

Prosecution of Hate Crimes in Bosnia and Herzegovina

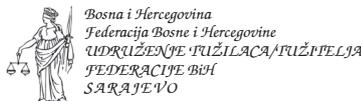
The Prosecutors' Perspective



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Marija Lučić-Čatić
Amir Bajrić



Sarajevo, 2014

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Editors:

Edin Hodžić and Amra Mehmedić

Authors:

Marija Lučić-Ćatić

Amir Bajrić

Peer review:

Zlata Đurđević

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Address:

Kaptol 5, 71000 Sarajevo, Bosnia and Herzegovina

info@analitika.ba

www.analitika.ba

Translator:

Mirjana Evtov

Proofreader:

Gina Landor

Copy Editing:

Sanela Hrlović

Design:

Branka Ilić

DTP:

Jasmin Leventa

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NORWEGIAN EMBASSY

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1.

Introduction

Hate crimes¹, understood as offenses motivated by hatred or prejudice against a particular group, are extremely damaging because of their harmful effect on the very foundation of society and trust between communities. In Bosnia and Herzegovina (BiH) these offenses are particularly dangerous because of their substantial potential to increase the existing tensions and negatively affect the trust building process and genuine recovery of the whole society. On the other hand, the legacy of the local war in the nineties of the last century, the existing fragmentation of the society, the dominance of collective identities and the media propagation of intolerance (and hatred) on a daily basis all contribute to the perception that in BiH society incidents motivated by hatred are not only ubiquitous, but generally accepted as “normal”.

Bearing in mind how important and serious the repercussions of hate crimes may be, it is imperative to introduce comprehensive preventive measures and activities and improve criminal legislation in this area. However, the successful prosecution of hate crimes in BiH requires much more than adopting an appropriate legal framework. The efficient implementation of the legal framework and the improvement of hate crime prosecution are subject to solving a number of concrete problems. In this regard, while taking into account the existing legal framework in this field in all of the four BiH jurisdictions, this study seeks to identify the key problems that prosecutors may face in bringing charges of hatred or deciding whether to classify a crime as a hate crime, and to establish how to overcome these problems. In other words, the fundamental objective of the study is to determine the underlying issues in this area and offer recommendations that would serve as a basis for creating the necessary conditions for the successful and adequate prosecution of hate crimes in BiH.

The methodological and conceptual approach used in this study differs from that of most previous analyses and studies dealing with the issue of hate crimes, especially in BiH, which have primarily focused on analysis of the legislation, its compliance with international standards, and the reasons it was introduced. This study, with its particular approach, is primarily intended for the legislative and executive bodies, the prosecution services and the police, the BiH High Judicial and Prosecutorial Council (HJPC), training centers for judges and prosecutors, as

¹ Hate crimes is a common translation from English, denoting bias-motivated crimes towards certain social groups in society. A detailed conceptual definition will be presented hereafter.

well as for all experts and practitioners who deal with the issue of prosecuting hate crimes in BiH.

In accordance with the specified orientation, the study first presents the conceptual and legal framework, as well as the analytical and methodological approach to the research. After this an analysis of the implementation of hate crimes legislation in each of the BiH jurisdictions is presented. In the next section of the study specific problems which prosecutors face in their practice are analyzed, and the specific structural problems that are important to the (non) prosecution of hate crimes in BiH are clarified. All of the above provide a sound basis for the final part of the study, where, together with the concluding remarks, recommendations are given for improving the prosecution of hate crimes in the BiH context.

2.

Conceptual and Legal Framework

2.1 The Concept of Hate Crime

Neither all sociologists nor all legislators agree on what constitutes hate crime, and hence its legal definition varies around the world. The reason for this is partly the fact that cultural differences, social norms and political interests play a major role in defining illegal behavior in general, and thus in defining hate crimes as well.² However, the numerous attempts to define such behavior most often refer to these offenses as criminal offenses.³ Levine and McDevitt thus state that offenses motivated by hatred are all offenses motivated, either in whole or in part, by the assumption, or the fact, that the aggrieved party is in some way different from the perpetrator of the crime in question.⁴ Simply put, hate crimes are all offenses motivated by prejudice, whether the prejudice be based on ethnicity, race, religious belief, or any other status.⁵ These crimes are, therefore, differentiated from other crimes by their bias motivation.

The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (hereinafter: ODIHR)⁶ has developed a useful working definition of criminal offenses motivated by hatred, which reads:

² Robert J. Boeckmann and Carolyn Turpin-Petrosino, "Understanding the Harm of Hate Crime," *Journal of Social Issues* 58, no 2 (2002), pp. 207–225.

³ Namely, hate crimes in the broadest context include all forms of unlawful conduct motivated by an obvious bias. Therefore, as such, hate crimes can occur in the form of criminal offenses, minor offenses and the like. See more in Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (New York: Russell Sage Foundation, 2001).

⁴ Jack Levin and Jack McDevitt, "Hate crimes," in *Encyclopedia of Violence, Peace and Conflict, Second Edition*, ed. Lester R. Kurtz (Oxford, San Diego: Academic Press, 2008), p. 2.

⁵ OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report for 2009* (Warsaw: OSCE/ODIHR, 2010), p. 6.

⁶ OSCE Office for Democratic Institutions and Human Rights (ODIHR) leads in establishing the standards and in initiating concrete actions to combat hate crimes in the world. On the importance of the ODIHR contribution to activities in this area, see more on the OSCE website: www.osce.org/odihr (Accessed on December 2, 2013).

“Any criminal offense, including offenses against persons or property, where the victim, premises or target of the offense are selected because of their real or perceived connection, attachment, affiliation, support or membership with a group [which] may be based upon their real or perceived race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation or other similar factor.”⁷

The definition clearly shows that hate crimes usually have two key elements: an action that the criminal code defines as a crime,⁸ and a bias motivation. The motivation by prejudice means that the perpetrator has chosen the aggrieved party on the basis of certain protected characteristics. A protected characteristic is the basic or main characteristic shared by members of a group, such as race, religion, nationality, language or sexual orientation. The aggrieved party may be one person, several people or property associated with an individual or a group that shares protected characteristics.

The peculiarity of hate crimes is reflected in the fact that the criminal act goes beyond the offender and the victim and their relationship. The consequences of hate crimes are far greater than the physical, psychological or financial distress suffered by the aggrieved party. These crimes are not intended only against the injured individual parties, but against the whole group to which they belong and whose protected characteristics they share. Moreover, the aggrieved party is essentially unimportant as an individual, and often replaceable by any other person who shares the same protected characteristics. In this sense, hate crimes are symbolic acts committed with the aim of demonstrating attitudes to a wider community.⁹ In short, the victims of hate crimes are selected because of what they represent, and not because of who they are. The message conveyed by these acts is addressed not only to the aggrieved party, but also to the wider community of which the aggrieved party is a part, and to the society as a whole. The negative impact of these acts therefore increases in situations where relations between ethnic, national or religious groups are already vulnerable.¹⁰

Recently BiH society and also BiH legislation have recognized the significant negative impact of hate crimes not only on the injured party but also on the

⁷ OSCE/ODIHR, *Challenges and Responses to Hate-Motivated Incidents in the OSCE Region: For the period January – June 2006* (Warsaw: OSCE/ODIHR, October 11, 2006).

⁸ Treating a criminal act of hate as an independent offense is not the only model of criminalizing hate crimes in the criminal law. Thus, the BiH criminal code, in addition to the mentioned model, additionally criminalizes a hate crime as an offense of incitement to national, racial and religious hatred, discord and intolerance. This will be discussed further on.

⁹ Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (New York, London: Routledge, 2001), p. 10.

¹⁰ OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (Warsaw: OSCE/ODIHR, 2009), pp. 13 and 16.

wider community. BiH society, in the recent past burdened by violent conflict, is particularly vulnerable to these crimes – this type of crime can increase discord and intolerance, making confidence building and tolerant coexistence between different groups difficult to achieve.¹¹

It is therefore an imperative to adopt and continuously improve hate crime legislation. In fact, legislation shows that the state recognizes the harmfulness of mutual attacks on the different groups that live in it.¹² Social commitment to the fight against hate crimes is best reflected by penalty enhancements for these offenses.¹³ Public authorities, law enforcement authorities and society at large working together on the improvement of hate crime legislation contributes to raising awareness about the harmful effects of hate crimes, and to an effective response to this phenomenon.¹⁴ In short, as Iganski points out, the criminal laws regarding hate crimes are directed at the collective consciousness as much as to the individual offender.¹⁵

2.2 Comparative and International Legislation

The importance of legal standards and regulation in this area is primarily recognized in international instruments dealing with human rights protection. On the basis of Annex 1 of the BiH Constitution,¹⁶ the International Convention on the Elimination of All Forms of Racial Discrimination (1965),¹⁷ the International Covenant on Civil and Political Rights (1966)¹⁸ and Optional Protocols to it (1966

¹¹ See more in OSCE/ODIHR, *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region* (Warsaw: OSCE/ODIHR, 2010).

¹² Boeckmann and Turpin–Petrosino, “Understanding the Harm of Hate Crime,” pp. 207-208.

¹³ Human Rights First (HRF), *2008 Hate Crime Survey* (New York: HRF, 2008), p. 169.

¹⁴ OSCE/ODIHR, *Hate Crime Laws*, p. 22.

¹⁵ Paul Iganski, *Hate Crime and the City* (Bristol: The Policy Press, University of Bristol, 2008), p. 16.

¹⁶ The Constitutional Court of Bosnia and Herzegovina has the authority to independently examine an alleged violation of this agreement, which has been confirmed in several of its decisions. See, for example, Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits No. U-9/09, November 26, 2010.

¹⁷ General Assembly of UN, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 - Entered into force 4 January 1969 (General Assembly of UN, 1965), Article 4, para. 1.

¹⁸ General Assembly of UN, International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 - Entered into force 23 March 1976 (General Assembly of UN), Article 20, para. 2.

and 1989)¹⁹ make up part of the BiH legal system. These are the most important international documents stipulating the state's duty to adopt legislation prohibiting hate crimes.

The first steps towards formulating legislation appropriate to combat hate crimes were taken in the United States of America (USA) in the middle of the last century. However, the USA started a systematic fight against hate crime only with the enactment of the Hate Crimes Statistics Act of 1990, which led the federal criminal justice system to increase activity in introducing standards for recognizing hate crimes.²⁰ The fact that regulations criminalizing hate crimes vary from state to state seems logical given the need of a country to criminalize hate crimes in accordance with its specific history and relationships in society.²¹ However, some discrepancies are less justified than others, as is the case with protected characteristics. Thus, for example, the law provisions apply to hate crimes related to religion and race in almost all of the OSCE participating states where legislation on bias-motivated crimes is adopted, but in only eleven of them do the provisions apply to sexual orientation, and in only seven to disability.²²

Comparing definitions of hate offenses as crimes in criminal laws, it is determined that two models dominate. The first one assumes a "substantive offence" as a separate offense ("that includes the bias motive as an integral element of the legal definition of the offence"),²³ whereas the second provides for penalty enhancements or general aggravating circumstances if hate crime is determined.²⁴ The ODIHR has found, in line with previous experience, that both solutions have certain advantages and disadvantages. The main advantages to enacting a law making hate crime a substantive offense include: greater visibility of the crime, explicit sentencing of the prohibited bias motive, and easier collection of hate crime data. The main drawback of this model stems from the fact that, if bias is not proven as a motive, a substantive hate crime indictment may not allow the court to convict on the base offense. Burney and Rose state therefore that prosecutors often, in order to

¹⁹ General Assembly of UN, Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 - Entered into force 23 March 1976 (General Assembly of UN); General Assembly of UN, Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted and proclaimed by General Assembly resolution 44/128 (General Assembly of UN, December 15, 1989).

²⁰ Perry, *In the Name of Hate*, pp. 2 and 3.

²¹ OSCE/ODIHR, *Hate Crime Laws*, pp. 52 and 53.

²² *Ibid*, p. 43.

²³ *Ibid*, pp. 32-33, e.g. Article 196, Paragraph 2 of the Czech Republic Criminal Code, or provisions of Chapter 29-32 of the the UK's Crime and Disorder Act of 1998.

²⁴ OSCE/ODIHR, *Hate Crime Laws*, p. 35, e.g. Articles 33-42 of Belgium's Law of May 10, 2007.

secure a conviction, accept a guilty plea for an “ordinary” offense even when hate crime is suspected.²⁵

Prescribing general aggravating circumstances for bias-motivated offenses is easier to incorporate into existing penal codes given that codes normally list aggravating and mitigating circumstances as factors to be considered in sentencing a crime. Furthermore, the principle of penalty enhancement is applicable for a variety of offenses, and a failure to prove the facts that justify penalty enhancement (i.e. the existence of bias motivation) will not affect the possibility of a conviction for an “ordinary” crime. On the other hand, the impossibility of tracking hate crime recidivism is emphasized as a significant disadvantage of this model, given that it may lead to the creation of an “unrealistic” image of the situation regarding hate crimes. Namely, the legislation might expressly prohibit the use of aggravating circumstances (including bias motivation) in the legal reasoning of judicial decisions to be recorded publicly, which directly affects the hate crime records; i.e. the hate crime will not be recognized as such.²⁶

2.3 Hate Crime Legislation in Bosnia and Herzegovina

The Criminal Codes of BiH, Brčko District of BiH (BDBiH) and the BiH entities (Federation of BiH, Republika Srpska) regulate this type of criminal offense in three different ways:

- as a separate criminal offense of inciting hatred, discord and intolerance²⁷
- hatred (bias as a motive) as a qualifying circumstance for a wide range of qualified crimes
- hatred as an aggravating circumstance in determining the sentence for any offense that does not qualify for enhanced punishment under the provisions of existing criminal laws.

²⁵ Elizabeth Burney and Gerry Rose, *Racist offenses – how is the law working?* (London: Home Office Research Study 244, 2002), p. 111.

²⁶ OSCE/ODIHR, *Hate Crime Laws*, p. 30, e.g. in Germany, the reasons for enhancement cannot be recorded publicly.

²⁷ It should be noted that the criminal offense of incitement to hatred is often considered a form of criminalization of hate speech (e.g. ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence - Policy brief* (London: ARTICLE 19, 2012)), and from such a perspective it does not belong to the field of criminal offenses motivated by hatred in a narrow sense. But regardless of the terminology and conceptual dilemmas and disagreements, we opted for a unique approach to this issue, focusing on hatred as a key concept. The reasons for this approach are set out in the third chapter of this study.

