July 16, 2009, para. 73.

<sup>21</sup> ECtHR, *Erbakan vs. Turkey*, para. 64; ECtHR, *Jersild vs. Denmark*, para. 31; European Court of Human Rights (ECtHR), *Sürek vs. Turkey*, July 8, 1999, para. 63; European Court of Human Rights (ECtHR), *Seurot vs. France*, May 18, 2004.

<sup>22</sup> In relation to broadcast media, see: ECtHR, *Jersild vs. Denmark*, para. 31 and 34; or ECtHR, *Gündüz vs. Turkey*, para. 49. In relation to artistic expression, see: European Court of Human Rights (ECtHR), *Karatas vs. Turkey*, July 8, 1999, para. 29; or European Court of Human Rights (ECtHR), *Vereinigung Bildender Künstler vs. Austria*, January 25, 2007, para. 33.

## 3.

# Hate Crime, Hate Speech, Incitement

The terms “hate crime” and “hate speech” are often used interchangeably, despite that they are distinct concepts requiring different responses from States. This conflation often leads to confusion regarding appropriate responses to “hate speech” and in its more severe form, “incitement”, in particular regarding the protection of the right to freedom of expression.

### 3.1 Hate crime

The term “hate crime” refers to the commission of a criminal offence where the perpetrator targeted the victim in whole or in part out of a bias motivation. Labelling a criminal offence as a “hate crime” serves as a vehicle for acknowledging the broader prejudicial context in which a person was victimised. This symbolises a rejection by society of “hate crimes”, inspires confidence among marginalised individuals in the criminal justice system, and allows the victim to feel that their full experience of the crime has been recognised.

As the Organisation for Security and Cooperation in Europe (the OSCE) has indicated, “hate crimes” are characterised by the existence of two elements:

- A “base” criminal offence; and
- The crime being committed out of a “bias motivation”, which means the perpetrator chose the target of the crime based on the victim’s “protected” characteristic.<sup>23</sup>

The term “bias motivated crime” therefore more accurately conveys that criminal liability is contingent on the proving of a base criminal offence with a bias motive, and does not require proof of hatred as an extreme emotional state. For the most part, prejudicial expression will not be an element of the base criminal offence. Rather, prejudicial expression uttered immediately prior to, during, or after the commission of a criminal offence may be an *indicator of a bias motivation*. Where

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<sup>23</sup> OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (Warsaw: OSCE/ODIHR, 2009).

an act of expression is not an element of the base criminal offence, the right to freedom of expression will not be engaged.

### 3.2 “Hate speech” and “Incitement”

“Hate crimes” should be distinguished in the most part from “hate speech”, as not all “hate speech” is or should be criminalised or prohibited, and in many cases the right to freedom of expression protects this speech.

However, in the absence of a universally agreed definition of “hate speech”, the term is the subject of a great deal of confusion. The Council of Europe Committee of Ministers has indicated that the term “hate speech” includes:

“[A]ll forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.”<sup>24</sup>

This broad definition encompasses a wide range of expression that is protected by Article 10 of the ECHR, and includes but is much broader than “incitement” which Article 20(2) of the ICCPR *requires* States to prohibit and denotes a more specific and severe form of expression. Domestic legislation in this area too, varies in breadth and specificity. Consequently there is a great deal of confusion regarding when hateful or intolerant **expression should be** proscribed. If criminal proscription is available, such offenses could also be accurately labelled “bias motivated crimes” or “hate crimes”.

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<sup>24</sup> Council of Europe, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech” (Strasbourg: Council of Europe, October 30, 1997); See also ECtHR, *Gündüz vs. Turkey*, para. 22 and 43.

## 4.

# Interpreting and Implementing Article 20(2) of the ICCPR

The interpretation and implementation of Article 20(2) of the ICCPR has been the subject of extensive examination by international fora, leading to the 2012 adoption of the Rabat Plan of Action,<sup>25</sup> which reflects numerous policy recommendations made by ARTICLE 19. Those recommendations are summarised in this section.<sup>26</sup>

### 4.1 Definition of key terms

ARTICLE 19 recommends that States should adopt uniform and clear definitions of the key terms of Article 20(2) of the ICCPR to ensure that interpretation given to these terms by domestic courts is consistent with international standards:

- “*Hatred*” is a state of mind characterised as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>27</sup>
- “*Discrimination*” shall be understood as “any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status, colour which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”
- “*Violence*” shall be understood as “the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation.”

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<sup>25</sup> In 2011 - 2012, the Office of the UN High Commissioner for Human Rights organised several regional workshops leading to the: Office of the High Commissioner for Human Rights (OHCHR), Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (OHCHR, 2011).

