

PROSECUTING HATE CRIMES IN BOSNIA AND HERZEGOVINA: PROBLEMS IN PROSECUTORIAL PRACTICE

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Taking the current legal regulations pertaining to hate crimes as a starting point, Analitika conducted research to identify some of the key problems faced by prosecutors in Bosnia and Herzegovina in their practice of prosecuting hate crimes. The research has shown that problems arise at the very beginning of the investigation, due to shortcomings in police reports. The absence of official indicators for recognizing bias motivation causes difficulties for prosecutors and for the police. Furthermore, there is a perception of the prevalence of various manifestations of hatred and bias, which leads to difficulties in distinguishing important from less important incidents motivated by hatred. There are also practical problems, foremost among them being the lack of training in this area, lack of access to relevant literature and examples from comparative case law. Another significant factor contributing to the inadequate prosecution of hate crimes in Bosnia and Herzegovina is related to structural problems such as the absence of a procedural protocol for these cases and the insufficient cooperation of prosecutors and the police with civil society.

MAIN FINDINGS

1. INTRODUCTION

Hate crimes differ from “ordinary” crimes because they are motivated by bias or prejudice. This means that the victim is chosen based on the perception of the perpetrator about the victim belonging to a group with which the victim shares protected characteristics (race, religion, nationality, language or sexual orientation).¹ The aim of these crimes is not just to impact the victim, but also the targeted group, because in the view of the perpetrator, the specific victim is, as a rule, in-

terchangeable with any other member of the targeted group.

The applicable criminal codes in Bosnia and Herzegovina – the Criminal Code of Bosnia and Herzegovina (BiH), of the Brčko District of BiH (BDBiH), and of the entities – the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS) – regulate these crimes in three different ways:

- as a criminal offense of inciting hatred, discord and hostility;²
- hatred, or bias, as motivation is stipulated as a qualifying circumstance for a

¹ OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report for 2009* (Warsaw: OSCE/ODIHR, 2010), p. 6.

² Even though this criminal offense is usually seen as separate and distinct from hate crimes given that it is, in essence, a matter of criminalizing certain forms of hate speech in the wider context, this study, but also the project within which it was developed, also includes inciting hatred, discord and hostility. The key reason behind this approach is that these are similar concepts that are often (unjustifiably) interchangeable in the practice of prosecuting these types of crimes in Bosnia and Herzegovina.

KEY RECOMMENDATIONS

- Developing a binding procedural protocol for hate crime cases to regulate the obligations of the competent bodies involved in discovering, prosecuting and monitoring results in this domain.
- Establishing a unique list of indicators for recognizing bias motivation for the police and prosecutor's offices.
- Conducting adequate and comprehensive training for all those involved in the criminal procedure related to hate crimes, as well as providing the necessary resources and information on key cases from comparative case law.
- Establishing cooperation of prosecutor's offices and the police with civil society organizations and implementation of the "community police" concept for preventing and prosecuting hate crimes.

number of qualified forms of criminal offenses (e.g. aggravated murder motivated by bias);

- hatred is stipulated as an aggravating circumstance for the purpose of determining sanctions for all criminal offenses.

This area is also regulated by laws on public order and peace in RS and BDBiH, as well as the corresponding cantonal laws in FBiH, all of which stipulate that certain forms of conduct that insult national, religious or similar sentiments of citizens in public constitute an offense.

Apart from the legal framework, which is still to be completed and harmonized in Bosnia and Herzegovina³, successful prosecution of these crimes requires solving a number of concrete problems in applying the legislation. This is of particular importance in the Bosnian-Herzegovinian context where hate crimes are particularly dangerous due to their potential to inflame already existing tensions and impede the establishment of trust and recovery of the society as a whole.