Regarding the criminal offense of incitement to hatred it is important to emphasize that the criminal legislation of many countries (e.g. Russia, Canada, Serbia, Montenegro, BiH)²⁸ make provision about such offenses for the most serious forms of threat to interethnic or interfaith relations. Although not universally applied,²⁹ this approach is justified especially in countries where specific interethnic relations and relations among different religious communities are an important and sensitive issue.³⁰ Criminal code regulation of incitement to hatred and intolerance among different communities is harmonized with the relevant recommendations issued by the Council of Europe³¹ and Council of the European Union.³²

In its base form, the criminal offense of incitement to hatred is regulated similarly in all of the four BiH jurisdictions.³³ The crucial differences in the *base offense* are reflected in: defining its public expression as a substantial element of the criminal offense, defining the protected groups, acts of commission, territorial jurisdiction, and the type and length of the prescribed sentence. The differences are particularly

²⁸ Article 370 of the Criminal Code of Montenegro, Article 317 of the Criminal Code of the Republic of Serbia, Article 319 of Canada's Criminal Code, Article 282 of the Russian Criminal Code, etc.; see more in Dušica Miladinović-Stefanović, "Odmeravanje kazne za krivično delo učinjeno iz mržnje" [Sentencing Hate Crimes], in *Zbornik radova Pravnog fakulteta u Nišu LXIV* [Proceedings of the Law Faculty Niš LXIV], (Niš: Centar za publikacije Pravni fakultet Niš, 2013), p. 265.

²⁹ E.g. Swiss criminal legislation contains no similar provision. See more in: Zoran Stojanović, *Komentar kaznenog zakonika Srbije - drugo izmenjeno i dopunjeno izdanje* [Commentary on the Criminal Code of Serbia - The Second Amended and Revised Edition], (Belgrade: Official Gazette, 2007), p. 689.

³⁰ Miloš Babić at al., *Komentar krivičnih/kaznenih zakona u BiH - Knjiga II* [Commentary on the Criminal Codes of BiH - Volume II], (Sarajevo: Council of Europe/European Commission, 2005).

³¹ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 7: On National Legislation to Combat Racism and Racial Discrimination – Adopted on 13 December 2002 (Strasbourg: ECRI, February 17, 2003), p. 7, para. 18; "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," *Official Journal of the European Union* L 328/55, December 6, 2008; European Union Agency For Fundamental Rights, *Making hate crimes visible in the European Union: acknowledging victims' rights* (Luxembourg: Publications Office of the European Union, 2012), p. 25.

³² According to the European Union Framework Decision, the member states had to incorporate specific *provision* for public *incitement* to hatred into their national laws before November 28, 2010.

³³ "Kazneni zakon Republike Srpske" [Criminal Code of the Republika Srpska], *Official Gazette of Republika Srpska* 49/03, 108/04, 37/06, 70/06, 73/10 and 67/13, Article 294 a) – Incitement to national, racial and religious hatred and bigotry; "Kazneni zakon Federacije Bosne i Hercegovine" [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 – Incitement to national, racial and religious hatred, discord or intolerance; "Kazneni zakon Brčko Distrikta Bosne i Hercegovine" [Criminal Code of the Brčko District of Bosnia and Herzegovina], *Official Gazette of the Brčko District BiH* 10/03, 45/04, 6/05 and 21/10, Article 160 – Incitement to national, racial and religious hatred, discord or intolerance; "Kazneni zakon Bosne i Hercegovine" [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) – Incitement to national, racial and religious hatred, discord or intolerance.

evident regarding the prescribed minimum as well as the prescribed maximum sentence.³⁴ All of these differences, however, do not significantly affect the essence and sense of criminalizing the offense of incitement to hatred.³⁵

All BiH criminal laws except the Criminal Code of Bosnia and Herzegovina (CCBiH) recognize hatred (bias) as an aggravating factor for a full range of qualified crimes.³⁶ More serious criminal offenses of this type differ from one jurisdiction to another, mainly by their different legislative techniques and prescribed sanctions, but also by some aggravating circumstances.³⁷ Grievous bodily harm and rape are the only crimes that the criminal codes of all four jurisdictions treat in the same way.³⁸ In addition, the inconsistency of the relevant BiH legal framework is reflected in the various possible sanctions prescribed for certain crimes qualified as hate crimes.³⁹

Finally, the Criminal Code of the Brčko District of BiH (CCBDBiH) explicitly defines hatred as an aggravating factor in sentencing for all crimes, while the Criminal Code of the Republika Srpska (CCRS) defines committing acts of hatred as an aggravating factor.⁴⁰ The CCBDBiH's basic terms⁴¹ define the meaning of "hatred" as a motivation for committing a crime, while the CCRS defines the meaning of hate

³⁴ E.g. Criminal Code of Bosnia and Herzegovina (CCBiH) and Criminal Code of the Federation of Bosnia and Herzegovina (CCFBiH) limit the application of legal repression solely to public provocation or incitement to national, racial or religious hatred, discord or intolerance, while this is not the case in the provisions of Criminal Code of the Brčko District of Bosnia and Herzegovina (CCBDBiH) and Criminal Code of Republika Srpska (CCRS). In addition, CCBiH provides that the offense is punishable no matter where in Bosnia and Herzegovina it was committed, CCBDBiH and CCFBiH only if it was committed in their jurisdiction, while the CCRS states no such territorial restrictions.

³⁵ Babić et al., Commentary on the Criminal Codes of BiH.

³⁶ Given the jurisdiction of the Court of BiH, i.e. that it has no jurisdiction over murder, grievous bodily harm, rape, serious theft, robbery, aggravated robbery, and causing general danger; it is only logical that these provisions are not included in CCBiH, and this also applies to the absence of a definition of "hatred" among the general concepts of CCBiH – which will be discussed further on in this study.

³⁷ For example, the CCBiH, CCBDBiH and CCFBiH prescribe abuse of position or authority as an *aggravating* factor for sentencing any "basic" or severe offense, while the CCRS does not.

³⁸ Unlike the CCBDBiH and CCFBiH which make provision for the *aggravation* of offenses by *prejudice* even for *aggravated form of murder*, under the CCRS this creates a separate substantive offense of first degree murder, which does not exist in other BiH criminal codes. While the CCBDBiH and CCRS also make provision about the *aggravation* of offenses by *prejudice* for qualified offenses of theft, burglary, robbery, and causing general danger, the CCFBiH does not.

³⁹ E.g. the criminal offense of grievous bodily harm, where the CCBDBiH and CCFBiH *prescribe a prison sentence* of one to ten years, while the CCRS *prescribe a prison sentence* of one to eight years; or qualified forms of offenses of robbery and aggravated robbery, for which the CCRS *prescribe a prison sentence* of five to fifteen years, while CCBDBiH of at least five years.

⁴⁰ See "Criminal Code of the Brčko District of Bosnia and Herzegovina," Article 49, para. 2; "Criminal Code of the Republika Srpska," Article 37, para. 3.

⁴¹ See "Criminal Code of the Brčko District of Bosnia and Herzegovina," Article 2, para. 37.

crime.⁴² These legal solutions imperatively require courts to consider hatred (hate crime) as an aggravating circumstance in all criminal cases, and to accordingly enhance sentences, except in cases where the law already provides for heavier penalties with aggravating circumstances. The Criminal Code of Federation of the BiH (CCFBiH) does not provide for such provisions. However, it should be pointed out that this Code, in its Article 49, establishes that the motive of a convicted defendant must be considered at sentencing. Since the CCBDBiH, for example, defines “hatred” as a “motive”, the hatred can be the aggravating circumstance for any proven hate crime and the enhanced punishment may apply. Although the CCBDBiH’s solution is better since it clearly prescribes the legal ideal to strive towards, its absence in the CCFBiH, given the aforementioned, cannot justify not prosecuting bias motivated crimes. In March 2013 the Federal Ministry of Justice submitted the Draft Law on Amendments to the CCFBiH, which in the general section provides a definition of hatred. At the time of finalizing this study, in October 2013, the Proposal is still in legislative procedure before the FBiH Parliament.⁴³

The BiH Criminal Codes are not the only laws that entail provisions about hate crimes; all the BiH jurisdictions’ laws on public order also deal with this area.⁴⁴ They stipulate that certain forms of conduct that publicly violate other citizens’ national

⁴² See “Criminal Code of the Republika Srpska,” Article 147, para. 25.

⁴³ The proposed amendments to the Law do not propose to expand the list of offenses that can be aggravated as hate-motivated crimes. Furthermore, the Law adopts the definition of “hate crime” which establishes the list of protected characteristics, thus permitting prosecution of *hate crimes* committed on the basis of only these *protected characteristics*; while this is not the case under the CCBDBiH and CCRS. Under provisions that establish incitement or participation in riots at sports events as a criminal offense, expression of hatred and incitement to hatred that happens before or after these events is not criminalized, although the explanation of the proposed amendments clearly states that grounds for amendments in this specific case was the awareness of the widespread occurrence of violence not only at sports events, but also before and after them.

⁴⁴ See “Zakon o javnom redu i miru Brčko Distrikta BiH” [Law on Public Peace and Order of the Brčko District of BiH], *Official Gazette of the Brčko District BiH* 2/02; “Zakon o javnom redu i miru Republike Srpske” [Law on Public Peace and Order of Republika Srpska], *Official Gazette of Republika Srpska* 20/07; and, e.g. “Zakon o javnom redu i miru Hercegovačko-Neretvanskog Kantona” [Law on Public Peace and Order of Herzegovina-Neretva Canton], *Official Gazette of Herzegovina-Neretva Canton* 9/09; “Zakon o javnom redu i miru Kantona Sarajevo” [Law on Public Peace and Order of Sarajevo Canton], *Official Gazette of Sarajevo Canton* 9/99 and 2/02; “Zakon o javnom redu i miru Tuzlanskog Kantona” [Law on Public Peace and Order of Tuzla Canton], *Official Gazette of Tuzla Canton* 9/01, 11/01, 11/07 and 14/11.

or religious feelings, or race, constitute a misdemeanor offense.⁴⁵ In addition, when it comes to preventing and punishing behavior that essentially constitutes hate crime, the Law on Public Gatherings of BDBiH,⁴⁶ the Law on Radio-Television of both RS and FBiH,⁴⁷ as well as the Law on Prevention of Violence at Sports Events of Herzegovina-Neretva Canton provide certain options in that regard⁴⁸.

⁴⁵ The BDBiH and entity laws on minor offences define a minor offense in the same way: “A minor offense is a violation of public order or economic and financial laws and regulations, for which characteristics are specified and sanctions prescribed.” See “Zakon o prekršajima Brčko Distrikta BiH” [Law on Minor Offenses of Brčko District BiH], *Official Gazette of the Brčko District BiH* 24/07, 06/12 and 11/12, Article 3, para. 1; “Zakon o prekršajima Republike Srpske” [Law on Minor Offenses of Republika Srpska], *Official Gazette of Republika Srpska* 34/06, 1/09 and 29/10, Article 1, para. 1; “Zakon o prekršajima Federacije BiH” [Law on Minor Offenses of Federation BiH], *Official Gazette of the Federation of BiH* 31/06, Article 2, para. 1.

⁴⁶ “Zakon o javnom okupljanju Brčko Distrikta BiH” [Law on Public Gatherings of the Brčko District BiH], *Official Gazette of the Brčko District BiH* 28/12, Article 23.

⁴⁷ “Zakon o radio-televiziji Republike Srpske” [Law on Radio-Television of Republika Srpska], *Official Gazette of Republika Srpska* 49/0, 73/08 and 42/10, Article 15; “Zakon o javnom servisu televizije Federacije BiH” [Law on Public Broadcasting Service of the Federation of BiH], *Official Gazette of the Federation of BiH* 48/08, Article 40, para. 1.

⁴⁸ E.g. “Law on Public Gatherings of the Brčko District BiH” provides in Article 23: “Police officers are authorized to prevent or disrupt a peaceful assembly if its participants invite or incite national, racial, religious or any other hatred and intolerance.”

3.

Analytical Framework and Methodology

The key question of this study is how to increase the number and quality of indictments for hate crimes, that is, how to stimulate the police and prosecutors to recognize bias motive and press charges adequately? In other words, what are the elements, or factors of a *coordinated* approach to this phenomenon within a prosecutorial function, and how to stimulate a coordinated approach in the BiH context?

The study, therefore, primarily focuses on examining the prosecutorial side, i.e. the implementation of the relevant hate crime legal provisions, precisely because most of the research papers treating this area, written either in BiH or elsewhere,⁴⁹ focus on the legal regulation, the reasons and arguments for its introduction, and not on judicial practice or preconditions and factors of the legislation's successful implementation. Naturally, such a focus does not mean that we consider that the current BiH legislation in this area is good and thorough. As already stated, the Federation BiH has yet to adopt appropriate amendments to its criminal code in order to balance the requirements of legislation with that of the other entity. However, we believe that this focus fills a significant gap in terms of understanding the hate crime issues, not only in BiH, and that it may indicate the necessary changes in laws and policies regarding the prosecutorial function and, in particular, that it may improve the technical discussion in this area in BiH.

A recent OSCE BiH report confirms that bias motivation is often omitted from indictments and that this is the key and most common problem regarding hate crimes in BiH. In other words, offenses motivated by hatred are very often prosecuted as "ordinary" crimes.⁵⁰ This trend opposes the essence and purpose of

⁴⁹ Human Rights Centre University of Sarajevo, *Ljudska prava u Bosni i Hercegovini 2011: Pravo, praksa i međunarodni standardi ljudskih prava sa ispitivanjem javnog mnijenja* [Human Rights in Bosnia and Herzegovina 2011: Legal Provisions, Practice and International Human Rights Standards in Bosnia and Herzegovina with Public Opinion Survey], (Sarajevo: Human Rights Centre University of Sarajevo, 2012); OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report 2009*; OSCE/ODIHR, *Opinion on Draft Amendments to the Federation of Bosnia and Herzegovina Criminal Code* (Warsaw: OSCE/ODIHR, 2009).