<sup>26</sup> ARTICLE 19, *Prohibiting Incitement to Discrimination, Hostility or Violence - Policy Brief* (London: ARTICLE 19, 2012).

<sup>27</sup> The term “hatred” in this context should be distinguished from the use of the term “hate” when referring to bias motive in a bias motivated crime or hate crime.

- “*Hostility*” shall be understood as “a manifested action of an extreme state of mind.” Although the term implies a state of mind, an action is required. Hence, hostility can be defined as the manifestation of hatred – that is the manifestation of “intense and irrational emotions of opprobrium enmity and detestation towards the target group.”

While States are not required to employ this exact language when implementing Article 20(2) of the ICCPR, they must avoid interpreting any terms in domestic legislation as implying broader meanings or as implying a lower threshold of harm than those advanced above.

## 4.2 Incitement requires intent

The intent of the speaker to incite others to commit acts of discrimination, hostility or violence should be considered a crucial and distinguishing element of incitement as prohibited by Article 20(2) of the ICCPR. Importantly, the element of *intent to compel others to act* distinguishes incitement from other forms of expression that may offend, shock or disturb but are nevertheless protected under Article 19(2) of the ICCPR.

ARTICLE 19 recommends that domestic legislation should always explicitly state that the crime of incitement is an *intentional crime*<sup>28</sup> and not a crime that can be committed with recklessness or negligence. While Article 20(2) of the ICCPR does not explicitly stipulate this, ARTICLE 19 believes that the term “advocacy” necessarily implies intention, and notes that this is an essential element of the offence in many countries, for example: the UK, Ireland, Canada, Cyprus, Malta, and Portugal.

## 4.3 All incitement cases should be strictly assessed under a six-part test

ARTICLE 19 recommends that judicial authorities assess all incitement cases under a six-part test to determine that the severity of the expression in issue reaches the threshold of “incitement” and therefore *may* require prohibition.

- **Context of the expression:** the expression must be put within the social and political context prevalent at the time it was made and/or disseminated. Such analysis would consider issues such as the existence of conflicts in

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<sup>28</sup> In some jurisdictions, also acting “wilfully” or “purposefully.”



- society, the existence and history of institutionalised discrimination, the legal framework, and the media landscape. It could also take into consideration: outbreaks of violence against a particular minority; regular and frequently negative media reports in respect of them, and the lack of access to alternative sources of information for opposing views (i.e. alternative media, including the Internet); structural inequalities and discrimination against that minority; the lack of anti-discrimination legislation or effective implementation (where legislation is in place and effectively implemented it indicates a protective legal environment where vulnerable groups *may* be less vulnerable to acts of incitement), or the lack of broad condemnation against hateful statements. An important aspect of the context would be the degree to which opposing or alternative ideas are present and available, as if only a single unchallenged source of information is available it will yield more influence over its audience.
- **The speaker:** the analysis should examine the position of the speaker (i.e. the proponent of the expression) and his or her authority or influence over the audience. For example, the expression of politicians or prominent members of political parties, as well as public officials or persons of similar status (e.g. teachers or religious leaders), generally receives greater attention and exerts greater influence over others. This analysis should also examine the relationship of the audience to the speaker, and issues such as the degree of vulnerability and fear of the various communities, including those targeted by the speaker, or whether the audience is characterised by excessive respect for authority.<sup>29</sup> This would, in part, be assessed according to evidence of a propensity of a certain community to respond to incitement in the past.
  - **Intent:** an essential element of the offence must be to prove the intent of the speaker to incite others to hostility, discrimination or violence. Determining the intent is a complex matter and requires an assessment of the case and its circumstances as a whole.<sup>30</sup> Intent can be determined from aspects such as the language used by the speaker, the scale and repetition of the particular communication or objectives pursued by the speaker (e.g. incitement may not apply to cases where a person seeks to inform the public about a matter of general interest for reasons such as the dissemination of news, historical research or attempts to expose the wrongdoings of government in the interests of public accountability). In relation to historical denial laws (e.g. prohibitions on denying the occurrence of certain historical events, e.g. a genocide) the European Court of Human Rights has stated that “it is an integral part of freedom of expression to seek historical truth” and has recognised the right of

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<sup>29</sup> Susan Benesch, *Dangerous Speech: A Proposal To Tackle Violence* (New York: World Policy Institute, 2011).

<sup>30</sup> See, for example: ECtHR, *Jersild vs. Denmark*, para. 31.

individuals to be informed of the circumstances of historical events.”<sup>31</sup> Where any denial of historical events is thought to be committed with the intention of inciting hostility, discrimination or violence, the six-part test must still be applied to establish the severity of the expression at issue.