Starting from the current legal framework, and viewing it from the perspective of practice, or rather, from the perspec-

tive of the prosecutor as the driving force in criminal prosecution, this *policy brief*⁴ seeks to point out key problems faced by prosecutors in prosecuting hate crimes and identify some of the key steps required to overcome these problems. Special attention is devoted to identifying the main causes and factors that affect the insufficient prosecution of hate crimes. The main sources of information used include findings from focus groups and interviews with prosecutors and a certain number of police officers. Theoretical insights and experiences from other countries regarding these issues were used where necessary.

2. KEY CHALLENGES IN PROSECUTING HATE CRIMES

2.1. Shortcomings in police reports

Given their authority and duties, police officers are usually the first to register facts that lead to establishing a criminal offense. Given that hate crimes differ from "ordinary" criminal offenses only by the fact of bias as motivation, any failure to register the bias may have negative effects on the rest of the investigation and

³ Shortcomings in CCFBiH stand out as particularly pertinent – among others, the fact that this law still stipulates only a small number of aggravated criminal offenses with hatred as a qualifying circumstance.

⁴ This policy brief is based on the study by Marija Lučić-Čatić and Amir Bajrić, *Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni i Hercegovini: Perspektiva tužitelja* [Prosecuting Hate Crimes in Bosnia and Herzegovina: From the Perspective of Prosecutors], (Sarajevo: Analitika - Center for Social Research, 2013).

the legal qualification of the act in question. The majority of the consulted prosecutors pointed out that if a police report does not explicitly state elements to indicate a bias motive, the act is treated as an “ordinary” criminal offense.

2.1.1. Lack of awareness and potential problem with personal views of police officers

The lack of awareness about hate crimes among the police can have a direct impact on identifying and including bias as motivation in police reports. This problem was also found in other countries where members of the police do not all equally support the implementation of hate crime legislation.⁵ Lack of awareness can lead to anything from absence of efforts to understand the essence of the legal norms to deliberately ignoring conduct that may fall within the scope of such norms.

Raising the awareness of police officers can lead to ensuring their adequate response to hate crimes, that is, having them identify bias motivation and include it in their reports. However, this still leaves the problem of the reports reflecting their personal value judgements, which may prevent them from seeing certain forms of conduct that are aligned with their individual system of values as indicative of hate crimes. This can have a direct impact on including discriminatory motivation in the reports. However, this problem is not characteristic only of Bosnia and Herzegovina. In other countries, personal views and existing social constructs (the social climate in a given area, predominant political beliefs, etc.) have a direct impact on recognizing and classifying bias motivation in police reports.⁶

2.1.2. Failure to investigate motivation

Even though the question “why?” is one of the nine so-called golden questions of criminology studies, the consulted prosecutors were of the opinion that police officers rarely investigate the motives of the perpetrator. This approach to investigations of hate crimes is an obstacle to further steps, especially when there is a risk of qualifying the offense in question as an “ordinary” criminal offense.

2.2. Absence of indicators to recognize bias as motivation

Recognizing bias as motivation is a difficulty in the prosecution of hate crimes, both in Bosnia and Herzegovina and elsewhere. Various theorists and practitioners have recognized this problem and endeavoured to offer appropriate solutions, which are now being employed in many countries, and which can serve as good practice examples for Bosnia and Herzegovina. One of the ways to identify bias is to view and assess the motivation from the perspective of “intent” (determining the basic role of bias as motivation for the act) and “extension” (determining whether the criminal offense would have been committed without the bias motivation).⁷ Identifying bias motivation in the UK and US, for example, is dominated by the application of subjective criteria (perpetrator’s record, his relationship to the victim, etc.).⁸

So, even though theory and comparative practice have developed a number of possible criteria for recognizing bias motivation for hate crimes, this research has shown that such criteria have not been defined in official documents pertaining to conducting investigations and prosecuting crimes in Bosnia and Herzegovina.



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⁵ Jennifer M. Balboni and Jack McDevitt, “Hate Crime Reporting: Understanding Police Officer Perceptions, Departmental Protocol, and the Role of the Victim,” *Justice Research and Policy*, no. 3 (2001), pp. 1-27.