⁵⁰ OSCE Mission to Bosnia and Herzegovina, *Borba protiv kaznenih djela počinjenih iz mržnje: Analiza incidenata motiviranih predrasudama u Bosni i Hercegovini s preporukama* [Tackling Hate Crimes: An analysis of bias-motivated incidents in Bosnia and Herzegovina with recommendations], (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2012), p. 27.

the hate crime regulations, which, by considering prejudice or hatred a motive and stipulating more severe punishment for such crimes, actually try to point out the unacceptability of such social phenomena and prevent a possible deterioration of relations between different groups in society.⁵¹

Yet another problem is the inconsistent use of the legal concept of “incitement to national hatred and intolerance,” which is broadly interpreted and often used as a “‘safety net’ option for hate crime cases and applied in situations for which it was possibly not initially intended by the legislator.”⁵²

Operational research questions are based on factors which the relevant literature⁵³ considers key in hate crime indictments.

Accordingly, the following research questions were formulated for the purposes of this study:

- How do prosecutors, based on previous cases and in general, understand the discriminatory motive / bias / hatred in the BiH context?
- On which grounds, on the basis of which document or policy, is the standard (bias as a motive) understood in the BiH judicial practice?
- Which factors influence the prosecutors’ decision to determine (or not) the bias / hatred charges in specific criminal offenses?
- Does the current organization and level of training of the prosecutors and police, and the principles and practice of their cooperation, meet the needs of criminal prosecution of hate crimes?

The study is based on an analysis of relevant secondary sources, and research papers from the respective areas, especially the research and analysis relating to BiH but also to other countries, with a particular focus on the European context. In addition, the relevant hate crimes statutory and regulatory provisions of all four BiH jurisdictions have been analyzed from the perspective – this needs to be emphasized – only of the study’s primary focus; that is, to the extent the normative solutions are problematic, vague or ambiguous and, as such, potentially adversely affect the efficient prosecution of hate crimes in BiH. The study entailed a detailed analysis of a number of available indictments and sentences (both convictions and

⁵¹ See e.g. Boeckmann and Turpin-Petrosino, “Understanding the Harm of Hate Crime”; Jack Levin and Gordana Rabrenovic, “Hate Crimes and Ethnic Conflict: An Introduction,” *American Behavioral Scientist* 45, no. 4 (2001), pp. 574–587.

⁵² OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*, p. 33.

⁵³ European Union Agency For Fundamental Rights, *Making hate crimes visible in the European Union*; Ryan D. King, “Hate Crimes: Perspectives on Offending and the Law,” in *Handbook on Crime and Deviance*, ed. Marvin D. Krohn, Alan J. Lizotte and Gina Penly Hall (New York: Springer, 2009); footnote 1; OSCE/ODIHR, *Hate Crime Laws*; Liz Dixon and Larry Ray, “Current Issues and Developments in Race Hate Crime,” *Probation Journal*, no. 54 (2007), pp. 109–124; *American Prosecutor’s Research Institute (APRI), A Local Prosecutor’s Guide for Responding to Hate Crimes* (USA: APRI, 2000).

acquittals) with different levels of the judiciary treating the subjects in question.⁵⁴ In the same context and with the same basic goal, the relevant judgments available within the region have also been analyzed.

Besides the secondary research, i.e. the analysis of legal norms and the available sentences in hate crime cases, the study is also based on two focus groups of FBiH, RS, BDBiH and BiH prosecutors.⁵⁵ The focus groups included prosecutors both experienced and inexperienced in this domain. In preparing this study, we have been aware of the limitations that interviews with the professional elite might imply, as it is less likely that the professional elite will share relevant information, and there was also a risk of giving information under pressure.⁵⁶ Trying to overcome these problems, we presented the study to prosecutors in a “nonthreatening” way, stressing that the goal was to improve the existing practices and not to search for culprits.

Furthermore, the results obtained through the focus groups were further deepened through semi-structured interviews with prosecutors experienced in the field.⁵⁷ In order to shed some light on the cooperation between the police and prosecutors' offices from the perspective of the police, several interviews were conducted with police officers experienced in conducting investigations related to this kind of case.⁵⁸ Given that police officers were not the focus of this study, the interviewees were chosen primarily on the basis of practical criteria and availability.

⁵⁴ A total of 28 indictments were analyzed, including both first and second instance sentences listed in the bibliography. Given the unavailability of the judicial institutions' websites, these have been mostly acquired through employees of the judicial institutions, or through applications for access to information under the Freedom of Access to Information Act for Bosnia and Herzegovina (there was no answer to the submitted request from Zvornik Basic Court).

⁵⁵ The first focus group workshop, held in Sarajevo on 18 April 2013, included seven prosecutors; the same number of prosecutors participated in the second focus group workshop in Banja Luka on 2 May 2013. Although the basic idea was for the focus groups to gather representatives of all Prosecutions in BiH, five cantonal and district Prosecutions did not participate in the workshops. However, the desired circle of respondents was subsequently filled through conducting interviews. Finally, representatives of the Cantonal Prosecution in Tuzla, and District Prosecutions in Bijeljina and in Banja Luka are the only ones not to be included in this study.

⁵⁶ Steen Mangen, “Qualitative research methods in cross-national settings,” *International Journal of Social Research Methodology* 2, no. 2 (1999), pp. 109–124.

⁵⁷ There were two additional interviews with prosecutors with experience in the relevant field.

⁵⁸ Interviews were conducted with a police officer of the Ministry of Internal Affairs of Sarajevo Canton, and two Brčko District police officers.

During the data collection and analysis, this study relied on a thematic analysis.⁵⁹ Wherever it has been possible and practical, the findings from the focus groups and interviews have been completed with an analysis of specific judicial and prosecutorial documents, legal solutions, insights from secondary sources, as well as with appropriate aspects of the relevant experience of other countries.⁶⁰

⁵⁹ M. Huberman and M. Miles, "Data Management and Analysis Methods," in *Handbook of Qualitative Research*, ed. N. Denzin and Y. Lincoln (London: SAGE Publications, 1994).

⁶⁰ Compare with: Ines Steinke, "Quality Criteria in Qualitative Research," in *A Companion to Qualitative Research*, ed. Uwe Flick, Erenst von Kardorff and Ines Steinke (London: SAGE Publications, July 4, 2004).

4.

Hate Crime Legislation in Practice Settings

4.1 Introduction

As previously noted, this study focuses on examining the prosecutorial side of the implementation of BiH legal provisions on hate crime, and the preconditions and factors of its successful implementation. In this regard, a number of analyses and reports published in recent years indicate the current problems with the relevant BiH legislation.⁶¹ However, most of these papers are concerned with the analysis and identification of differences in the legal frameworks for hate crime legislation of the four BiH jurisdictions, while this study attempts to determine how these regulations influence the practice of prosecuting hate crimes.

A consistent and harmonized criminal legislation at each administrative level of a particular state represents a legal principle which guarantees legal certainty to all its citizens.⁶² Boeckmann and Petrosino also advocate the principle of harmonization of criminal legislation, pointing out that hate crime laws should be comprehensive and unified if they are to ensure an adequate protection of human rights. Namely, the criminalization of hate crimes must be made in a way which facilitates identification of a specific behavioral norm and eliminates all elements that can cause difficulties in the process. The standards must include all behaviors that essentially constitute a crime, even if not explicitly stated (e.g. the actual BiH

⁶¹ OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*; Justice Network in Bosnia and Herzegovina, *Ljudska prava i pravosuđe u Bosni i Hercegovini: Izvještaj o provedbi preporuka u oblasti pravosuđa iz Univerzalnog periodičnog pregleda Vijeća za ljudska prava Ujedinjenih nacija 2011–2012* [Human Rights and Judiciary in Bosnia and Herzegovina: A Report on Implementation of the Recommendations for Justice Sector in Bosnia and Herzegovina from the Universal Periodic Review of the UN Human Rights Council 2011-2012], (Sarajevo: Association for Democratic Initiatives (ADI)/ Human Rights Centre in Sarajevo (HRC) on behalf of the Justice Network in Bosnia and Herzegovina, 2012), pp. 70–71; Human Rights Centre, *Human Rights in Bosnia and Herzegovina 2011*.

⁶² See more in Zoran Stojanović, *Krivično pravo* [Criminal Law], (Belgrade: Pravni fakultet, 2001); Berislav Pavišić and Velinka Grozdanić, *Komentar osnovnog kaznenog zakona Republike Hrvatske* [Commentary of the Basic Criminal Code of the Republic of Croatia], (Rijeka: Pravni fakultet Sveučilišta u Rijeci, 1996).

dilemma regarding public posts on the Internet⁶³).⁶⁴ This principle is imposed as necessary in the prosecution of hate crimes in BiH, especially given the BiH context discussed in the conceptual section.

Some specific issues directly affecting the inadequate prosecution of this category of offenses were identified while analyzing criminal legislation primarily through the prism of its implementation: the issues in defining and understanding the criminal offense of incitement to hatred; the issues in defining, or partial failure to define, the terms “incitement”, “hatred”, “discord” and “intolerance” in regard to criminal offenses of incitement to hatred; the issue of public expression as an element of the offense of incitement to hatred under the CCBiH and CCFBiH, and potential issues of jurisdiction in the criminal prosecution of hate crimes.

4.2 Issues in Defining and Understanding What Actually Constitutes the Criminal Offense of Incitement to Hatred, Discord and Intolerance

4.2.1 Provision Prescribed Too Broadly

The broad legal standard in BiH criminal laws defining the criminal offense of incitement to hatred, discord and intolerance is a significant problem in identifying what, under these standards, actually constitutes aberrant behavior. In fact, none of the hate crime laws in the four BiH jurisdictions provide a precise definition. The respondents of both focus groups pointed out that lack of definition of ways of committing this offense is causing problems in the very first phase of their work, the phase of evaluating police reports on specific incidents. Namely, the lack of clear guidance on what constitutes this offense leaves an excessive “burden to prosecutors”: they have to assess whether a specific behavior constitutes a hate crime using only their discretion. This finding is also strikingly confirmed by the researched judicial practice in BiH, clearly showing that the offense of incitement to hatred could be committed by insulting, belittling, strife,⁶⁵ performing or

⁶³ Brčko District Prosecutor’s Office BiH, Indictment No. T 18 0 KT 0001113, May 11, 2010; Basic Court of Brčko District BiH, Judgment No. 96 0 K 006861 10 K, January 30, 2012; Appellate Court of Brčko District BiH, Judgment No. 96 0 K 006861 12 Kž, November 28, 2012.

⁶⁴ Boeckmann and Turpin-Petrosino, “Understanding the Harm of Hate Crime,” p. 214.

⁶⁵ Basic Court in Srebrenica, Judgment No. 82 0 K 000896 09 K, January 28, 2010; Basic Court in Srebrenica, Judgment No. 82 0 K 000092 08 K, February 2, 2009.

reproducing music content or texts,⁶⁶ writing,⁶⁷ handing out leaflets,⁶⁸ and a number of other methods. This is also emphasized by the BDBiH Court of Appeals, noting that: “the way in which the law defines the elements of this crime (“whoever incites and inflames national, racial or religious hatred, discord or intolerance among the constituent peoples and others who live in Brčko District”) suggests that this offense can be committed in almost unlimited number of ways and in a series of actions.”⁶⁹

A too broad set of standards, allowing excessive arbitrariness of participants of criminal prosecution adversely affects the legal certainty. One of the basic conditions of legal certainty is that the standard be set in such a way that an individual (rather than other participants of criminal prosecution) should be able to reasonably predict the consequences of their acts.⁷⁰ This is evident in the ICCPR, which states that the limit (in this case – of freedom of speech) may be prescribed only by the law applicable and formulated with sufficient precision to enable its subjects to adjust their behavior.⁷¹ The importance of the concept of legal certainty emphasizes a number of other regional and international instruments in the field of human rights protection.⁷² Therefore, a precise provision is a prerequisite for the successful and consistent prosecution of crimes, including hate crimes. In the case of an abstract legal definition of the criminal offense of incitement to hatred, it becomes necessary to evaluate the importance of each individual case and the actual seriousness of a concrete criminal act, in which case a prosecutor might not recognize this crime as such, and decide not to prosecute. The prosecutors point out that there are no clear criteria for assessing the actual seriousness of criminal acts in this context and that they must manage on a case-by-case basis.⁷³ The current BiH legal practice provides specific examples and explanations on how the seriousness of a particular behavior has been assessed, but most of the judgments leave this dilemma unexplained.⁷⁴ Thus, for example, a ruling by the

⁶⁶ Basic Court in Bijeljina, Judgment No. 80 0 K 001402 08 K, March 4, 2009.

⁶⁷ Municipal Court in Travnik, Judgment No. 51 0 K 040343 10 Kps, December 21, 2010.

⁶⁸ Basic Court of Brčko District BiH, Judgment No. 96 0 K 000638 09 K, April 1, 2010.

⁶⁹ Appellate Court of Brčko District BiH, Judgment No. 96 0 K 000638 10 Kž, March 31, 2011.

⁷⁰ European Court of Human Rights, *Cantoni vs. France*, November 15, 1996; OSCE/ODIHR, *Hate Crime Laws*, p. 46.

⁷¹ See General Assembly of UN, ICCPR, Article 19, para. 3.

⁷² The European Court of Human Rights (ECtHR), for instance, justifies further clarification of legal norms as applied by courts and explanation of the judgments. See e.g. European Court of Human Rights, *Kokkinakis vs. Greece*, May 25, 1993.

⁷³ Focus group in Sarajevo, April 15, 2013, and focus group in Banja Luka, April 26, 2013.

⁷⁴ See e.g. Basic Court in Srebrenica, Judgment No. 82 0 K 004445 10 K, January 11, 2011; Basic Court in Bijeljina, Judgment No. 80 0 K 001402 08 K; Basic Court of Brčko District BiH, Judgment No. 96 0 K 000638 09 K.