- **Content of the expression:** the analysis of the content will typically include examination of what was said, the form and the style of the expression, whether the expression contained direct calls for discrimination or violence, the nature of the arguments deployed or the balance struck between the arguments. This analysis should also look at the targeted audience (those that the speech was intending to incite), how the targeted group are described, and the form of the expression. It should also be noted that under international standards, it has been recognised that certain forms of expression provide “little scope for restrictions of freedom of expression;”<sup>32</sup> in particular artistic expression, public interest discourse, academic discourse and research and statements of facts and value judgements.
- **Extent and magnitude of the expression:** the analysis should examine the public nature of the expression,<sup>33</sup> the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume (e.g. one leaflet as opposed to broadcasting in the mainstream media, or singular dissemination as opposed to repeated dissemination). If the expression was disseminated through media, consideration should be given to media freedom, in compliance with international standards.<sup>34</sup>
- **Likelihood of harm occurring, including its imminence:** in order to qualify as incitement, it must be established that there was a probability of harm actually occurring as a result of the expression. It should be noted that a

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<sup>31</sup> European Court of Human Rights (ECtHR), *Chauvy vs. France*, September 29, 2004; See by contrast, Human Rights Committee, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (Human Rights Committee, November 8, 1996); For a more in depth analysis of historical denial laws, see: ARTICLE 19, *France: Senate must reject Armenian genocide law* (London: ARTICLE 19, January 19, 2012).

<sup>32</sup> ECtHR, *Erbakan vs. Turkey*, para. 68.

<sup>33</sup> ARTICLE 19 suggests that this should include looking at issues such as whether the statement or communication was circulated in a restricted environment or whether it was widely accessible to the general public; whether it was made in a closed place accessible by ticket or in an exposed and public area; whether the communication was directed at a non-specific audience (the general public); or whether the speech was directed to a number of individuals in a public place, and whether the speech was directed to members of the general public.

<sup>34</sup> As the ECtHR noted, “while the press must not overstep the boundaries set, *inter alia*, for the protection of the vital interests of the State, [...] it is nevertheless incumbent on it to impart information and ideas on political issues, including divisive ones. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. The freedom to receive information or ideas provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of their leaders.” See: European Court of Human Rights (ECtHR), *Halis Dogan vs. Turkey*, February 7, 2006.

number of domestic laws have established the occurrence of violence as an aggravating circumstance in criminal cases. However, ARTICLE 19 notes that incitement, by definition, is an inchoate crime and the action advocated in the expression need not occur. However, courts should determine whether there was a reasonable probability that the speech would succeed in inciting the audience into committing the harm advocated.<sup>35</sup> The considerations must be also given to “whether the ordinary, reasonable viewer would understand from the public act that he or she is being incited to hatred.”<sup>36</sup> ARTICLE 19 also argues that the possibility of such harm should be imminent: it should be made sure that the length of time that has passed between the speech and the time when the intended acts could take place is not be so long that the speaker could not reasonably be held responsible for the eventual result.

## 4.4 Sanctions for incitement should not be limited to the criminal law

Article 20(2) of the ICCPR does not require States to criminalise but envisages a range of sanctions through both the civil and administrative law, which both afford greater opportunities for victim-centred proceedings and remedies:

- *Civil law sanctions* should be a part of a comprehensive anti-discrimination framework.<sup>37</sup> The remedies for victims should include compensation in the form of pecuniary and non-pecuniary damages,<sup>38</sup> and the right of correction

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<sup>35</sup> ARTICLE 19 suggest that this examination should look at issues such as whether the speech is understood by its audience to be a call to acts of discrimination, violence or hostility; whether the speaker is able to influence the audience; whether the audience had the means to resort to the advocated action, and commit acts of discrimination, violence or hostility, or whether the targeted victim group suffered or recently been the target of discrimination, violence or hostility. C.f. Benesch, *Dangerous Speech*.

<sup>36</sup> New South Wales Administrative Decisions Tribunal, *Ekerawali vs. Network Ten Pty Ltd*, November 18, 2008, December 16, 2008.

<sup>37</sup> E.g.: “Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,” *Official Journal of the European Union*, L 18/2000.

<sup>38</sup> Council of Europe Committee of Ministers Recommendation No. R (97) 20 on ‘Hate Speech’, Principle 2. The awards of damages should be proportional and carefully and strictly justified and motivated so that they do not have a collateral chilling effect on the freedom of expression.