⁶ Ryan D. King, “Hate Crimes: Perspectives on Offending and the Law,” in *Handbook on Crime and Deviance*, eds. Marvin D. Krohn, Alan J. Lizotte and Gina Penly Hall (New York: Springer, 2009), p. 534.

⁷ James J. Nolan III et al., “Learning to See Hate Crimes: A Framework for Understanding and Clarifying Ambiguities in Bias Crime Classification,” *Criminal Justice Studies* 17, no. 1 (2004), pp. 91–105.

⁸ Liz Dixon and Larry Ray, “Current Issues and Developments in Race Hate Crime,” *Probation Journal*, no. 54 (2007), pp. 109–124.

Conversations with prosecutors have led to the conclusion that the identification of bias is left to their discretion, and therefore may depend on their familiarity with these issues, as well as their personal beliefs.⁹ The case law in Bosnia and Herzegovina also indicates that there are diverse understandings of this element of the criminal offense, but does not allow for more precise identification of indicators employed for this purpose.¹⁰

The consulted prosecutors expressed different opinions about the way investigations are conducted when a discriminatory motive is identified. The prevailing view is that the investigation should focus on the perpetrator, his earlier life, previous criminal record for similar offenses, any public statements expressing bias, participation in organizations or groups advocating a certain bias, etc.¹¹ Many theorists believe investigating “previous actions” of the perpetrator is essential to the investigation in terms of proving bias motivation.¹² This approach to investigation, and later to establishing proof, can also be found in case law in Bosnia and Herzegovina.¹³ There is also the view that the investigation should be conducted so as to determine the feelings of the victim/injured party towards the act.¹⁴

Therefore, even though prosecutors consulted as part of this research understand the basic avenues that investigations of such cases should take, comprehensive and clear guidelines applicable to each individual case would certainly facilitate investigation.

2.3. Perception of prevalence of these crimes and difficulties in distinguishing significant from insignificant acts

A perception of prevalence of hate crimes is very pronounced in all multi-ethnic countries, including Bosnia and Herzegovina. It is precisely the perception of prevalence of these acts that causes problems for police officers and prosecutors in determining whether an incident can be qualified as a bias crime or an ordinary criminal offense.¹⁵ In practice, there is also the problem of distinguishing “significant” from “insignificant” acts, which is particularly pronounced for the criminal offense of inciting national, racial or religious hatred, discord or hostility. Since this crime may be committed in many different ways (anything from graffiti, verbal statements, to withholding a legally guaranteed right), prosecutors are faced with the problem of determining the degree of “seriousness” necessary to characterize certain actions as criminal offenses. For example, when it comes to graffiti as a form of commission of this offense, even though a final judgement has been passed in Bosnia and Herzegovina whereby this is one of the ways of commission of this criminal offense,¹⁶ the opinions of the consulted prosecutors range from complete negation of such a possibility to the view that the manner of commission is irrelevant and that what matters is the character or the circumstances of each individual case.¹⁷

There is also lack of clarity in distinguishing between actions that fall under freedom of expression, “hate speech” in the

⁹ Cf: European Commission against Racism and Intolerance (ECRI), *Report on Bosnia and Herzegovina*, CRI(2011)2 (Strasbourg: ECRI, 2011), p. 20, para 20.

¹⁰ For more see Lučić-Čatić and Bajrić, *Processing Hate Crimes in Bosnia and Herzegovina*, p. 26.

¹¹ Banja Luka Focus Group, May 2, 2013.

¹² Richard A. Devine and Alan J. Spellberg, “Hate Crime Prosecution,” in *Hate Crimes: Understanding and Defining Hate Crime*, eds. Barbara Perry et al. (Westport: Praeger Publishers, 2009), p. 101; See also OSCE/ODIHR, *Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina* (Warsaw: OSCE/ODIHR, 2010), pp. 23-24.

¹³ E.g. Elementary Court of Brčko District of BiH, Judgement No. 96 0 K 006861 10 K, January 30, 2012.