BDBiH Appellate Court⁷⁵ states that the gravity of a behavior is to be assessed by looking at its harmful effects on a specific protected category, but how the assessment is done is not the court's concern. The OSCE has also identified this problem and, in order to establish a consistent jurisprudence, it has recommended that the judges provide guidelines for the application and interpretation of the provisions prohibiting "incitement to hatred".⁷⁶

4.2.2 Issues in Understanding the Boundaries Between Freedom of Expression and Incitement to Hatred

Given that hate speech does not necessarily constitute a criminal offense, but its concept is so similar to that of the criminal offense of incitement to hatred and intolerance, there are serious problems in recognizing the crime. Given that the offense of incitement to hatred is primarily, if not exclusively, committed through speech⁷⁷, a dilemma will often appear of whether a given speech is a criminal offense or a hate speech not prohibited by the criminal law. This dilemma can certainly have direct repercussions on whether or not hate crimes are prosecuted. Defining, identifying and penalizing hate speech is a complex issue treated differently in different countries. Some countries penalize speech that expresses or incites to hatred or is offensive to certain groups. The legal regulation of this matter ranges from criminal laws criminalizing hate speech to hate speech provisions of other legislation, such as non-discrimination laws or laws on religious institutions and relations among religious groups.⁷⁸ Hate speech as such is not criminalized by the penal codes of BiH at any administrative level, and is usually subsumed under the offense of incitement to hatred.⁷⁹ This can be noted from the current legal practice in BiH which, as noted above, clearly shows that the criminal offense of incitement to hatred is usually associated with certain types of "speech".⁸⁰ The real problem, therefore, is to discern the difference between hate speech as an offense of

⁷⁵ Appellate Court of Brčko District BiH, Judgment No. 96 0 K 000638 10 Kž.

⁷⁶ OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*, pp. 53–54.

⁷⁷ More on ways of committing offenses in section 4.2.1.

⁷⁸ OSCE/ODIHR, *Hate Crime Laws*.

⁷⁹ Hate speech is partially regulated by the Anti-discrimination Law, the Law on Gender Equality, the Law on Freedom of Religion and Legal Position of Churches and Religious Communities in Bosnia and Herzegovina. These laws, through some articles, treat the concept of hate speech. Hate speech is also regulated by the Code of audiovisual media services and radio media services (Article 4) of the BiH Communications Regulatory Agency and the Press Code of Bosnia and Herzegovina (Article 3) of the Press Council in Bosnia and Herzegovina. See more in Centar za kulturu dijaloga, *Stop govoru mržnje* [Stop Hate Speech], (Sarajevo: Centar za kulturu dijaloga, 2012), pp. 5–6.

⁸⁰ In the majority of cases in Bosnia and Herzegovina the way of committing the criminal offense of inciting to hatred consists precisely in verbal attacks/insults, writing insulting letters, printing and distributing fliers with offensive content or singing offensive songs.

incitement to hatred and hate speech which does not constitute a criminal offense. In other words, the problem is often the blurred boundaries between freedom of expression and hate speech that turns into the criminal offense of inciting hatred and intolerance.

The European Convention on Human Rights (ECHR) in its Article 10, paragraph 1, provides for freedom of expression as the right which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of borders. However, in paragraph 2 it allows restrictions for, among other things, prevention of disorder or crime and protection of the reputation or the rights of others.⁸¹ Similar rights and obligations are provided for in Article 19 of the ICCPR.⁸² These provisions seen through the prism of the ICCPR definition of incitement to hatred (“... any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”)⁸³ clearly indicate problems in establishing the boundaries between free speech, hate speech, and the criminal offense of incitement to hatred. Namely, it is a serious problem to determine in which cases the specific expression is truly referenced to national, racial or religious hatred, or the incitement to discrimination, hostility or violence escalates. The borders between criminal and noncriminal acts in this field became even less clear since the European Court of Human Rights (ECHR) in its recent practice proposes that incitement to hatred does not necessarily require a call for violent or other criminal acts; but acts of disparaging protected groups that share the protected characteristics also qualify as hate crime.⁸⁴

The BiH prosecutors themselves indicate that it is very difficult to determine when freedom of expression stops and when a certain behavior becomes hate speech and criminal offense of incitement to hatred. One of the prosecutors, expressing the essence of the problem, emphasizes: “Where is the line? How to assess that? Are our courts going to set those boundaries, or shall we press charges and then wait for a final court judgment and comments... That to me is a big problem; the law might need to define that...”⁸⁵ It should be noted that the analyzed judgments of the BiH courts, even if convictions for the criminal offense of incitement to hatred include hate speech, do not provide an explanation on when

⁸¹ Konvencija o zaštiti ljudskih prava i temeljnih sloboda [Convention for the Protection of Human Rights and Fundamental Freedoms], Rome, November 4, 1950, *Official Gazette of Bosnia and Herzegovina* 6/99, Article 10, para. 2.

⁸² General Assembly of UN, ICCPR, Article 19, para. 3.

⁸³ *Ibid*, Article 20, para. 2.

⁸⁴ See European Court of Human Rights, *Féret vs. Belgium*, July 16, 2009.

⁸⁵ Focus group in Banja Luka, April 26, 2013.

and why a particular speech is a criminal offense of incitement to hatred, and not free speech guaranteed by the BiH Constitution.⁸⁶

It is important to note that this problem is also recognized internationally. Thus the organization Article 19, in order to determine when hate speech (which in itself is not necessarily a crime) becomes an offense of incitement to hatred, proposes a test consisting of six elements that should be applied and analyzed on a case-by-case basis. These elements are: context of the expression, speaker / proponent of the expression, intent of the speaker / proponent of the expression, content of the expression, extent and magnitude of the expression (including its public nature, its audience and means of dissemination), and likelihood of the advocated action occurring, including its imminence.⁸⁷ The available BiH judgments clearly show that these elements have yet to find their place in BiH judicial practice.

4.2.3 Terms “Incitement”, “Hatred”, “Discord” and “Intolerance” Insufficiently Defined in Provisions Establishing Inciting Hatred as a Criminal Offense

An additional issue, directly linked to the previous one, is the fact that the term “hatred” is not defined in the BiH jurisdictions, except in Brčko District Criminal Code.⁸⁸ The CCRS, in its 2013 amendments, defines a “hate crime” in its Article 147, paragraph 25. By introducing the definition of “criminal offense of incitement to hatred” the BDBiH criminal law at least partly explains what exactly is to be considered a bias motivation in cases of committing criminal acts. The term “hatred” is defined as follows:

“Hatred is a motive for committing a criminal offense as defined by the law, wholly or partly based on differences on the basis of real or perceived ethnic or national origin, language or script, religious beliefs, race, color, sex, sexual orientation, political or other opinion, social origin, social status, age, health status or other characteristics, or associated with individuals who have any of the above properties.”⁸⁹

⁸⁶ See e.g. Basic Court of Brčko District BiH, Judgment No. 96 0 K 000638 09 K; Basic Court in Bijeljina, Judgment No. 80 0 K 001402 K; Basic Court in Srebrenica, Judgment No. 082 0 K 06 000021, February 15, 2008; Basic Court in Srebrenica, Judgment No. 82 0 K 000092 08 K; Basic Court in Srebrenica, Judgment No. 82 0 K 000896 09 K; Municipal Court in Travnik, Judgment No. 51 0 K 040343 10 Kps; Basic Court in Novi Grad, Judgment No. 76 0 K 005273 K, July 7, 2010.

⁸⁷ ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*, pp. 27–40.

⁸⁸ Although activities have been undertaken to define hatred within the basic concepts and in FBiH criminal law, the new draft law has not yet passed the parliamentary procedure.

⁸⁹ “Criminal Code of the Brčko District of BiH,” Article 2, para. 37.

The term “hatred” needs to be defined as without an adequate explanation the term “hatred” could be identified with the emotional state of the perpetrator towards a particular individual, which is not an element of a hate crime.⁹⁰ The lack of definition of the term (in all BiH jurisdictions) is rooted in the criminal legislation of the Socialist Federal Republic of Yugoslavia (SFRY).⁹¹ However, influential actors such as Article 19 point out that a clear and uniform definition of terms ensures consistency in meeting the obligations of prosecuting these crimes,⁹² and thus increases the level of the previously elaborated legal certainty.

Although a significant number of prosecutors interviewed pointed out that a definition of the terms “incitement”, “hatred”, “discord” and “intolerance” is not required in criminal legislation given that the relevant definitions and interpretations can be found in the legal tradition of the SFRY, in the international and national judicial practice, in comparative practice, etc.,⁹³ the ODIHR points to the need to define these terms in the law in order to facilitate and improve the prosecution of these crimes.⁹⁴ In fact, the international regulations, and also the legal interpretations, offer very different views on how to understand “hatred” and interpret it in the context of hate crime prosecutions, which can cause confusion in the understanding of this standard in BiH. For example, in the Framework Decision the Council of the European Union offers certain guidelines for understanding “hatred”, stating that in this context hatred should be understood as an offense, i.e. criminalized conduct, when directed against a group of persons (or a member of such a group) defined by reference to race, color, religion, descent or national or ethnic origin.⁹⁵ Some authors also argue that “hatred” should be seen as a hostile feeling towards someone, and that it is a psychological basis for creating conflict and taking actions which may cause severe disturbances between nations, religions and races, and which are often accompanied by other severe consequences.⁹⁶ Furthermore, the authors of the Commentary of the Criminal Code of Serbia, for

⁹⁰ OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*.

⁹¹ Aleksandar Stajić and Milanka Vešović, *Komentar krivičnog zakona – Posebni dio* [Commentary on the Criminal Code - Special Section], (Sarajevo: Svjetlost – OOUR Zavod za udžbenike i nastavna sredstva, 1983), pp. 36–37.

⁹² ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*, p. 19.

⁹³ Focus group in Sarajevo, April 15, 2013.

⁹⁴ OSCE/ODIHR, *Opinion on Draft Amendments to the Federation of Bosnia and Herzegovina Criminal Code*, para. 21.

⁹⁵ “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,” points 4, 5 and 9 of the Framework Decision.

⁹⁶ Zdravko Rajić, Mirko Tomić and Zovko Miljko, *Komentar Kaznenog zakona FBiH* [Commentary on the Criminal Code of FBiH], (Mostar: OSCE Office for Democratic Institutions and Human Rights, 2000), p. 55.

example, claim that hatred consists of the willingness to inflict harm, and that it is a psychological basis for conflict.⁹⁷ Thus, although only partially shown, the variety of approaches to the definition of the term “hatred” supports the need for a more precise definition in all the BiH Criminal Codes. In this context, the definition of “hatred” offered by the CCBD BiH, besides its good aspects,⁹⁸ certainly has some flaws as well. This applies in particular to the fact that protected characteristics as defined there are set fairly wide. Namely, protected characteristics such as “social status” or “age” are unusual in a comparative perspective, and may cause confusion and difficulty in applying these provisions.

The absence of definition of “incitement”, “discord” and “intolerance” in criminal legislation in all BiH jurisdictions also impedes the prosecution of these crimes. One of the prosecutors pointed out: “I have a problem ... with words like discord and intolerance. There are no precedents or judgments that could help me discover what this means. For that we need a standard...”⁹⁹ In this case, many theorists and practitioners also seek to define these terms. For example, the Commentary on the Criminal Code of the SFRY indicates that “inflammation means expanding and strengthening existing hatred and strife,” while intolerance is a feeling of lower intensity than hatred, and is reflected exclusively in national, racial or religious intolerance.¹⁰⁰ The Commentary of the Criminal Code of Serbia points out that the negative potential of intolerance is of a lower intensity than that of hatred, but that it nevertheless may lead to committing acts which may have elements of criminal offense.¹⁰¹ Similarly, Rajić, Tomić and Miljko, commenting on the Criminal Code of FBuH, point out that “discord” means severe opposition, antagonism between members of different nations, religions and races, lack of willingness to dialogue with each other, with a constant veiled threat of outbreak of conflict, while “intolerance” is characterized by a milder form of negative relations between nations, racial and religious groups, i.e. a state of distrust, a sense of intolerance and aversion.¹⁰² Given the absence of any definition in the BiH criminal codes, too many theoretical definitions may appear confusing and significantly complicate the hate crime prosecution. While the conceptual differences are generally understandable,

⁹⁷ Svetislav Vuković, *Komentar Krivičnog zakonika* [Commentary on the Criminal Code], (Belgrade: Poslovni biro, 2005), p. 221.

⁹⁸ One of the key advantages of this definition of “hate” is the acceptance of a discrimination and not a hostility model, thus avoiding the need for expert evaluation of offenders in order to establish the existence of “hate” as a mental condition and one of the elements of the offense, i.e. excessive psychologizing is avoided and the application of standards facilitated in practice; see more in OSCE/ODIHR, *Hate Crime Laws*, p. 48.

⁹⁹ Focus group in Banja Luka, April 26, 2013.

¹⁰⁰ Stajić and Vešović, *Commentary on the Criminal Code*, pp. 36–37.

¹⁰¹ Stojanović, *Commentary on the Criminal Code of Serbia*, pp. 689–690.

¹⁰² Rajić, Tomić and Miljko, *Commentary on the Criminal Code of FBiH*, p. 55.

the degree of disruption of relations between groups in society, which the terms “hatred”, “discord” and “intolerance” actually define can be difficult to determine in each particular case.

The fact that key terms such as “incitement”, “hatred”, “discord” and “intolerance” are not defined in the BiH criminal codes (the first two terms are not defined in any of the jurisdictions) has obvious consequences in the BiH judicial practice. A review of the available judgments clearly shows that their reasonings do not contain any definition or explanation of the terms “incitement”, “hatred”, “discord” and “intolerance”, and that these terms have been used without an understanding of their essence.¹⁰³ A judgement of conviction passed on the accused for both inciting and inflaming hatred presents a striking example.¹⁰⁴ Namely, according to the previously outlined definition of “inflammation” and “incitement,” it is justified to ask how the hatred that had previously not existed, given that it was “inflamed,” could be also “incited” by the same actions. Another interesting example is that where a defendant is convicted of simultaneous incitement to national and religious hatred *and* intolerance, with no explanation provided in the reasoning on how it is possible for the same actions to cause hatred, discord and intolerance (which, bearing in mind the previously presented definitions does not seem possible).¹⁰⁵ Furthermore, a lack of understanding of these concepts and an inconsistency in their application are also demonstrated by the judgments in which the firing of missiles at a house of worship qualified as incitement to intolerance (which is of lower intensity than the incitement to hatred,) ¹⁰⁶ while a verbal abuse was characterized as incitement to hatred.¹⁰⁷

Inconsistent interpretation of these terms undoubtedly leads to arbitrariness of the courts. However, for the purposes of this study it is even more important that the lack of clear guidance regarding the interpretation of the key standards directly affects the prosecution of the criminal offense of incitement to hatred, in all its phases. Namely, the lack of clarity regarding the basic concepts of what constitutes a criminal offense causes difficulties in identifying behaviors that incite “hatred”, “discord” or “intolerance”, and difficulties in subsuming these under the norm. One

¹⁰³ Only one available judgment, the judgment of a first instance court, defines hatred and intolerance in its reasoning, accepting the definition offered in: Rajić, Tomić and Miljko, *Commentary of the Criminal Code of FBiH*; See Basic Court of Brčko District BiH, Judgment No. 096 0 K 07 000298, May 13, 2008.