- and reply.<sup>39</sup> States should also allow NGOs to bring civil claims in relevant cases and should provide for the possibility of bringing class actions in discrimination cases. This is especially important in cases concerning vulnerable groups, where individual victims are often reluctant to initiate cases for fear of reprisals or further victimisation.
- *Administrative sanctions* should also be considered to enforce rules established by communication, media and press councils, or any other regulatory bodies, for example formal codes of conduct and employment rules for politicians, public officials, and civil servants such as teachers. These measures should support the principle that public officials at all levels should, as far as possible, avoid making statements that promote discrimination or undermine equality and intercultural understanding. Sanctions may include an order to: issue a public apology; issue a correction; provide a right of reply; allocate broadcasting time to publicise the outcome of an administrative decision, or the imposition of fines.
  - *Criminal penalties* should be imposed only in the most serious cases and as a last resort measure “to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.”<sup>40</sup> Consideration should be given to the potential for criminal proceedings to give greater exposure to the incitement expression, and for the outcome of any proceeding to allow the accused to present themselves as martyr if convicted, or as vindicated if acquitted.

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<sup>39</sup> *Ibid*; Also, ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (London: ARTICLE 19, 2009), Principle 7. The right of reply gives any person the right to have a mass media outlet disseminate his or her response where the publication or broadcast by that media outlet of incorrect or misleading facts has infringed a recognised right of that person, and where a correction cannot reasonably be expected to redress the wrong. This remedy also has the result of encouraging further dialogue, rather than restricting it.

<sup>40</sup> European Commission for Democracy through Law (Venice Commission), *Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred* (Venice: European Commission for Democracy through Law, October 17-18, 2008).

## 5.

# Incitement in the BiH Criminal Codes

This section assesses the incitement provisions in the four Criminal Codes in BiH for compliance with international standards on freedom of expression. These are Article 145a of the BiH Criminal Code, Article 163 of the Federation of BiH Criminal Code (FBiH), Article 294a of the Republika Srpska Criminal Code (RS), and Article 160 of the Brcko District Criminal Code (BDBiH).<sup>41</sup>

Aspects of the obligation to prohibit incitement as provided for by Article 20(2) of the ICCPR are incorporated into each of these provisions. While they vary in the language used and the breadth of conduct proscribed, they share a number of common flaws from a freedom of expression perspective:

### 5.1 The need for harmonisation

ARTICLE 19 is concerned that four different formulations of the prohibition on incitement exist in BiH, as this creates significant obstacles to any effective national and coordinated strategy in this area. In particular, collecting reliable, comparable and disaggregated data on the problem of incitement across BiH is incredibly difficult absent a harmonised approach in the legislation.

Considering the shared experience across BiH of the consequences of intolerance and hatred, and the shared weaknesses at present in responding to incitement, there is a strong case for a coordinated response, and if possible harmonised legal reforms in this area.

### 5.2 “Advocacy of hatred”, the need for expressive conduct

The term “advocacy” is used in Article 20(2) of the ICCPR to target any expression of hateful opinions or ideas aimed at compelling others to commit a proscribed action. None of the provisions in the BiH criminal codes pertaining to this crime contain the term “advocacy” or equivalent language to indicate that the communication of information or ideas must be an essential element of incitement.

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<sup>41</sup> See Annex 1.

In ARTICLE 19's view, incitement requires expressive conduct, and this is reflected in a number of jurisdictions. For example, in Canada, any incitement must be "by communicating statements in any public place"<sup>42</sup>, in South Africa, the proscribed conduct is limited to acts of publication, propagation, advocacy and communication of words,<sup>43</sup> and in Sweden the dissemination of a statement or communication is required.<sup>44</sup>

Absent any requirement for expressive conduct, the scope of these provisions broadens to encompass non-expressive acts where there is no indication that the accused has engaged in "advocacy", i.e. expression intended to compel others to engage in hostile, discriminatory or violent acts. As a consequence, it has been documented that these provisions are applied to conduct that is not "incitement" as envisaged by the ICCPR, but to situations where the right to freedom of expression is not engaged, such as acts of violence or property destruction. In these cases alternative provisions on general bias-motivated crime would more accurately describe the conduct at issue.