¹⁴ Banja Luka Focus Group, May 2, 2013.

¹⁵ Susie Bennett, James J. Nolan and Norman Conti, “Defining and Measuring Hate Crimes: A Potpourri of Issues,” in *Hate Crimes: Understanding and Defining Hate Crime*, eds. Barbara Perry et al. (Westport: Praeger Publishers, 2009), p. 164.

¹⁶ Elementary Court of Brčko District of BiH, Judgement No. 096 0 K 07 000298, May 13, 2008.

¹⁷ Sarajevo Focus Group, April 18, 2013.

broader sense, and the criminal offense of inciting hatred or hostility, especially in cases where the subjects of such actions are political representatives or when the action is committed via the internet or other media. Namely, the consulted prosecutors expressed apprehension that proceedings against politicians for certain “inflammatory” statements would drag prosecutor’s offices into political conflicts.¹⁸ On the other hand, a certain number of prosecutors believe that these actions should be dealt with primarily by other state agencies, such as, for example, the BiH Communications Regulatory Agency, which would analyse such statements and undertake the necessary steps.¹⁹ However, it is certainly important to note that the basic right and duty of the prosecutor, in line with the law, is to discover and prosecute perpetrators of crimes, and that in cases with grounds for suspicion that a crime has been committed, prosecutors are obliged to undertake the prescribed measures and conduct an investigation in line with the law.

2.4. Perceived uncertainty in terms of proof and practical reasons

Due to uncertain outcomes when attempting to prove hate crimes, there is a pronounced tendency to prosecute these crimes as “ordinary” criminal offenses. There are many problems in proving hate crimes. One is the way bias motivation is manifested. In situations where it is manifested by a visible trace (graffiti, letters, forum posts, etc.), establishing proof is made easier. On the other hand, establishing proof is made considerably more difficult when bias is manifested only verbally. In such situations prosecutors must rely on witnesses, and there is uncertainty in terms of the consistence of their testimony (e.g. when witnesses are not prepared to repeat statements given during

investigation in the courtroom) and in terms of witness credibility. In such cases, prosecutors opt for examining the perpetrator’s past as the best way of establishing proof, which makes the investigation more complex and extends its duration. Closely related to the above is the problem of prosecutors being overburdened. Namely, certain prosecutor’s offices cover a territory with larger populations, so when faced with lack of time and resources, the prosecutors choose the simpler option – prosecuting hate crimes as “ordinary” criminal offenses or even using the misdemeanour liability mechanism with its lower threshold of proof.

2.5. Insufficient training and lack of familiarity with relevant case law

The consulted prosecutors pointed out that lack of training in the area of hate crimes is a significant problem for their prosecution.²⁰ Training is needed both in the domain of the current legal framework and in the context of practical problems that can arise during the investigation and in establishing proof for these crimes. Lack of training for legal officers was also pointed out as a significant shortcoming. Given that legal officers are authorised officers performing certain evidence activities and drafting legal acts, lack of training for them in this area can have a negative impact on the prosecution of these crimes. And in fact, training in this area in Bosnia and Herzegovina has so far only focused on prosecutors. Prosecutors also pointed out that relevant case law from Bosnia and Herzegovina and the region is inaccessible, and the same could be said of standards and positions of the European Court for Human Rights related to cases of this type. Insight into such case law could help resolve practical dilemmas that crop up during investigations into these crimes.

¹⁸ Banja Luka Focus Group, May 2, 2013.

¹⁹ *Ibid.*

²⁰ Cf: ECRI, *Report on Bosnia and Herzegovina*, p. 11.