¹⁰⁴ See e.g. Basic Court in Srebrenica, Judgment No. 082 0 K 06 000021; Basic Court of Brčko District BiH, Judgment No. 96 0 K 006861 10 K.

¹⁰⁵ See e.g. Basic Court of Brčko District BiH, Judgment No. 96 0 K 005533 09 K, February 1, 2010; Basic Court of Brčko District BiH, Judgment No. 96 0 K 000638 09 K; Basic Court in Bijeljina, Judgment No. 80 0 K 001402 08 K; Basic Court in Srebrenica, Judgment No. 082-0-K-06-000089, January 3, 2007.

¹⁰⁶ Municipal Court in Mostar, Judgment No. K 021546 07, February 12, 2007.

¹⁰⁷ Basic Court in Srebrenica, Judgment No. 82 0 K 000092 08 K.

of the interviewed prosecutors clearly pointed to the need to “accurately define the act and the manner of its execution as well as its consequences.”¹⁰⁸

4.2.4 Potential Problems in Criminal Jurisdiction

Almost identical definitions of the offense of incitement to hatred in legal solutions at the state and entity levels could cause problems in determining the jurisdiction. Differences in definitions of criminal acts of incitement to hatred between the state and entity levels cannot serve as adequate guidelines for determining jurisdiction.¹⁰⁹ Namely, in addition to differences in defining the manner of committing an offense, the element of “public” and the like, the provisions about the criminal offense of inciting hatred, discord and intolerance significantly differ regarding determination of the territorial jurisdiction. Thus, Article 145.a) of the CCBiH refers to crimes committed on the territory of BiH, Article 163 of the CCFBiH – on the territory of FBiH, Article 160 of the CCBDBiH – within the District, while Article 294) CCRS does not contain a territorial limitation in this regard. However, it is evident that this kind of territorial limitation does not resolve the question of prosecutorial and court jurisdiction for these crimes. All the aforementioned clearly show a problem of determining jurisdiction between state and entity (and BDBiH) prosecutions in terms of prosecuting this kind of crime. Namely, none of the characteristics of the offense as defined in the state and entity (and BDBiH) laws indicates which offense (which form of harassment, the degree of threat, the weight of the consequences thereof, and the like) is to be prosecuted at the state level, and which at the entity level. One of the prosecutors, who participated in the focus group, particularly emphasized this problem, pointing out that: “... some features should be established in BiH upon which to differentiate this kind of offense at the state level from the entity or Brčko District level. Because this way it is really not clear who is responsible for what.”¹¹⁰

¹⁰⁸ Focus group in Banja Luka, April 26, 2013.

¹⁰⁹ “Criminal Code of Bosnia and Herzegovina,” Article 145a), para. 1 reads: “Whoever publicly incites or inflames national, racial or religious hatred, discord or intolerance between the constituent peoples and others, or anyone else living or residing in Bosnia and Herzegovina, shall be punished by imprisonment of three months to three years”; “Criminal Code of the Brčko District of BiH,” Article 160, para. 1 reads: “Whoever incites or inflames national, racial or religious hatred, discord or intolerance between the constituent peoples and others living in Brčko District, shall be punished by imprisonment of one to five years”; “Criminal Code of the Republika Srpska,” Article 294.a), para. 1 reads: “Whoever causes or incites national, racial or religious hatred, discord or intolerance, or whoever spreads ideas about the superiority of one race or nation over another, shall be punished by a fine or imprisonment of up to two years”; “Criminal Code of the Federation of Bosnia and Herzegovina,” Article 163, para. 1 reads: “Whoever publicly causes or incites national, racial or religious hatred, discord or intolerance between the constituent peoples and others living in the Federation, shall be punished by imprisonment of one to three years.”

¹¹⁰ Focus group in Banja Luka, April 26, 2013.

Even a more detailed analysis of the relevant statutory provisions about jurisdiction of criminal laws,¹¹¹ provisions of the Law on the Court of BiH,¹¹² Criminal Procedure Code of BiH,¹¹³ and Criminal Procedure Codes of the entities and Brčko District¹¹⁴ would not provide a solution to this dilemma. This problem is also identified in a report of the Centre for Human Rights, where it is stated that:

“...since it is essentially the same offense (of incitement to hatred) that all criminal legislations define, it is necessary to harmonize the legislations and clearly demarcate territorial jurisdictions. Even though it could be logically assumed that the legislator intended for the BiH Prosecutor's Office to prosecute “severe forms” of this crime, that is not evident from the relevant provisions, even when it comes to the sentences prescribed.”¹¹⁵

Moreover, the gravity of an offense as a criterion for determining territorial jurisdiction, given that it is directly influenced by the value of the protected object, in the case of criminal acts of incitement to hatred is not quantitatively detectable (unlike, for example, traffic or property offenses). In this sense, determination of the severity of a concrete offense of incitement to hatred, discord and intolerance is subject to the almost entirely subjective assessment of the participants of criminal prosecution, and its use as a criterion for determining territorial jurisdiction is questionable.

The practice of prosecuting this crime by the Prosecutor's Office BiH does not provide criteria for determining jurisdiction in these cases. By the end of 2012, the

¹¹¹ “Criminal Code of Bosnia and Herzegovina,” Article 11; “Criminal Code of the Federation of BiH,” Article 12; “Criminal Code of Republika Srpska,” Article 119; “Criminal Code of the Brčko District of Bosnia and Herzegovina,” Article 12.

¹¹² “Zakon o Sudu Bosne i Hercegovine” [Law on the Court of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04 and 32/07, 49/09 – refined text, 74/09 and 97/09, Article 7 and 13.

¹¹³ “Zakon o kaznenom postupku Bosne i Hercegovine” [Criminal Procedure Code of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09, Article 29, para. 1 and 2.

¹¹⁴ “Zakon o kaznenom postupku Brčko Distrikta BiH” [Criminal Procedure Code of the Brčko District of BiH], *Official Gazette of Brčko District BiH*, 10/03, 48/04, 06/05, 12/07, 14/07, 21/07, 44/10 – the consolidated text, Article 27, para. 1; “Zakon o kaznenom postupku Federacije BiH” [Criminal Procedure Code of the Federation of BiH], *Official Gazette of the Federation BiH*, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 8/13, Article 36, para. 2; “Zakon o kaznenom postupku Republike Srpske” [Criminal Procedure Code of Republika Srpska], *Official Gazette of Republika Srpska* 53/12, Article 34, para. 2.

¹¹⁵ Human Rights Centre University of Sarajevo, *Human Rights in Bosnia and Herzegovina 2011*, pp. 151–152.

BiH Prosecutor's Office had filed only two indictments for this offense, but only one judgment was released, which was an acquittal.¹¹⁶ Judging by the previous experience of the prosecutors, these issues have been solved ad hoc, assessing the situation in each individual case. According to their statements, in situations where a prosecutor thinks a criminal offense might be within the jurisdiction of the Prosecutor's Office of BiH a common practice is to either inform or forward the case to the Prosecutor's Office for consideration. If it declares the case out of its jurisdiction, the case is returned to the cantonal and district prosecutors. Such an approach to this issue is definitely not adequate as there are no clearly defined criteria on determining territorial jurisdiction.

4.2.5 Public Expression as an Element of the Offense of Incitement to Hatred under the CCBiH and CCFBiH

The prosecution of the offense of incitement to hatred is complicated due to the fact that public expression is not an essential element of the offense in all BiH jurisdictions. Namely, the CCBiH and CCFBiH define public expression as an essential element of the offense of incitement to hatred, but the CCRS¹¹⁷ and CCBDBiH do not (the element was deleted from CCBDBiH by 2010 amendments¹¹⁸). Other counties' legislations also treat this issue in different ways. Some states do not define this element of the offense of incitement to hatred, discord and intolerance in their criminal laws,¹¹⁹ while others condition the offense by its public expression.¹²⁰ It should be noted that determining public expression as an element of criminal offense is in accordance with the relevant European standards. Thus, for instance, although CERD and ICCPR impose the obligation to penalize "any" act of provoking hatred, i.e. not only acts committed publicly,¹²¹ the relevant Framework Decision of the European Union nevertheless provides for an element of public

¹¹⁶ HJPC information, in author's archive.

¹¹⁷ See "Criminal Code of the Republika Srpska," Article 390. Later on "Zakon o izmjenama i dopunama kaznenog zakona Republike Srpske" [Law on Amendments to the Criminal Code of the Republika Srpska], *Official Gazette of Republika Srpska* 73/10, the same provision in Article 294.a) of the CCRS, together with the already mentioned comment in this article, Babić et al., Commentary on the Criminal Codes of BiH.

¹¹⁸ "Zakon o izmjenama i dopunama Kaznenog Zakona Brčko Distrikta BiH" [Law on Amendments to the Criminal Code of Brčko District of BiH], *Official Gazette of the Brčko District BiH*, 21/10.

¹¹⁹ See e.g. "Krivični zakonik Republike Srbije" [Criminal Code of Republic of Serbia], *Official Gazette of Republic of Serbia* 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009, Article 317.

¹²⁰ See e.g. "Kazneni zakon Republike Hrvatske" [Criminal Code of the Republic of Croatia], *Official Gazette of Republic of Croatia* 144/12, Article 325 and 386, para. 10.

¹²¹ See General Assembly of UN, CERD, Article 4, para. 1; General Assembly of UN, ICCPR, Article 20, para. 2.

expression in the definition of this crime.¹²² As pointed out by some authors in BiH, this criminal offense is most likely to be committed at various public meetings, political and other forums, on the streets, in shops or through the public media – therefore, publicly.¹²³

The prosecution of these offenses is further complicated by the lack of definition of the notion of “public” which, under the CCBiH and CCFBiH is an essential element of the criminal offense of incitement to hatred. Namely, the CCBiH and CCFBiH define the criminal offense of incitement to hatred as such only if committed publicly.¹²⁴ This is to say that an act would not qualify as a criminal offense should the investigation determine that it was not committed in a public place. But a clear distinction between a private and a public place is not always obvious in this context. The difficulties with this element of the offense, regarding its understanding and the classification of a specific behavior under such a standard, result from the fact that none of the BiH criminal laws define the term “public place”, meaning that the interpretation of the term is left to the Prosecutor’s discretion. The prosecutors who participated in the focus groups point out that they are not always sure how to interpret this element, given that it is a very fluid concept. It is not clear, in fact, as pointed out by one of our interviewees, “... whether it implies a closed circle of your friends, or a pub as a public building, whether it implies a rally...”¹²⁵

Provisions of the Law on Public Order may provide some guidance in interpretation of this element: “public place” means any area to which an unspecified number of people have access without any conditions (streets, squares, public roads, parks, picnic areas, waiting rooms, restaurants, retail and craft shops, resources and facilities of public transportation, etc.) or under some conditions (stadiums and playgrounds, cinemas, theaters and concert halls, exhibition rooms, etc.), as well as other areas which in a given period are used for such purposes (outdoor or indoor spaces used for public gatherings, contests, etc.). Additionally, in the context of misdemeanor offenses, a public space also includes places not considered public in a narrow sense if the place is seen from a public place (balconies, terraces, corridors, courtyards, etc.), or if the consequence of the offense occurred in a public place.¹²⁶ However, even with this kind of framework guidelines by analogy, there are numerous problems with interpretation of this element, directly causing difficulties in qualification of the offense. The prosecutors we interviewed believe that the available definitions do not provide a response to all possible manifestations of this element. Thus, for example, the respondents in this research problematize

¹²² “Criminal Code of the Republic of Croatia,” Article 325 and 386, para. 10.

¹²³ Rajić, Tomić and Miljko, *Commentary on the Criminal Code of FBiH*.

¹²⁴ “Whoever publicly incites.” See “Criminal Code of Bosnia and Herzegovina,” Article 145.a), para. 1; “Criminal Code of Federation of Bosnia and Herzegovina,” Article 163, para. 1.

¹²⁵ Focus group in Sarajevo, April 15, 2013.

¹²⁶ See e.g., “Law on Public Peace and Order of Sarajevo Canton,” Article 4.

the fulfillment of this element if the offense is committed by writing letters to one person, posting on the Internet (is posting public only if on forums or *YouTube* or is any online writing public, etc.), or when the offense is committed in a catering establishment where at the time there was only one staff member and two guests, etc. Finally, the interviewees pointed out that the problem of (not) defining and establishing this element may be a disincentive to prosecution of incitement to hatred, discord, and intolerance.¹²⁷

¹²⁷ Focus group in Banja Luka, April 26, 2013.

5.

Problems in the Prosecutors' Practice

5.1 Introduction

A series of reports from international organizations relating to BiH¹²⁸ indicate a significantly larger number of registered hate crime incidents than cases for which an indictment has been issued, or which have been prosecuted. Namely, the OSCE 2009 data,¹²⁹ for example, indicate 151 incidents in which bias was identified as a motive, and this mainly in parts of the country with significant returnee population.¹³⁰ During the same period only fifteen criminal offenses motivated by hatred were reported in the whole country.¹³¹

As already pointed out in the third section of this study, not including the bias motive in indictments of hate crimes is the most common problem in prosecuting hate crimes in BiH. Hate crimes are thus either prosecuted as “ordinary” crimes or as misdemeanors, which will be discussed later in the study.¹³² This study, therefore, has sought to identify the dominant reasons and factors affecting the lack of prosecution of crimes motivated by hatred. In the absence of research on this issue in BiH, the main sources of insight into this area were the feedback from the focus groups, interviews with prosecutors in BiH, and interviews with a number of police officers. Where this was purposeful, the findings were further contextualized and analyzed through theoretical analyses and a comparative perspective under individual categories, i.e. identified issues. The identified key issues will be presented separately in the following sections.

¹²⁸ European Commission against Racism and Intolerance (ECRI), *ECRI Report on Bosnia and Herzegovina: fourth monitoring cycle* (Strasbourg: ECRI, 2011); OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*.

¹²⁹ OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses: Annual Report for 2009*, p. 44.