This problem is compounded in the BiH context by penalty enhancements in the Criminal Codes for FBiH, RS, and BDBiH for so-called "incitement" committed through specified acts, many of which would not be considered "advocacy" or even "expressive" under the ICCPR.<sup>45</sup> These include: duress (or coercion and molestation in BDBiH), torture, jeopardising the safety of any person, damaging other people's belongings, desecrating monuments, memorials or graves.<sup>46</sup> While these acts should legitimately be subject to criminal sanctions, their inclusion within the provisions on "incitement" improperly conflates "hate crimes" and "incitement". Damaging a person's belongings, for example, is not an act of expression that could be considered "advocacy of hatred that constitutes incitement", i.e. the act does not involve the communication of information or ideas that compel others to acts of hostility, discrimination or violence. Punishing such acts as "incitement" adds confusion to where the right to freedom of expression is engaged and the circumstances under which that right may be subject to legitimate restrictions. Distinguishing expressive acts of "advocacy of hatred" that constitute incitement from non-expressive hate crimes is therefore important. In the context of property damage where information or ideas are communicated, e.g. in cases of graffiti, the act of property damage may also constitute incitement – but must nevertheless be assessed according to the six-part test. While the threshold is high, it is important

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<sup>42</sup> "Criminal Code of Canada," *Ministry of Justice* RSC, 1985, c. C-46, Article 319.

<sup>43</sup> "Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000," *Republic of South Africa Government Gazette* 20876, section 10(1).

<sup>44</sup> "Swedish Penal Code," *Ministry of Justice* Ds 1999:36, Chapter 16, section 8.

<sup>45</sup> Incitement in the Criminal Code of BiH (Article 145a) does not include equivalent provisions.

<sup>46</sup> The provisions also include "exposing national, ethnic or religious symbols to derision," but this aspect is analysed separately below.

to distinguish incitement from other forms of speech offences, such as direct threats of violence, which may also be communicated through graffiti.

It is perhaps not surprising then, as observed by the OSCE mission to BiH, that incitement provisions have not been applied to address expressive acts of “advocacy of hatred” constituting incitement. Instead, they have been enforced to prosecute bias-motivated criminal conduct such as attacks against the person or property damage.<sup>47</sup> This can, in part, be attributed to the lack of provision prior to legislative reforms in 2010 for recognising bias-motive in the commission of criminal offences, leading to over-reliance on the incitement provisions. However, the 2010 reforms rectified this through the creation of new offences or by allowing “hatred” to be considered an aggravating factor in sentencing.<sup>48</sup> These reforms, and the need to distinguish hate crime from incitement in particular, add weight to the case for narrowing the incitement provisions to conform with Article 20(2) of the ICCPR.

### 5.3 Inflammatory or provocative expression

The term “inflammate” is included alongside the term “incite” in each of the provisions in a manner where it can be interpreted as an alternative rather than additional element of the offence. This potentially expands the scope of the prohibition to cover expression that is offensive, but where the speaker does not intend to incite discrimination, hostility or violence.

The term “inflames” is not found in Article 20(2) of the ICCPR and is much less specific than the term “incite”. The term “incite” clearly denotes an expressive act of advocacy *intended to compel others to a proscribed action*. ARTICLE 19 is concerned that inflammatory speech may be interpreted to include a range of expression that, while provocative, shocking, offensive or disturbing, is without intent to incite others to engage in hostile, discriminatory or violent acts. However, intent must be decisive in determining this question, with regard also being paid to each part of the six-part threshold test outlined above.

Each of the provisions on incitement, with the exception of the Criminal Code of BiH, further criminalise “exposing national, ethnic or religious symbols to derision”. International standards are clear that symbols, ideas or institutions cannot be

<sup>47</sup> OSCE Mission to Bosnia and Herzegovina *Tackling Hate Crimes: An analysis of bias-motivated incidents in Bosnia and Herzegovina with recommendations* (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2012), pp. 19-20.

<sup>48</sup> *Ibid.* Prior to 2010, the Criminal Codes for FBiH and BDBiH only recognized aggravated offences for murder, grievous bodily harm, and malicious mischief, in addition to the provisions on incitement to hatred cited above. It was not until the 2010 reforms that the Criminal Code for BiH incorporated a provision on incitement. In RS and BDBiH, the 2010 reforms introduced bias motivation (“hatred”) as an aggravating circumstance for the sentencing of any criminal offence, as well as aggravated forms of numerous additional serious criminal offences.

protected from criticism or ridicule, as this is an illegitimate interference with the right to freedom of expression.<sup>49</sup> This is important to protect critical discussion of matters of great public importance, including discussion of religion, flags, symbols, and institutions, even where some people find contributions to those debates offensive. While the derision of symbols may, under certain circumstances, advocate hatred in manner that constitutes incitement, the essential elements of incitement must nevertheless be present and proven in order to justify a restriction on expression.

The provisions do not distinguish the advocacy of hatred that incites others to commit acts of hostility, discrimination or violence, from offensive expression that provokes a violent reaction not intended by the speaker. The advocacy of hatred intended to incite hostility, discrimination or violence against a protected group or individual must be distinguished from expression that offends individuals to the extent that they react violently – either in an untargeted way or against the proponent of the expression or persons associated with them. Certain legitimate expression, for example the criticism of religious ideas or the discussion of historical figures, may cause widespread disturbances, but in those circumstances any criminal culpability rests with the person or persons engaging in violent acts, or with those who incite that reaction.