2.6. Structural problems

2.6.1. Absence of appropriate bylaws

The absence of protocols/instructions/guidelines or any other bylaws on procedure in cases of hate crimes considerably impedes their processing. Developing documents such as these is common practice in many countries. In the UK, the Government document on hate crimes²¹ analyses challenges in prosecuting these crimes (from the point of view of legislation and practice) and prescribes concrete activities to overcome them. Another good practice example is the protocol used in Croatia that determines the duties of competent bodies participating in the discovery, processing and monitoring of results of criminal prosecution in this domain.²² When asked about the need to develop similar documents in Bosnia and Herzegovina, most of the consulted prosecutors supported the idea, adding that such documents should be succinct and practice centred.

2.6.2. The insufficiently developed cooperation of the prosecutor's offices with the police and civil society stakeholders in processing hate crimes

Although generally satisfied with existing communication with the police, the prosecutors believe that there is room for improvement in communication with respect to investigating hate crimes. Lack of joint training and exchange of experience has a negative impact on identifying and removing problems in mutual cooperation and communication.

Cooperation of prosecutor's offices, and of the police, with various civil society stakeholders is another underused capacity in this area. One of the activities of civil society organizations in the area of hate crimes is registering incidents and gathering information about them. Although data gathered in this way cannot be used

to replace official statistics, they can be useful to prosecutor's offices as indicators of the extent of the problem in the field. Civil society organizations in Bosnia and Herzegovina are intensifying their activities in the area of hate crimes, which is something prosecutor's offices and the police should make use of.

The concept of "community policing" where the police work with citizens to resolve and prevent problems in the area of security also has considerable potential in the context of hate crimes. Namely, police officers, especially those in smaller communities, are able to better understand the values of the community, and also of individuals within that community, all of which can facilitate recognizing and processing hate crimes. However, this concept is still not used in Bosnia and Herzegovina to address hate crimes, because its application is relatively recent and it has not been sufficiently developed in practice.²³

3. CONCLUSIONS

Researching problems in prosecution practice in Bosnia and Herzegovina has led to the identification of some of the most important factors affecting the processing of hate crimes:

- Already during the registration of the criminal offense by the police, a lack of awareness and the influence of personal views of police officers may lead to bias being left out as motivation for the commission of the criminal offense.
- The frequent practice of failing to investigate the motives of the perpetrator in the context of hate crimes is a significant obstacle to the further processing of these cases.

²¹ Home Office Government, *Hate Crime – The Cross-Government Action Plan* (UK: Home Office Government, 2009).

²² "Protocol on Procedures in Hate Crime Cases," *Office for Human Rights and Rights of National Minorities – Working Group for Monitoring Hate Crimes*, 2011.

²³ For more see Irma Deljkić and Marija Lučić-Čatić, "Implementing community policing in Bosnia and Herzegovina," *Police, Practice and Research* 12, no. 2 (2011), pp. 172–184.

- Difficulties in practice are also caused by the absence of appropriate indicators for recognizing bias as motivation.
- There is also a perception about the prevalence of these crimes, which leads to difficulties in distinguishing between “significant” and “insignificant” elements, and this directly affects the legal qualification of the offense and the decision to leave out bias as the motive.
- Apart from that, there are also practical problems, foremost among them the lack of training in this area, as well as the lack of access to relevant practical resources and information about relevant cases from comparative case law.
- The lack of protocols/instructions/guidelines on procedure for the processing of hate crimes is an additional challenge in terms of their processing and consistent procedures in such cases.
- There is also an evident lack of cooperation of the prosecutor’s offices and the police with various civil society stakeholders.
- An untapped resource for improving the processing of hate crimes (as well as their prevention) is the concept and practice of community policing.

4. RECOMMENDATIONS

Recommendation to executive authorities of BiH, the Federation of BiH, Republika Srpska and the Brčko District

- It is necessary to develop a protocol on procedure for hate crimes whose application is to be made mandatory for all participants in criminal prosecution in Bosnia and Herzegovina.