¹³⁰ It was not specified whether the incidents / events qualified as criminal offenses, or minor offenses.

¹³¹ OSCE/ODIHR, *Hate Crimes in the OSCE Region: Incidents and Responses – Annual Report for 2011* (Warsaw: OSCE/ODIHR, 2012), p. 23.

¹³² OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*, p. 27.

5.2 Deficiencies in Police Reports

5.2.1 The Importance of an Adequate Police Response

Since police officers are the first persons at the crime scene and it is they who register the facts of the act, from which stem the elements of the offense, any flaws at this stage are extremely difficult to correct later. In this regard, police officers have a key role in the prosecution of hate crimes. Police actions significantly influence the outcome of a criminal investigation, as well as communities' reactions to the offense. Communities may react to hate crimes in a number of ways. The aggrieved party's group often feels vulnerable and insecure in the community where the offense is committed, and the general feelings towards them are estimated precisely by the police response.¹³³ Emphasizing this fact, prosecutors within both focus groups pointed to possible failures in the police reports, which are the basis of the prosecutors' future work: "Here we have a problem with the police because we often do not see it [a crime committed out of hatred] from their reports... or it is just mentioned in passing."¹³⁴ This problem is certainly recognized in other countries as well, since the means of recognizing bias as a motive, either by the police or by the prosecution, is not easy to objectify.¹³⁵

Most of the prosecutors pointed out that once they receive a police report, if it does not explicitly specify elements that might indicate bias as a motive; they treat the offense as an "ordinary" one (especially when it comes to robbery, bodily injuries, burglary, etc.) One of the prosecutors pointed out: "... because we often cannot see it from their reports ... so, if only they would give us some kind of hint, prosecutors would willingly investigate the motive, and ask the police to additionally investigate and determine that part."¹³⁶ Also, because of the nature of the language used in the police reports, even when these elements are mentioned, it is often easy to overlook them. For example, in the case of a burglary of a returnee home, where the injured party was chosen on the basis of the discriminatory motive, i.e. the

¹³³ Stephen Wessler, *Addressing Hate Crimes: Six Initiatives That Are Enhancing the Efforts of Criminal Justice Practitioners* (Maine: Center for the Study and Prevention of Hate Violence University of Southern Maine, 2000), p. 4.

¹³⁴ Focus group in Sarajevo, April 15, 2013. and Focus group in Banja Luka, April 26, 2013.

¹³⁵ A comparative analysis *Policing Racist Crime and Violence* states that in the Czech Republic, Estonia, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal and Slovenia, police register a racial motivation only in cases of criminal acts of racism; and in Austria, Denmark, Finland, France, Germany, Ireland, Slovakia, Spain, Sweden and the UK police register a racial motivation in general crime, whereas in Cyprus and Greece police do not register racial motivation. See European Monitoring Centre on Racism and Xenophobia (EUMC), *Policing Racist Crime and Violence: A Comparative Analysis* (Luxembourg: EUMC, 2005), p. 11.

¹³⁶ Focus group in Banja Luka, April 26, 2013.

offense was bias motivated; it is easy to overlook the term 'returnee house' stated in the report.

5.2.2 Lack of Sensitization and Police Officers' Personal Attitudes as Potential Problems

A lack of sensitization of the police on hate crimes has been also identified as a significant problem which may directly affect the identification of, and thus the inclusion of, bias motive in reports. This problem has been observed in other countries as well. Balboni and McDevitt, for example, emphasize that not all members of law enforcement agencies equally support the law enforcement on hate crimes.¹³⁷ Lack of support of law enforcement on hate crimes, according to the above authors, occurs in several forms. It ranges from a lack of effort to understand the essence of the provisions and thereby improve their implementation in the field, to the deliberate ignoring of behavior that can be subsumed under this standard. Bell also emphasizes the skepticism of police officers toward prosecuting hate crimes, arguing that it is often caused by the perceived additional workload that follows the introduction of any new standards.¹³⁸ Boyd, Berk and Hamner (1996),¹³⁹ in their ethnographic study of the practice of decision-making by officers from two police stations in urban areas, conclude that a large number of police officers consider that dealing with hate crimes distracts them from real crime, and that it is only the result of naive criminal policy which aims at "political correctness" rather than dealing with real crime control. Most participants of the focus groups in our study also recognized this problem; they consider that the lack of sensitivity of police officers, as those who first encounter the criminal offense, greatly influences the lack of prosecution of these offenses: "It's a question of the sensitivity of the police as they are in the field, they are eyes and ears of the prosecutors ... If you do not get any information from the field ... you cannot choose to go in that direction ..."¹⁴⁰

Furthermore, the inclusion of bias motive in a police report is certainly influenced by the personal attitudes of police officers. Although this is a construct very similar to the issue of lack of sensitization, it is an issue regarding police officers' personal value systems, which they adopt as a product of the social climate of their own

¹³⁷ 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* 3, no. 1 (2001), pp. 1–27.

¹³⁸ Jeannine Bell, "Deciding When Hate is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime," *Rutgers Race and the Law Review* 4, no. 1 (2002), p. 115.

¹³⁹ Elizabeth A. Boyd, Richard A. Berk and Karl M. Hamner, "Motivated by Hatred or Prejudice: Categorization of Hate-Motivated Crimes in Two Police Divisions," *Law and Society Review* 30, no. 4 (1996), in *Making Hate a Crime: From Social Movement to Law Enforcement*, ed. Valerie Jenness and Ryken Grattet (New York: Russell Sage Foundation, 2001), p. 132.

¹⁴⁰ Focus group in Sarajevo, April 15, 2013.

social environment. Sensitizing police officers can result in them responding to hate crimes (identifying bias as a motive and entering it in the report, although they personally believe that it is a waste of time, etc). Therefore, it is possible to get them to work independently of their personal attitudes. The personal (value) attitudes of a police officer is by far a greater problem given that they might prevent the officer from perceiving a certain behavior as a hate crime, because such a behavior might be close to the officer's individual system of values. This, of course, is not specific to BiH only. Generally speaking, personal attitudes about the importance of prosecuting hate crimes, as well as existing social constructs (social climate in a given area, the ruling political affiliation, etc.) directly affect the recognition and inclusion of bias motives in police reports.¹⁴¹

This problem was highlighted by some of the participants in the focus groups, who pointed out that personal opinions of police officers determine their perception of the issue, which can have direct repercussions on the recognition of discriminatory motive and, subsequently, on its inclusion in the report. One of our interviewees pointed out: "In my opinion, we have to raise the awareness of the police on this issue. For example, a police inspector currently on duty in Zavidovići, or Žepče, should be aware that graffiti on the Orthodox church reading 'kill Serbs' is a criminal offense ... But the police officer passes by the church hundreds of times, reads the graffiti and just moves on."¹⁴²

5.2.3 Gaps in Investigation

The common format of investigations, often not adapted to the needs of hate crime criminal prosecution, is also a significant problem when it comes to including bias motive in police reports. Namely, in the current investigative scenario in BiH, the investigating police officers generally do not examine "why something happened," i.e. do not question the motive of a crime.¹⁴³ While questioning motives is not a common practice of the police officers, it is of crucial importance in the investigation of hate crimes.¹⁴⁴ While the question of motivation is irrelevant for most criminal offenses,¹⁴⁵ for some it is necessary to collect evidence on a particular form of culpability (*mens rea*).¹⁴⁶ The BiH prosecutors believe that police officers do not actually deal with the motivation of the crime, which in hate crime cases

¹⁴¹ King, "Hate Crimes," p. 534.

¹⁴² Focus group in Sarajevo, April 15, 2013.

¹⁴³ Actions of the police during the investigation are defined by the procedural laws.

¹⁴⁴ Jack Levine and Jack McDevitet, *Hate Crime: The Rising Tide of Bigotry and Bloodshed* (New York: Plenum, 1993), pp. 165–173.

¹⁴⁵ Bell, "Deciding When Hate is a Crime," p. 40.

¹⁴⁶ E.g. For the offense of fraud, abuse of insurance (i.e. insurance fraud), and for a number of crimes against property, and the like.

presents a problem for any further work, especially when there is a possibility of prosecuting the offense as an “ordinary” crime. As one of the prosecutors pointed out: “In RS there was an example of burning a mosque, or something like that. Basically the police questioned all the people, the perpetrators admitted to the offense, but the police did not ask why they did it. The motive was the only thing they did not ask about...”¹⁴⁷

Therefore, it is evident that there are several possible reasons why police officers either do not recognize bias as a motive of the offense or, even if they do, they do not enter it in the reports submitted to prosecutors. Whatever the causes, the prosecution of hate crimes is thus prevented in the earliest stage, and there is no legal response to the crime.

5.3 The Lack of Indicators for Identification of Bias-Motivated Crimes

Recognizing and identifying bias motive often presents a difficulty. Namely, recognizing bias motive of a crime, either a qualified form of the base offense or an offense committed under aggravating circumstances, represents a significant challenge in other countries as well. Various scholars, theoreticians and practitioners have been trying to offer a solution to this dilemma, which has resulted in a large number of models used in different countries, and which can serve as examples of good practice. A possible approach to this problem is to analyze the bias motive on the basis of the given elementary definition. The motive is observed and evaluated through the prism of “intent” (the fundamental role of bias motive is to be verified) and “extension” (it is determined whether an offense would have been committed even without bias motivation).¹⁴⁸ Bell has also developed a set of criteria for identifying a bias motive, according to which it is necessary to determine the diverse identities of the perpetrator and the aggrieved party, and the context of the criminal offense.¹⁴⁹ The context of a criminal offense involves determining not only what happened but also why it happened, with particular emphasis on the issues of dual motivation.¹⁵⁰ Guided by the criteria that Bell offers, it is possible to

¹⁴⁷ Focus group in Sarajevo, April 15, 2013.

¹⁴⁸ 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.

¹⁴⁹ Bell, “Deciding When Hate is a Crime.”

¹⁵⁰ A criminal offense (hate crime) could have two motives. E.g. when a burglary is committed in a house of a returnee, the intent is to commit theft, but the choice of dwelling (returnee house) is bias motivated.

determine an approximate list of indicators for recognition of bias motivation, and its role in the particular offense.

In the United Kingdom and the United States bias motivation is predominantly determined through applying subjective criteria (offender's personal history, relationship with the victim and the like).¹⁵¹ In London, for example, "victim based" recognition is used (a model where the subjective feeling of the victim is examined and thus it is established whether bias motive is an element of the offense).¹⁵² The aggrieved party (victim) of the hate crime is also the focus of a practice adopted in some states of the USA. Namely, such a model implies investigating a series of precisely identified steps for testing the history of a victim, their relationship with the perpetrator, victimization and a range of other factors that can shed light and prove the bias motivation of the offense.¹⁵³ Many theoreticians stress the importance of investigations oriented toward the victim. Thus, for instance, Iganski states that due to the fact that a large number of hate crimes are committed by "ordinary" citizens in the context of "everyday life," the investigations oriented toward victims can clarify the situational dynamics of the offense (or, as Bell suggests, the specific circumstances of the offense), and enable understanding of the background structure of the offense, and the collection of valid evidence.¹⁵⁴

Although both theory and comparative practice, therefore, offer a number of criteria and methods for identifying bias motivation of a crime, our research shows that in BiH there are no defined criteria for understanding this standard. Discussions with the BiH prosecutors showed that understanding of this standard is left to their discretion, which can greatly depend on their personal knowledge of these issues, but also their personal views about the importance of specific overt behaviors.¹⁵⁵ The 2011 report on BiH by the European Commission against Racism and Intolerance (ECRI)¹⁵⁶ expressed concern over the fact that the majority of hate crimes reported by the police are not prosecuted, and the reason for this is lack of knowledge regarding elements and indicators for identifying bias motive. At the same time, the available judicial practice in this area indicates a diverse understanding of the elements of the offense, but it does not offer more precise indicators for identifying a bias motive.¹⁵⁷ The cases where an indictment was issued,

¹⁵¹ Dixon and Ray, "Current Issues and Developments in Race Hate Crime," pp. 109–124.

¹⁵² Iganski, *Hate Crime and the City*.

¹⁵³ APRI, *A Local Prosecutor's Guide for Responding to Hate Crimes*, p. 26.

¹⁵⁴ Iganski, *Hate Crime and the City*, p. 20.

¹⁵⁵ On the influence of personal attitudes of participants in criminal process on identification and prosecution of hate crimes see more in King, "Hate Crimes."

¹⁵⁶ ECRI, *ECRI Report on Bosnia and Herzegovina*, p. 18.

¹⁵⁷ During the research, an analysis was performed of court decisions on hate crimes, as listed in the bibliography.

and those with sentences issued (for criminal offenses of inciting national, racial and religious hatred and intolerance, as well as criminal offenses where hatred was a qualifying circumstance), show that the indicators most commonly used for bias motive recognition are verbal expressions of hatred¹⁵⁸, oral or written.¹⁵⁹ Finally, when asked about indicators for identifying bias motive and methods of proving it, the majority of respondents stated that they had no clear position and that they managed “from case to case”.

Methods of conducting investigations of bias motivated crimes are also problematic. Namely, the methods of conducting investigations are directly related to the indicators of bias motivation. Each of the identified indicators can and should be subjected to testing in further investigation, and can directly affect its course. When discussing ways of conducting investigations when a discriminatory motive is identified, the BiH prosecutors interviewed had different opinions. The dominating view is that investigations should be directed towards the perpetrators of crimes and the offender's past conduct should be investigated, together with earlier convictions for similar offenses, or public statements in which prejudice was expressed, and participation in organizations and groups that promote certain prejudices and the like, that is, a “continuity of conduct” should be established.¹⁶⁰ Many theoreticians believe that collecting evidence and investigating the perpetrator's “prior actions” is an intrinsic part of the investigation when dealing with prejudice as a motive.¹⁶¹ ODIHR¹⁶² also recommends taking these actions into the investigation, and such an approach during the investigation and later in proving bias motive can be found in BiH judicial practice. Although it is not used in every case that we have consulted (investigation and evidence collection depend on the nature of the offense), its application is still evident in some cases.¹⁶³ Investigation of the history of relations between the offender and the victim is also an important element that could confirm the importance of bias motive in the commission of the offense. The history of relations is extremely important in investigating criminal cases with dual motivation (dual motivation for committing

¹⁵⁸ E. g. Brčko District Prosecutor's Office BiH, Indictment No. T 18 0 KT 0004328 12, August 7, 2012.