## 5.4 Hatred, discord, or hostility

Each of the Criminal Codes in BiH prohibits incitement of “hatred, discord, or hostility.” This formulation is much broader than Article 20(2) of the ICCPR.

The ICCPR does not require States to prohibit the “incitement of hatred”, but instead proscribes the advocacy of hatred as a vehicle for inciting discrimination, hostility, or violence. Therefore the incitement of “hatred” as an emotional state is a restriction on the right to freedom of expression not required by the ICCPR, and which may violate Article 19(3).

Moreover, the prohibitions on incitement in BiH do not reference the specific harms of discrimination or violence – both harms that Article 20(2) of the ICCPR seeks to prevent. While discrimination or violence may be inferred from the terms “discord” or “hostility”, these do not denote these concepts and may be interpreted more broadly to allow less severe expression to be considered as incitement.

Additionally, the Criminal Code for RS prohibits “spreading ideas of superiority of one race or nation over another.” In ARTICLE 19’s view, spreading ideas of superiority is of vague terminology and may be subject to abuse, and such expression should only be prohibited where all of the elements of incitement under Article 20(2) of the ICCPR are present, as described above.

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<sup>49</sup> Human Rights Committee, General Comment No. 34, para. 38.



## 5.5 Limited protected characteristics

Each of the Criminal Codes in BiH prohibits incitement on the basis of nationality, religion or race. While these three protected characteristics mirror those of Article 20(2) of the ICCPR, the list should be considered non-exhaustive, and should include other grounds recognised under international law, e.g. disability, sexual orientation or gender identity, and others.

## 5.6 Enhanced penalties for abuse of office

All of the criminal codes provide enhanced penalties for individuals who commit the offence of incitement through abuse of their public office or authority, except for the Criminal Code for RS.

ARTICLE 19 notes that public officials hold a particular responsibility to not engage in harmful forms of expression, and that it is therefore legitimate to consider an individual's official position as an aggravating circumstance when determining sentencing. However, the identity of the speaker, including their official position, is also relevant to identifying expression as incitement in the first place, and should not only be considered as an aggravating factor in sentencing but also as an integral part of assessing the severity of the expression.

## 5.7 Proportionality of sanctions

Due consideration must also be given to the principle of proportionality when applying sanctions for incitement.

ARTICLE 19 is particularly concerned that the criminal codes for RS and BDiH both contain powers to order the forfeiture of the equipment used for disseminating the harmful expression. Ordering the confiscation of communications equipment is a severe sanction, likely to impact not only the individual convicted of incitement, but also all of the persons sharing their household or business premises. Such confiscations not only affect the right to property, but also are essential to all modern forms of seeking, imparting, and receiving information and ideas. Such orders must always be regarded as being a particularly severe restriction on the right to freedom of expression, and likely one that would be disproportionate.

We also recall that Article 20(2) of the ICCPR only requires States to prohibit incitement, and not to criminalise it. Much less does it require States to only have available as sanctions custodial sentences. Restrictions on freedom of expression must also comply with the principle of proportionality under Article 19(3) of the ICCPR. For this reason, alternative non-custodial sanctions should also be considered, including through both administrative and civil law.

## 6.

# Conclusion and Recommendations

ARTICLE 19 finds that the prohibitions on incitement in the four Criminal Codes of the BiH are all too broad in their scope, particularly in light of the 2010 legislative reforms that have given prosecutors measures outside of these prohibitions for targeting bias-motivated crimes.

We provide the following recommended reforms with a view to bringing the incitement provisions within BiH into conformity with Article 20(2) of the ICCPR and to ensure the protection of the right to freedom of expression:

- Harmonisation between the four prohibitions on incitement in BiH;
- Any reforms to the provisions should clearly express the intent of the legislators to implement Article 20(2) of the ICCPR;
- Any criminal prohibition should apply only to expressive acts, specifically the “advocacy of hatred” that reaches the threshold of “incitement” to a proscribed outcome, which should include discrimination and violence;
- Penalty enhancements for non-expressive acts that are not “incitement” should be repealed and, where appropriate, dealt with as distinct bias motivated crimes;
- “Exposing national, ethnic or religious symbols to derision” should not be a criminal offence or the basis for a penalty enhancement;
- References to inflammatory expression should be removed;
- The offence of incitement should require specific intent;
- When interpreting the offence of incitement, prosecutors and judges should make reference to the six-part threshold test and consider: the identity of the speaker, context, intent, content, extent and magnitude of the expression, and the likelihood of harm occurring, including its imminence;
- Due regard must be paid to the principle of proportionality in sentencing, and the availability of less severe sanctions that would achieve the same intended effect;
- Powers to order the confiscation of communications equipment as punishment should be repealed;
- Any reforms to the law of incitement must be supported by a public information campaign, and trainings for law enforcement, prosecutors, and the judiciary.

