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Criminal offence of Inciting National, Racial or Religious Hatred, Discord or Hostility¹: Lack of Precision Within the Norm and Problems in its Practical Application² in Bosnia and Herzegovina²

Differences in the stipulation of the criminal offence of inciting national, racial or religious hatred, discord or intolerance (hereinafter: inciting hatred), imprecise formulations and lack of definition of the key terms in the description of this offence in the four currently applicable criminal codes in Bosnia and Herzegovina (hereinafter: BiH) hinder the efficient and consistent prosecution of these crimes.

1. Differences in the Norm

In its basic form, the criminal offence of inciting hatred is stipulated so that the perpetrator of the offence is described as:

- “Whoever publicly provokes or inflames national, racial or religious hatred, conflicts or intolerance among the constituent peoples and others, as well as among other people living or residing in Bosnia and Herzegovina” (Criminal Code of BiH, hereinafter: CCBiH);
- “Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation” (Criminal Code of the Federation of BiH, hereinafter: CCFBiH);
- “Whoever incites or fans national, racial or religious hatred or discord or hostility, or advocates superiority of one race over the other” (Criminal Code of Republika Srpska, hereinafter: CCRS);
- “A person who publicly incites or fans national, racial or religious hatred, discord or hostility between constitutional nations and other residents of the Brčko District” (Criminal Code of the Brčko District of BiH, hereinafter: CCBDBiH).

There are certain similarities, but also significant differences in describing the basic form of this criminal offence between each of the four criminal codes. The differences pertain to (not) stipulating the public nature of the act as an important element of the offence, the determination of the protected group against which the offence is committed, as well as the territories where the offence can be committed, and the types and degrees of stipulated sanctions, or rather, the specific mandatory minimum and maximum sanctions foreseen. Apart from that, the aggravated forms of this criminal offence, as stipulated³ in the four criminal codes, differ mainly in the envisaged sanctions, but also in certain aggravating

¹ This memo is a summary of parts of 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: The Prosecutor's Perspective], (Sarajevo: Analitika – Centre for Social Research, 2013) related to the basic form of the crime of inciting hatred under Paragraph 1 of the articles cited in Footnote 2. We would like to thank Amir Bajrić for his wholehearted support in preparing this document.

² See CCRS – “Inciting National, Racial or Religious Hatred, Discord or Hostility” – “Criminal Code of Republika Srpska,” *Official Gazette of Republika Srpska* 49/03, 108/04, 37/06, 70/06, 73/10, 1/12 and 67/13, Article 294.a); CCFBiH – “Inciting National, Racial or Religious Hatred, Discord or Hostility” – “Criminal Code of the Federation of Bosnia and Herzegovina,” *Official Gazette of the Federation of BiH* 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 and 42/11, Article 163; CCBDBiH – “Inducing National, Racial or Religious Hatred, Discord or Hostility” – “Criminal Code of the Brčko District of Bosnia and Herzegovina,” *Official Gazette of the Brčko District of BiH* 10/03, 45/04, 6/05 and 21/10, Article 160; CCBiH – “Provoking ethnic, racial and religious hatred, conflicts and intolerance” – “Criminal Code of Bosnia and Herzegovina,” *Official Gazette of BiH* 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 and 8/10, Article 145.a). English versions available at: CCRS - http://www.ohr.int/ohr-dept/legal/crim-codes/default.asp?content_id=5129#16 (Accessed on February 16, 2014); CCFBiH - http://www.tuzilastvobih.gov.ba/files/docs/zakoni/FBH_CRIMINAL_CODE_36_03.pdf (Accessed on February 16, 2014); CCBDBiH - <http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/005%20-%20Criminal%20Code,%20Criminal%20Procedure%20Codes%20and%20Criminal%20Sanctions/Criminal%20Codes/BDBH/BD%20Criminal%20Code%2010-03.pdf> (Accessed on February 16, 2014); CCBiH - http://www.sudbih.gov.ba/files/docs/zakoni/en/Criminal_Code_of_BH_-_Consolidated_text.pdf (Accessed on February 16, 2014).