Recommendations for HJPCBiH, centres for the education of judges and prosecutors and ministries of internal affairs

- It is necessary to adequately train and raise the awareness of all participants in criminal prosecution, particularly with respect to recognizing bias as motivation, conducting investigations and the specificities of evidence in these criminal offenses.
- It is important to ensure regular joint trainings for prosecutors and police officers that would also serve as platforms for exchanging experience among all the participants in criminal prosecution.
- It is necessary to develop a database of relevant case law from Bosnia and Herzegovina, the region and European courts in the domain of hate related crimes.
- It is necessary to develop concrete programs within the concept of community policing in order to prevent and improve the processing of hate crimes. These programs are particularly necessary in communities where hate related incidents are most frequent.

Recommendations for prosecutor’s offices and the police

- To facilitate recognition, identification and registration of hate crimes, it is necessary to create a unique list of indicators for recognizing bias and motivation.
- It is necessary to establish regular and constructive cooperation of prosecutor’s offices and the police with civil society organizations involved in hate crimes issues.



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SOURCES

Reports and articles

1. Balboni, Jennifer M. and Jack McDevitt. "Hate Crime Reporting: Understanding Police Officer Perceptions, Departmental Protocol, and the Role of the Victim." *Justice Research and Policy*, no. 3 (2001), pp. 1-27.
2. Bennett, Susie, James J. Nolan and Norman Conti. "Defining and Measuring Hate Crimes: A Potpourri of Issues." In *Hate Crimes: Understanding and Defining Hate Crime*, edited by Perry, Barbara, Brian Levin, Paul Iganski, Randy Blazak and Frederick M. Lawrence, pp. 163-182. Westport: Praeger Publishers, 2009.
3. Deljkić, Irma and Marija Lučić-Ćatić. "Implementing community policing in Bosnia and Herzegovina." *Police, Practice and Research* 12, no. 2 (2011), pp. 172-184.
4. Devine, Richard A. and Alan J. Spellberg. "Hate Crime Prosecution." In *Hate Crimes: Understanding and Defining Hate Crime*, edited by Perry, Barbara, Brian Levin, Paul Iganski, Randy Blazak and Frederick M. Lawrence, pp. 89-108. Westport: Praeger Publishers, 2009.
5. Dixon, Liz and Larry Ray. "Current Issues and Developments in Race Hate Crime." *Probation Journal*, no. 54 (2007), pp. 109-124.
6. European Commission against Racism and Intolerance (ECRI). *Report on Bosnia and Herzegovina*, CRI(2011)2. Strasbourg: ECRI, 2011.
7. King, Ryan D. "Hate Crimes: Perspectives on Offending and the Law." In *Handbook on Crime and Deviance*, edited by Krohn, Marvin D., Alan J. Lizotte and Gina Penly Hall, pp. 525-581. New York: Springer, 2009.
8. Lučić-Ćatić, Marija and Amir Bajrić. *Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni i Hercegovini: Perspektiva tužitelja* [Prosecuting Hate Crimes in Bosnia and Herzegovina: From the Perspective of Prosecutors]. Sarajevo: Analitika – Center for Social Research, 2013.
9. Nolan, James J. III, Jack McDevitt, Shea Cronin and Amy Farrell. "Learning to See Hate Crimes: A Framework for Understanding and Clarifying Ambiguities in Bias Crime Classification." *Criminal Justice Studies* 17, no. 1 (2004), pp. 91-105.
10. OSCE/ODIHR. *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report for 2009*. Warsaw: OSCE/ODIHR, 2010.
11. OSCE/ODIHR. *Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina*. Warsaw: OSCE/ODIHR, 2010.

Legal sources

1. Elementary Court of the Brcko District of BiH. Judgement No. 096 0 K 07 000298, May 13, 2008.
2. Elementary Court of the Brcko District of BiH. Judgement No. 96 0 K 006861 10 K, January 30, 2012.
3. Home Office Government. Hate Crime – The Cross-Government Action Plan. UK: Home Office Government, 2009.
4. "Protocol on Procedures in Hate Crime Cases." *Office for Human Rights and Rights of National Minorities – Working Group for Monitoring Hate Crimes*. 2011.

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