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# Annex I

## Criminal Code of BiH

Article 145a – Inciting National, Racial and Religious Hatred, Discord or Hostility

- 1) Whoever publicly incites or inflames national, racial or religious hatred, discord or hostility among the constituent peoples and others who live in Bosnia and Herzegovina shall be punished by imprisonment for a term between three months and three years;
- 2) Whoever perpetrates the criminal offence referred to in paragraph (1) by abuse of office or authority shall be punished by imprisonment for a term between one and ten years.

## Criminal Code of the FBiH

Article 163 – Inciting National, Racial or Religious Hatred, Discord or Hostility

- 1) Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation of Bosnia and Herzegovina shall be punished by imprisonment for a term of between three months and three years.
- 2) Whoever commits an offence under paragraph (1) above by employing duress and torture, jeopardising the safety of any person, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments or graves, shall be punished by imprisonment for a term of between one to eight years.
- 3) Whoever perpetrates the criminal offence referred to in paragraph (1) of this Article by abuse of office or authority shall be punished by imprisonment for a term between one and ten years.
- 4) Whoever commits an offence under paragraph (2) above by abuse of his official capacity, or if the offence results in riots, violence or any other serious consequence to the coexistence of the constituent peoples and others who live in the Federation of Bosnia and Herzegovina, shall be punished by imprisonment for a term of between one and ten years.

## Criminal Code of the RS

Article 294a (prior to 2010 reforms, Article 390) – Inciting National, Racial or Religious Hatred, Discord or Hostility

- 1) Whoever incites and inflames national, racial or religious hatred, discord or hostility, or spreads ideas of superiority of one race or nation over another, shall be punished by a fine or imprisonment for a term of not more than two years.
- 2) Whoever commits an offence under paragraph (1) above by employing duress and torture, jeopardizing the safety of any person, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments or graves, shall be punished by imprisonment for a term of between six months and five years.
- 3) Where an offence under paragraphs (1) and (2) above results in riots, violence or any other serious consequence to the co-existence of the constituent peoples and others who live in the Republika Srpska, the offender shall be punished by imprisonment for a term of between one and eight years.
- 4) Any material or article bearing messages under paragraph (1) above and equipment for their production, duplication or distribution shall be subject to forfeiture.

## Criminal Code of BDBiH

Article 160 – Inciting National, Racial or Religious Hatred, Discord or Hostility

- 1) Whoever incites and inflames national, racial or religious hatred, discord or hostility amongst constitutional peoples and others in the Brčko District BiH, shall be sentenced to imprisonment of one to five years.
- 2) If the criminal offence referred to in paragraph (1) of this Article has been committed by coercion, molestation, jeopardizing of safety, exposing to derision of national, ethnic or religious symbols, damaging belongings of another, desecrating monuments, memorials or graves, the perpetrator shall be sentenced to prison from one to eight years.
- 3) Whoever commits the criminal offence referred to in paragraph 1 of this Code through the abuse of his position or authority or if these offences resulted in disorder, violence, or other grave consequences for the joint life of constitutional nations and others living in the Brčko District BiH, shall be punished by the sentence referred to in paragraph 2 of this Article, shall be sentenced to prison from one to ten years.
- 4) Any material or article bearing messages under paragraph 1 above and equipment for their production, duplication or distribution shall be subject to forfeiture.

# Bibliography

## Books, Articles and Reports

1. ARTICLE 19. *France: Senate must reject Armenian genocide law*. London: ARTICLE 19, January 19, 2012.
2. ARTICLE 19. *Prohibiting Incitement to Discrimination, Hostility or Violence - Policy Brief*. London: ARTICLE 19, 2012.
3. ARTICLE 19. *The Camden Principles on Freedom of Expression and Equality*. London: ARTICLE 19, 2009.
4. Benesch, Susan. *Dangerous Speech: A Proposal To Tackle Violence*. New York: World Policy Institute, 2011.
5. European Commission for Democracy through Law (Venice Commission). *Report on the Relationship between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*. Venice: European Commission for Democracy through Law, October 17-18, 2008.
6. OSCE/ODIHR. *Hate Crime Laws: A Practical Guide*. Warsaw: OSCE/ODIHR, 2009.