³ “Criminal Code of Bosnia and Herzegovina,” Article 145.a), para 2; “Criminal Code of the Brčko District of Bosnia and Herzegovina,” Article 160, para 2, 3 and 4; “Criminal Code of Republika Srpska,” Article 294.a), para 2 and 3; “Criminal Code of the Federation of Bosnia and Herzegovina,” Article 163, para 2, 3 and 4.

circumstances foreseen as significant elements of certain aggravated forms of this criminal offence. Thus, for example, the sanctions foreseen in the CCRS for all forms of this criminal offence are milder than the sanctions stipulated in other criminal codes in Bosnia and Herzegovina. When it comes to the qualifying circumstances, the CCBiH, CCBDiH and CCFBiH, for instance, stipulate abuse of office or authority as a qualifying circumstance, while the CCRS has no such provision.

2. The Regulations from the Point of View of Practice

An analysis of criminal law regulations – primarily from the perspective of their practical application, – both on the basis of available judgements in cases related to inciting hatred and on the basis of conversations with prosecutors from various levels in Bosnia and Herzegovina – has identified a series of concrete problems with a negative impact on the effective prosecution of the criminal offence of inciting hatred.

2.1 Problems in defining and understanding the criminal offence of inciting hatred

The main problems identified in this domain pertain to:

a) A norm that is too broadly defined

The broadness of the norm by which criminal codes in Bosnia and Herzegovina stipulate the criminal offence of inciting hatred is a significant problem for identifying and classifying specific acts under this norm for the following reasons:

- The norm does not specify manners of execution of the criminal offence; case law in Bosnia and Herzegovina indicates that due to its abstract legal description, this criminal offence can be committed in an almost unlimited number of ways and by undertaking various actions.⁴
- There are no criteria at the level of the prosecutor's offices to assess the actual seriousness and severity of a specific act to satisfy the elements for this criminal offence.
- Existing case law does not provide answers or guidance on distinguishing permitted from prohibited behaviour, i.e. to assess the seriousness and severity of a specific act and determine whether it constitutes this particular criminal offence.

b) (Non-)understanding of the line between freedom of expression and the criminal offence of inciting hatred

The similarity between the concept of hate speech (which does not necessarily constitute a criminal offence in BiH) and the criminal offence of inciting hatred creates serious problems in recognising this criminal offence because:

- Hate speech, as such, is not criminalised in criminal codes in Bosnia and Herzegovina.
- The criminal offence of inciting hatred may be primarily, if not exclusively, committed through speech in the broad sense of the word.
- International standards in this area foresee prohibiting the *advocacy* of hatred, which requires active manifest behaviour directed at the public generation of hatred, a considerably more demanding standard from the very flexible concept of incitement as foreseen by the criminal codes in Bosnia and Herzegovina⁵. In that sense, definitions of relevant terms within international standards have limited significance in Bosnia and Herzegovina.
- In relation to the above point: the boundaries between the freedom of expression and prohibited hate speech incriminated through the criminal offence of inciting hatred are unclear; the lack of definition for this boundary can lead to the prosecution of forms and types of speech otherwise protected under international standards guaranteeing freedom of expression.⁶

⁴ Appellate Court of Brcko District of BiH, Judgement No. 96 0 K 000638 10 Kž, March 31, 2011.

⁵ See: Andrew Smith, "Hate Speech and Hate Crime of Inciting Hatred: Drawing the Line in BiH Context," in *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH* [Hate Crimes in Bosnia and Herzegovina: Challenges in Regulation and Prosecution], ed. Edin Hodžić and Amra Mehmedić (Sarajevo: Analitika - Center for Social Research, 2013).

⁶ Ibid.

- There are no criteria at the level of the prosecutors' offices that would define this boundary, or any court judgements in Bosnia and Herzegovina that explain why a certain act of speech constitutes inciting hatred, as opposed to free expression as guaranteed under the provisions of the Constitution of BiH and relevant international human rights instruments applicable in Bosnia and Herzegovina.

2.2 The problem of lack of definition for the terms “fanning/inflaming”, “hatred”, “discord” and “hostility” within the criminal offence of inciting hatred

Although theory offers a wide range of definitions for the above terms, there is considerable confusion in practice. Prosecuting the criminal offence of inciting hatred is thereby considerably impeded because:

- a) None of the criminal codes in Bosnia and Herzegovina contain definitions for the terms “hatred”, “fanning/inflaming”, “discord” and “hostility”, which are important elements of this criminal offence.
- b) Neither law theorists nor judges writing judgements in these cases in different jurisdictions in BiH offer adequate explanations of the terms such as “hatred”, “discord” and “hostility”, thus failing to clarify with sufficient precision the degree of disruption to relations between groups in society that is required for each of the forms of perpetration of the criminal offence of inciting hatred.