¹⁵⁹ E.g. Basic Court of Brčko District BiH, Judgment No. 96 0 K 006861 10 K; Brčko District Prosecutor's Office BiH, Indictment No. KT-96/07, September 12, 2007; Basic Court of Brčko District BiH, Judgment No.0960 K 07 000298, etc.

¹⁶⁰ Focus group in Banja Luka, April 26, 2013.

¹⁶¹ Richard A. Devine and Alan J. Spellberg, “Hate Crime Prosecution,” in *Hate Crimes: Understanding and defining hate crime*, ed. Barbara Perry et al. (Westport: Praeger Publishers, 2009), p. 101.

¹⁶² OSCE/ODIHR, *Razumijevanje krivičnih djela počinjenih iz mržnje: Priručnik za Bosnu i Hercegovinu* [Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina], (Warsaw: OSCE/ODIHR, 2010), pp. 23-24.

¹⁶³ E.g. Basic Court of Brčko District BiH, Judgment No. 96 0 K 006861 10 K.

crimes or bias as the motive in selecting the victim – see footnote 151).¹⁶⁴ There is also the opinion that investigations should lead towards determining the feelings of the victim (the aggrieved party): “We would have to introduce the victim’s feelings somehow. How the victims experienced it ... Does the person against whom the offense was committed, or the environment in which it was committed actually recognize the crime as such?”¹⁶⁵

Therefore, even though the prosecutors interviewed generally and intuitively understand the basic directions in which the investigation of such cases should go, the lack of clear guidance on this issue makes it difficult for them, in the sense that there are no landmarks, and consistency in investigating these cases is not ensured.

5.4 The Perceived Ubiquity of These Crimes, and the Difficulty in Distinguishing the Relevant from the Irrelevant

A perception about the ubiquity of hate crimes is very pronounced in the BiH context as well as in other countries. Levine and Rabrenovic point out that the majority of multi-ethnic societies, faced with the problem of establishing an adequate balance between human and ethnic rights, daily encounter behaviors that can essentially be related to hate crimes. The problem is particularly pronounced in countries with poorly developed economies, those facing poverty and significant structural changes, such as some countries of the former Yugoslavia.¹⁶⁶ In BiH incidents of various forms and intensity which are very similar to hate crimes are seen almost daily, even though, legally speaking, they do not necessarily constitute hate crimes. For example, hate speech is often present in the media, at football matches or in public gatherings, but it does not necessarily progress into incitement of hatred and intolerance. The same applies to insults (and curses) on account of ethnicity or faith, where hatred is evident and where there is evidence of bias motivation but which, as such, do not necessarily constitute hate crimes.¹⁶⁷ The media coverage of events that can be linked to hate crimes but not necessarily constitute criminal or misdemeanor offense certainly significantly contributes to the perception of the omnipresence of hate crimes in everyday life. Such reporting significantly affects both the world of the “ordinary citizen” and the perception of

¹⁶⁴ See more in Bell, “Deciding When Hate is a Crime”; Nolan “Learning to See Hate Crimes.”

¹⁶⁵ Focus group in Banja Luka, April 26, 2013.

¹⁶⁶ Levin and Rabrenovic, “Hate Crimes and Ethnic Conflict,” pp. 574–588.

¹⁶⁷ *Ibid*; see Section 4.2.2. of this study.

people dealing with identification and prosecution of hate crime.¹⁶⁸ It is precisely the perception of ubiquity of hate crime that often causes problems for the police officers and prosecutors who try to determine whether a particular incident is indeed a hate crime, be it a criminal offense or a misdemeanor.¹⁶⁹ The perception of the ubiquity of these crimes – from outbursts of hatred at stadiums and offensive speeches of politicians,¹⁷⁰ to offensive graffiti, Internet forums, etc. – seems to have a sort of paralyzing effect on the prosecutors.

In this regard, the prosecution of hate crimes also faces the problem of distinguishing the “relevant” from “irrelevant” hate crimes. An extremely important finding of this study is certainly a disparity in understanding of the “weight” and the seriousness of hate crimes, especially when it comes to the offense of incitement to national, racial and religious hatred, discord and intolerance. Specifically, this offense can be committed in an extremely large number of ways, but the dilemma remains among prosecutors of “what to include under the criminal offense, as it could also constitute a misdemeanor ...”¹⁷¹ i.e. how to determine the degree of “seriousness” of an offense which could be characterized as a criminal offense. The prosecutors interviewed had very different opinions on this issue: “If we are to prosecute a case, we first need to ask ourselves where to start. From top to bottom or vice versa, from bottom to top ...”¹⁷² Namely, the prosecutors wonder if it is more important and purposeful to pay attention to hate crimes committed by politicians and media personalities, or whether hate crimes are equally significant and their consequences the same no matter who the perpetrator is. The problem of inconsistent understanding of the seriousness of an offense is most obvious in cases of offensive graffiti as a form of criminal offense of incitement to national, racial and religious hatred and intolerance. While offensive graffiti writing has already been sentenced in BiH as a hate crime,¹⁷³ the prosecutors’ opinions about this vary greatly. Opinions range from categorical rejection (“... a mild misdemeanor, if you ask me”, “... I would always say a misdemeanor”)¹⁷⁴ to the understanding that what matters is the essence of the offense and not the way in which it is

¹⁶⁸ Iganski, *Hate Crime and the City*, pp. 13, 14, 24 and 25.

¹⁶⁹ 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*, ed. Barbara Perry et al. (Westport: Praeger Publishers, 2009), p. 164.

¹⁷⁰ The question that this study does not explore and which is related to this issue regards immunity of MPs and other politicians guaranteed unlimited freedom of speech, hate speech included. In contrast, international law insists on the punishability of hate speech. This extremely important issue requires special treatment and will not be considered in more detail in this study.

¹⁷¹ Focus group in Sarajevo, April 15, 2013.

¹⁷² *Ibid.*

¹⁷³ Basic Court of Brčko District BiH, Judgment No. 096 0 K 07 000298.

¹⁷⁴ Focus group in Sarajevo, April 15, 2013.

committed. Namely, some prosecutors believe that, in this particular case, the most appropriate way of solving the dilemma of “seriousness” of the offense would be to evaluate the circumstances in which the graffiti was written.¹⁷⁵ Some prosecutors believe that whenever there is bias as a possible motive, it must be assessed in the context of the circumstances of the offense, regardless of the way in which it is manifested.¹⁷⁶ It should be noted that this type of assessment is generally considered necessary and that it has a significant theoretical basis.¹⁷⁷

An additional problem is also the unclear boundaries between “freedom of speech”, “hate speech” in the broad sense and the criminal offense of incitement to hatred and intolerance, especially by political representatives, as well as on the Internet and in the media. The prosecutors were concerned that prosecuting offenses committed in this way and by these subjects would “open a Pandora’s box”¹⁷⁸ and draw the prosecution offices into “unbefitting political struggles”¹⁷⁹. There is also some ambiguity about whether prosecutors should initiate prosecution when they see certain statements in the media or in public gatherings (election rallies). Opinions about this important issue are divided. Some prosecutors consider that this should be covered by other government agencies, such as the BiH Communications Regulatory Agency or self-regulatory bodies (e.g. the BiH Press Council) which should analyze such statements and take the appropriate steps.¹⁸⁰ A different opinion is best expressed by the following statement: “... but I remember how it used to be before the judiciary reform... the then chief prosecutor had files with newspaper articles, individual files for media persons ... This *is* our task, we cannot escape it...”¹⁸¹

Looking at the differences in understanding and defining behaviors that may be considered hate crimes and prosecuted as such, it is evident that the failure to

¹⁷⁵ This view is advocated by King, “Hate Crimes,” p. 534; but also ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*, pp. 1, 23, 24 and 41.

¹⁷⁶ E.g. “But if there’s any such incident, any sort of incidental action at a time when an ethnic or religious group celebrates a holiday, then we are on a trail of some sort of degree of hatred. It entirely makes a difference if such an incident happens on just any day or on a religious festival, and if the perpetrator belongs to one religious or ethnic group and the victim belongs to another.” Focus group in Banja Luka, April 26, 2013; “Imagine a situation in Blažuj, returnee settlement, a large church in Blažuj, graffiti on a church where people gather daily for religious ceremonies. Graffiti reads ‘Kill Serbs’. This cannot be a misdemeanor only... It cannot only be a misdemeanor given the place of the offense, the manner in which it is written. In my opinion this certainly cannot be misdemeanor...” Focus group in Sarajevo, April 15, 2013.

¹⁷⁷ Bell, “Deciding When Hate is a Crime”; Nolan et. al., “Learning to See Hate Crimes”; APRI, *A Local Prosecutor’s Guide for Responding to Hate Crimes*.

¹⁷⁸ Focus group in Banja Luka, April 26, 2013.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Focus group in Sarajevo, April 15, 2013.

prosecute is not caused by objective and practical issues only but largely depends on the perception of the ubiquity of these crimes in the BiH context. The reasons for this may be various – subjective attitudes of each individual (including the prosecutors), the historical and cultural context, the social climate prevailing in a given society or community, the media reporting on behaviors that have elements of hate crimes, etc. Regardless of the reasons, it is clear that the frequency of these behaviors and the related phenomena can be confusing, if not paralyzing, for the work of prosecutors in the area of hate crimes prosecution, which is definitely a problem that requires attention.

5.5 Perceived Uncertainty Regarding the Evidence, and Reasons of a Practical Nature

The perceived uncertainty about proving a hate crime is often a disincentive, and it may result in a decision not to press charges. In other words, in such situations, hatred as an element of a criminal offense or an aggravating circumstance is ignored and the offense prosecuted as an “ordinary” crime. Exploring predictors of hate crime prosecution, Byers, Warren-Gordon and Jones¹⁸² conclude that, apart from legal concerns, decisions to prosecute are also influenced by problems with proving bias motivation. According to these authors, due to the problems of proving, a large number of hate crime cases end up in civil proceedings¹⁸³ where the standard of proof is much lower (at least in Anglo-Saxon law countries).¹⁸⁴ As an additional reason for such action, Jenness and Grattet state the fact that while collecting evidence and making a decision on the charges, prosecutors mainly “weigh” the likelihood of conviction against the cost of the process.¹⁸⁵ Namely, proving a bias

¹⁸² Bryan D. Byers, Kiesha Warren-Gordon and James A. Jones, “Predictors of Hate Crime Prosecutions: An Analysis of Data from the National Prosecutors Survey and State-Level Bias Crime Laws,” *Race and Justice* 2, no. 3 (2012), pp. 203–219.

¹⁸³ E.g. Verbally expressed hatred on ethnic grounds, expressed through cursing, can end up in civil proceedings if the person insulted files a lawsuit. Although this is not a hate crime *de jure, de facto* it can be seen as such.

¹⁸⁴ Namely, Byers, Warren-Gordon and Jones point out that “preponderance of the evidence” required in civil cases is much easier to achieve than “beyond reasonable doubt” required in criminal proceedings. Byers, Warren-Gordon and Jones, “Predictors of Hate Crime Prosecutions,” p. 215.

¹⁸⁵ Jenness and Grattet, *Making Hate a Crime*.

motivation “beyond reasonable doubt”¹⁸⁶ can be an extremely difficult task.¹⁸⁷ A similar conclusion was reached by our focus group participants who stated that due to the uncertainty of proving bias motivation they often opt for charges of “ordinary” crimes, or misdemeanors.¹⁸⁸

Problems with proving hate crimes can be numerous. However, proving a hate crime is not necessarily complicated. The bias motivation is often clear, and as such easy to prove. Nevertheless, there are certain situations where difficulties may arise with proving. The extent to which prosecutors perceive difficulties with proving is best reflected in a statement by one of the respondents in the focus groups: “The longer I think, the more I’m convinced that at least one whole volume of evidence is needed to charge someone with hate crime...”¹⁸⁹ The following statement gives a striking example of the consequences of lack of clarity and perceived difficulties in the proving process: “We have listed here more than one occasion when we were on the verge of an investigation into a hate crime. Then, frankly, we took the path of least resistance; we fled from it, because of the standard of proof...”¹⁹⁰

Furthermore, given that bias as a motive for the offense can be manifested in various ways (creating physical evidence or not), the problem of proving a motive is further complicated. Thus, one of the interviewed prosecutors emphasizes: “We have no physical evidence there; it is very difficult to obtain evidence.”¹⁹¹ In situations where bias motivation is manifested so that it leaves a material trace of committing a criminal offense (graffiti, letters, posts on forums and the like), the proving becomes a lot easier. On the other hand, in situations where bias motivation was manifested only verbally the proving is considerably harder: “For this type of crime the problem of proving does not occur in a situation where something is written; if there is a video, it is not a problem. But the verbal communication between the victim and the..., it’s always a big question of whether a witness would repeat it in court.”¹⁹² The prosecutors point out concerns with regard to proving verbally manifested bias even when expressed in front of a large number of witnesses. There is a concern regarding inconsistent testimony (that witnesses would not repeat in court what they had said to the police) and the credibility of the witnesses (for example, if a crime occurred in a bar and the witnesses were drunk at the time of the

¹⁸⁶ It should be noted that the standard of “beyond reasonable doubt” mainly relates to the common law (which provides standard of “balance of probability” for civil matters). In civil law the distinction between standards of proof is not as strict.

¹⁸⁷ James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York: Oxford University Press, 1998), p. 103.

¹⁸⁸ Focus group in Sarajevo, April 15, 2013.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Focus group in Banja Luka, April 26, 2013.

offense, etc.) This problem has also been observed and elaborated in the relevant literature. Susan Gellman, for instance, points out that in situations where words are the only evidence of bias, the very arbitrariness of racial (ethnic and religious) epithets makes it almost impossible to identify bias motivated offenses, and to prove them.¹⁹³ In situations where the bias motivation is expressed only verbally, taking into account the probability of the previously mentioned restrictions on the use of witnesses, the prosecutors see investigation of the perpetrator's past as the best way of proving¹⁹⁴, which certainly complicates further investigation. But it is certainly important to note that, despite these difficulties, in terms of the offense of incitement to national, racial and religious hatred and intolerance, the examined BiH judicial practice offers a number of examples where the offense was committed verbally.¹⁹⁵

Certain practical problems affecting the lack of criminal prosecution of hate crimes in BiH are also closely related to the previous problem. Namely, the BiH prosecutors' offices organizational structure does not provide organizational criteria at either state or entity level which would provide a uniform dispersion and a relatively equal case load per prosecutor, taking into account the number of prosecutors per square kilometer, the number of prosecutors per capita, or number of prosecutors per a certain number of cases.¹⁹⁶ Therefore, it often happens that a small number of prosecutors work in an office that serves a large jurisdiction, which can lead to work overload. The problem is best illustrated by the statement of a prosecutor who stressed: "But you have to understand us, we are quite crowded

¹⁹³ Jeannine Bell, *Policing Hatred: Law Enforcement, Civil Rights and Hate Crime* (New York: University Press, 2004), p. 20.