## Rules and Jurisprudence

1. "Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin." *Official Journal of the European Union*, L 18/2000.
2. Council of Europe. European Convention on Human Rights. Rome: Council of Europe, September 4, 1950. [http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer) (Accessed on January 22, 2014)
3. Council of Europe. Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech". Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies. Strasbourg: Council of Europe, 1997.
4. "Criminal Code of Canada." *Ministry of Justice RSC*, 1985, c. C-46. <http://laws.justice.gc.ca/> (Accessed on January 31, 2014)
5. European Court of Human Rights (ECtHR). *Chauvy vs. France*. App. Nos. 64915/01, September 29, 2004.
6. European Court of Human Rights (ECtHR). *Erbakan vs. Turkey*. App. Nos. 59405/00, July 6, 2006.
7. European Court of Human Rights (ECtHR). *Féret vs. Belgium*. App. Nos. 36109/02, July 16, 2009.
8. European Court of Human Rights (ECtHR). *Garaudy vs. France*. App. Nos. 65831/01, June 24, 2003.
9. European Court of Human Rights (ECtHR). *Glimmerveen and Hagenback vs. The Netherlands*. App. Nos. 8348/78 and 8406/78, October 11, 1979.

10. European Court of Human Rights (ECtHR). *Gündüz vs. Turkey*. App. Nos. 35071/97, December 4, 2003.
11. European Court of Human Rights (ECtHR). *Halis Dogan vs. Turkey*. App. Nos. 71984/01, February 7, 2006.
12. European Court of Human Rights (ECtHR). *Handyside vs. United Kingdom*. App. Nos. 5493/72, December 7, 1976.
13. European Court of Human Rights (ECtHR). *Honsik vs. Austria*. App. Nos. 25062/94, October 18, 1995.
14. European Court of Human Rights (ECtHR). *Incal vs. Turkey*. App. Nos. 22678/93, June 9, 1998.
15. European Court of Human Rights (ECtHR). *Jersild vs. Denmark*. App. Nos. 15890/89, September 23, 1994.
16. European Court of Human Rights (ECtHR). *Karatas vs. Turkey*. App. Nos. 23168/94, July 8, 1999.
17. European Court of Human Rights (ECtHR). *Lehideux and Isorni vs. France*. App. Nos. 24662/94, September 23, 1998.
18. European Court of Human Rights (ECtHR). *Marais vs. France*. App. Nos. 31159/96, June 24, 1996.
19. European Court of Human Rights (ECtHR). *Norwood vs. the United Kingdom*. App. Nos. 23131/03, November 16, 2004.
20. European Court of Human Rights (ECtHR). *Pedersen and Baadsgaard vs. Denmark*. App. Nos. 49017/99, June 19, 2003.
21. European Court of Human Rights (ECtHR). *Seurot vs. France*. App. Nos. 57383/00, May 18, 2004.
22. European Court of Human Rights (ECtHR). *Sürek vs. Turkey*. App. Nos. 26682/95, July 8, 1999.
23. European Court of Human Rights (ECtHR). *Vereinigung Bildender Künstler vs. Austria*. App. Nos. 68354/01, January 25, 2007.
24. General Assembly of UN. Universal Declaration of Human Rights: Adopted and proclaimed by UN General Assembly resolution 217 A (III) of 10 December 1948. Paris: General Assembly of UN, 1948. <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=src1> (Accessed on January 21, 2014)
25. Human Rights Committee. General Comment No. 34: Article 19 Freedoms of Opinion and Expression, CCPR/C/GC/34. Human Rights Committee, September 12, 2011.
26. Human Rights Committee. Hak-Chul Shin v. Republic of Korea, Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000. Human Rights Committee, March 16, 2004.
27. Human Rights Committee. Leonardus Johannes Maria de Groot v. The Netherlands, Communication No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994. Human Rights Committee, July 14, 1995.
28. Human Rights Committee. Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997. Human Rights Committee, October 26, 2000.
29. Human Rights Committee. Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993. Human Rights Committee, November 8, 1996.

30. New South Wales Administrative Decisions Tribunal. *Ekermawi vs. Network Ten Pty Limited*. App. Nos. [2008] NSWADT 334, November 18, 2008, December 16, 2008.
31. Office of the High Commissioner for Human Rights (OHCHR). General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20). OHCHR, July 29, 1983.
32. Office of the High Commissioner for Human Rights (OHCHR). Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. OHCHR, 2011.
33. "Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000." *Republic of South Africa Government Gazette* 20876.
34. "Swedish Penal Code." *Ministry of Justice* Ds 1999:36.

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