2.3 The problem concerning the element of publicity in relation to the criminal offence of inciting hatred in the criminal codes applicable in Bosnia and Herzegovina

The failure to stipulate (in the CCRS and CCBDBiH), and the failure to define (in the CCBiH and CCFBiH) the public nature of the act as a significant element of the criminal offence of inciting hatred compounds the prosecution of this crime. In concrete terms:

- a) Not defining the terms “publicly/public place” in the criminal codes of BiH and FBiH introduces uncertainty when it comes to understanding this element of the criminal offence and impedes the classification of specific acts under this norm. This, for example, begs the question of whether the element of the public nature of the act is fulfilled if the act is committed within a closed circle of persons, at a rally, by writing a letter to a person in public office, by posting on the internet, etc.
- b) Not determining the element of the public nature of the act as required for the criminal offence of inciting hatred in the criminal codes of RS and BDBiH is not in line with relevant European standards that insist on this element being included in the legal definitions of this specific criminal offence.⁷

2.4 The problem of competence for prosecuting the criminal offence of inciting hatred

The almost identical definition of the criminal offence of inciting hatred in state, entity and BDBiH level legislation can cause problems in determining the competence for prosecuting this crime, given that:

- a) There is not a single element of this crime as defined in state, entity and BDBiH regulations that would indicate which specific offences (depending on the form of violation, degree of violation, characteristic of the perpetrator, etc.) should be prosecuted by the Prosecutor's Office of Bosnia and Herzegovina, at entity level and at the level of BDBiH respectively.
- b) Prosecutor's offices do not have criteria to determine the competence between the BiH Prosecutor's Office and entity and BDBiH prosecutor's offices in these cases. Instead, this decision is made *ad hoc*, based on the assessment of the prosecutors concerned.
- c) The lack of territorial restriction on the commission of this criminal offence in the criminal code of Republika Srpska can lead to a positive conflict of competences between the competent bodies of RS, on the one hand, and competent bodies of BDBiH, FBiH and BiH on the other.
- d) The uncertainty arising in this respect is all the greater because in the event of a conflict of competences between entity-level prosecutors' offices, or between either of them and the BDBiH Prosecutor's Office, or between any of them and the BiH Prosecutor's Office, there is no authority to resolve such a conflict.

⁷ See The Council of the European Union, Council Framework Decision 2008/913/JHA, of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, L 328/55, *Official Journal of the European Union* (Brussels: The Council of the European Union, December 6, 2008). According to this Framework Decision, European Union member states were obliged to incorporate provisions incriminating *public* incitement to hatred as a criminal offence in their national legislation by November 28, 2010.

3. Recommendations

Given the above, and with the aim of:

- removing objective obstacles to the prosecution of criminal offences of inciting hatred,
- harmonising the legal regulations in Bosnia and Herzegovina with relevant European standards, and
- achieving the highest possible level of clarity and precision of the law as the legal ideal to be aspired to,

the following recommendations have been formulated for competent legislative bodies in Bosnia and Herzegovina:

- It is necessary to reconsider the current definition of the criminal offence of inciting hatred and hostility since its formulation leaves room for arbitrary prosecution even of certain forms of offensive speech protected under international standards on the freedom of expression.
- It is necessary to carry out a comprehensive harmonisation of criminal codes in Bosnia and Herzegovina as they relate to this particular offence in order to create equal preconditions for successful prosecution of inciting hatred and ensure equality of citizens before the law in all jurisdictions in Bosnia and Herzegovina.
- It is necessary to equally define the terms “fanning/inflaming”, “hatred”, “discord”, and “hostility” as significant elements of the criminal offence of inciting hatred in all the criminal codes in force in Bosnia and Herzegovina.
- It is necessary to incorporate the “public nature” of the act as a significant element of the criminal offence of inciting hatred into the criminal codes of BDBiH and RS, and unequivocally define this term in the general sections of the criminal codes of all the jurisdictions in Bosnia and Herzegovina.
- It is necessary to clearly distinguish legal provisions relating to the criminal offence of inciting hatred in CCBiH and in the entity criminal codes, as well as the CCBDBiH (which currently use almost identical formulations) in order to avoid potential conflicts of competence. One of the possibilities for avoiding such conflicts of competence would be to stipulate the criminal offence of inciting hatred exclusively in the CCBiH.

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