¹⁹⁴ In cases where words are the only evidence of motivation, Bell (*Ibid*, p. 39) points out the necessity of multifactor analysis as a means of gathering evidence (facts of the offense, circumstances of the offense, and characteristics of the offense and character of the perpetrator); also, the focus group in Banja Luka, April 26, 2013.

¹⁹⁵ See footnote 63 and 86.

¹⁹⁶ See "Zakon o tužiteljstvu BiH" [Law on the Prosecutor's Office of BiH], *Official Gazette of BiH* 42/0, 03/03, 37/03, 42/03, 09/04, 35/04, 61/04 and 97/09; "Zakon o Federalnom tužiteljstvu Federacije BiH" [Law of the Federal Prosecutor's Office of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation BiH* 19/03; "Zakon o tužilaštvima Republike Srpske" [Law on the Prosecutor's Offices of Republika Srpska], *Official Gazette of Republika Srpska* 55/02, 85/03 and 37/06; "Zakon o tužilaštvu of Brčko Distrikta BiH" [Law on the Prosecutor's Office of Brčko District BiH], *Official Gazette of the Brcko District BiH* 19/07; the ten cantonal laws on Prosecutor's Office and a number of Rulebooks regulating this matter, such as: "Pravilnik o unutaršnjem ustrojstvu tužiteljstva BiH" [Regulation on the Internal Organization of the BiH Prosecutor's Office], *Official Gazette of Bosnia and Herzegovina* 36/13; "Pravilnik o unutrašnjoj organizaciji i poslovanju tužilaštava Republike Srpske" [Regulation on the Internal Organization and Operations of the Prosecutor's Offices of Republika Srpska], *Official Gazette of Republika Srpska* 86/12; "Pravilnik o unutrašnjoj organizaciji i poslovanju Federalnog tužiteljstva Federacije BiH" [Regulation on the Internal Organization and Operations of the Federal Prosecutor's Office of the Federation of BiH], *Official Gazette of Bosnia and Herzegovina* 36/13, etc.

with cases. There are hundreds of cases and sometimes we take the path of least resistance. The important thing is to file an indictment ...”¹⁹⁷ So, in this situation, faced with lack of time and resources, prosecutors often take the simplest option – prosecuting an “ordinary” crime or a misdemeanor. This problem has been recognized in a number of countries which have developed systems against bias motivated crimes, and have proposed and implemented ways of overcoming it. Some states of the United States, for example, have set up special units for hate crime prosecution because of these problems, among other things,¹⁹⁸ while the Prosecutor’s Office Palm Beach, Florida, uses a model of specialization, where there are a number of prosecutors who specialize in hate crimes.¹⁹⁹

5.6 Lack of Training and Knowledge about the Case Law in this Area

All the prosecutors we interviewed for the purposes of this study stated lack of training in hate crime as a major problem in the prosecution of these crimes. A lack of familiarity with the subject of hate crime is evident in the very legislation, and in the practical problems of investigating and proving the crime. This problem was identified in the 2011 ECRI report on BiH,²⁰⁰ which emphasizes the importance of training the participants in the prosecution process. The OSCE study on combating hate crime also recommends improving the competence of all participants in the criminal prosecution.²⁰¹ A large number of experts also emphasize the importance of the training of all participants in the prosecution process.²⁰²

The OSCE Mission to BiH takes steps to strengthen the institutional capacity of law enforcement bodies and the judiciary through training of their employees. Namely, in 2012, the Mission, in cooperation with ODIHR and the centers for training judges and prosecutors, organized a training for prosecutors on hate crime prosecution, which was followed by the ODIHR/OSCE publication “Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina”.²⁰³ This publication provides key information about the hate crime concept and the response expected from

¹⁹⁷ Focus group in Banja Luka, April 26, 2013.

¹⁹⁸ Cook County and Illinois; APRI, *A Local Prosecutor’s Guide for Responding to Hate Crimes*.

¹⁹⁹ *Ibid.*

²⁰⁰ ECRI, *ECRI Report on Bosnia and Herzegovina*, p. 18.

²⁰¹ OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*, pp. 52, 53 and 54.

²⁰² See more in Barbara Perry et al., *Hate Crimes: Understanding and defining hate crime* (Westport: Praeger Publishers, 2009), p. 51; Wessler, *Addressing Hate Crimes*, p. 5.

²⁰³ OSCE/ODIHR, *Understanding Hate Crime*.

law enforcement agencies, judicial bodies and local authorities. The training of prosecutors continued within the 2013 program of initial training and professional development of the Center for Judicial and Prosecutorial Training of the Federation of BiH (CESTFBiH), within which a seminar “Acts committed out of hatred” was jointly organized by CESTFBiH and OSCE/ODIHR.²⁰⁴ However, one of the prosecutors we interviewed confirmed the inadequacy of the training by pointing out that, to his knowledge, the only training on hate crimes was organized in a seminar attended exclusively by chief prosecutors.²⁰⁵ Although this statement, in view of the presented information, is not accurate, it speaks volumes about the need to intensify education in this field.

A lack of training for legal staff in the area of hate crime prosecution is yet another significant disadvantage in hate crime prosecution in BiH. The OSCE Mission to BiH recognized the importance of general training of expert associates and organized a two-week training for newly employed professionals and consultants in order to provide further support for the prosecution of war crimes in BiH, with the support of CESTFBiH. The OSCE Mission points out that such training is important in speeding up fair and effective prosecution of these offenses.²⁰⁶ Given the significant role of this category of employees²⁰⁷ of prosecutor’s offices, their lack of training in the area of hate crimes can certainly affect the (lack of) prosecution of hate crimes.

The prosecutors participating in the focus groups noted that the lack of available practical literature and judicial practice in the area of a hate crime is also a major problem in hate crime prosecution. Only a small number of respondents were familiar with the studies and manuals published by the OSCE,²⁰⁸ while none of them

²⁰⁴ The seminar was organized to train judges on specifics of hate crime prosecution.

²⁰⁵ Focus group in Banja Luka, April 26, 2013.

²⁰⁶ OSCE Mission to Bosnia and Herzegovina – Human Rights Department, *Suđenja za ratne zločine pred sudovima u Bosni i Hercegovini: Napredak i prepreke* [War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles], (OSCE Mission to Bosnia and Herzegovina, 2005).

²⁰⁷ The Basic Concepts of laws on criminal procedures applied in BiH (see “Criminal Procedure Code of BiH,” Article 20, point g); “Criminal Procedure Code of the Brčko District BiH,” Article 20, point d); “Criminal Procedure Code of Republika Srpska”; “Criminal Procedure Code of the Federation BiH,” Article 20, para. 1, point g.) stipulate that the professional staff of prosecutors’ offices have the status of authorized officials, which means that, in accordance with instructions of a prosecutor during the criminal proceedings, they can independently take and implement the actions of proving a crime, e.g. examination of the witnesses, examination of the suspects, etc. Rules of Procedure of prosecutorial offices (e.g. “Regulation on Internal Organization of the BiH Prosecutor’s Office,” Article 49, para. b) and d.) stipulates that the professional staff, in addition to taking action during the investigation, prepare drafts of all types of prosecutorial legal briefs – indictments, complaints, motions, orders – and attend main hearings and coordinate the activities of law enforcement agencies for conducting investigations. In addition to all stated above, expert advisors give advice or legal opinions on specific criminal cases and legal issues within the scope of prosecution offices.

²⁰⁸ OSCE Mission to Bosnia and Herzegovina, *Tackling Hate Crimes*; OSCE/ODIHR, *Understanding Hate Crime*.

were familiar with other research literature in the respective area. The importance of the availability of literature for the successful prosecution of these crimes is highlighted by the statement of one of the rare prosecutors who attended the earlier mentioned OSCE training and who owns their publication: "Well, I've gone through this [the training], and I already know a lot of things and I know where I can find what I need here in the booklet [the Guide]."²⁰⁹

The prosecutors also point out the unavailability of judicial practice in this area from both BiH and the region, but also from Europe and beyond. In their opinion, the said verdicts would help them to solve practical dilemmas they encounter during investigation. One of the BiH prosecutors said it would be useful "to see how the countries with highly developed democracy deal with this. Whether there are trials there and how this is done there."²¹⁰

²⁰⁹ Focus group in Banja Luka, April 26, 2013.

²¹⁰ *Ibid.*

6.

Structural Problems

6.1 Lack of Documents and Policies in Terms of Understanding Bias-Motivated Crimes, and the Need to Stimulate Hate Crime Prosecution

A lack of protocol / directions / guidelines on handling hate crimes impedes the prosecution of these crimes. These documents, in fact, are part of common practice in many countries, including those in the region. The UK government has, for instance, prepared an action plan on hate crimes²¹¹ providing a detailed description of challenges for hate crime prosecution (from the legislative perspective and from the perspective of practice) and detailed instructions on how to overcome them. In order to ensure that all hate crimes are prosecuted fairly, firmly and comprehensively, and that all the victims of such incidents get full support through positive action, the Kent Police in the United Kingdom issued “M62 Hate Crime,” a protocol proscribing police conduct and their cooperation with the prosecution in hate crime cases.²¹² An example of good practice in a judicial system and social context similar to BiH is the “Protocol on Procedures in Hate Crime Cases” (hereinafter referred to as the Protocol) adopted by the Human Rights Office of the Croatian Government.²¹³ The purpose of the Protocol²¹⁴ is to provide the conditions for effective and comprehensive action by authorities involved in detecting, prosecuting and monitoring the results of hate crimes proceedings, and aspects of cooperation between these bodies and their other activities and obligations relating to training in combating these crimes. Thus, on the basis of laws and regulations, the Protocol establishes the obligations of the relevant bodies involved in detecting, prosecuting and monitoring the results of hate crime prosecution. There are also various professional and academic organizations that

²¹¹ Home Office Government, *Hate Crime – The Cross-Government Action Plan* (UK: Home Office Government, 2009).

²¹² “M62 Hate Crimes,” Kent Police, last modified June 12, 2013, http://www.kent.police.uk/about_us/policies/m/m062.html (Accessed on July 18, 2013).

²¹³ “Protokol o postupanju u slučaju zločina iz mržnje” [Protocol on Procedures in Cases of Hate Crime], *Government of the Republic of Croatia – Task Force for monitoring hate crimes*, 2011.

²¹⁴ *Ibid*, Article 2.

contribute to better prosecution of these offenses. In the USA, for instance, *The American Prosecutors Research Institute* and *National District Attorneys Association* developed “A Local Prosecutor’s Guide for Responding to Hate Crimes”²¹⁵ which offers answers to a number of dilemmas related to the prosecution of hate crimes.

On the other hand, none of the relevant legal regulations in the four jurisdictions in BiH²¹⁶ contains the appropriate protocol / instruction / guidance on the prosecution of hate crimes in BiH. This was confirmed by all the participants of the focus groups. Other BiH relevant authorities, including the relevant ministries, have also failed to take appropriate action in this regard.²¹⁷ When asked about whether it was necessary to develop protocols / instructions / guidelines on handling hate crime cases in BiH, most of the prosecutors responded affirmatively, noting that the guidelines should be concise and practical. The interviewed prosecutors point out that they are faced with a series of guidelines for various areas of their work, but these are often not practical and given their length and inappropriate content, they remain unused.²¹⁸

Internal documents and policies should also stimulate prosecutors to decide to prosecute bias motivated crimes. It is therefore important to note that the organization of prosecutors’ work, as planned by the Regulations on orientation criteria for the operation of the BiH prosecutors’ offices,²¹⁹ is fully applicable to hate crime cases. Therefore one of the possibilities for improving hate crime prosecution is surely to stimulate the prosecutors to work on these cases through the said Regulations. When asked about this, the focus group participants expressed seemingly contradictory

²¹⁵ APRI, *A Local Prosecutor’s Guide for Responding to Hate Crimes*.

²¹⁶ Namely, all criminal substantive and procedural laws were consulted, as well as laws and regulations governing the establishment and operation of prosecutors’ offices, including rules and guidelines available in all four judicial jurisdictions in Bosnia and Herzegovina. In addition to the regulations that were published in the official gazettes, we have examined and analyzed the regulations available on the website of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, the portal of Justice of Bosnia and Herzegovina and Entity centers for the training of judges and prosecutors.

²¹⁷ E.g. neither the 2012 Report on the Work of the BiH Ministry of Justice, no.10-02-5-13509/12 of 16 January 2013, the 2013 program of the BiH Ministry of Justice, no. 10-02-57538/12 of 16 January 2013 nor any other document in the library of legal regulations available on the website of the BiH Ministry of Justice anticipates providing these necessary documents; neither does the 2011-2013 Strategic Plan of the BiH Ministry of Security from September 2010, nor the proposed measures with information on the state of security in BiH for 2012, no. 01-6-04-10-1-16/13 of 5 May 2013, nor any other document available on the Ministry of Security web page. Finally, none of the websites of Republika Srpska Government, RS Ministries, the Federation BiH Government, its Ministries, and the Council of Ministers of BiH indicate the existence of these documents nor can they be found on these websites.

²¹⁸ Focus group in Sarajevo, April 15, 2013.

²¹⁹ “Pravilnik o orijentacijskim mjerilima za rad tužitelja u tužiteljstvima u Bosni i Hercegovini” [Regulations on the Orientation Criteria for the Work of Prosecutors in Prosecutors’ Offices in Bosnia Herzegovina], *Official Gazette of BiH* 103/12.

views, noting that hate crimes are complex criminal offenses indeed, but that their prosecution should not be further stimulated (beyond the current provisions of the Regulations). This apparent contradiction becomes quite grounded if seen through the prism of the provisions of Article 8 of the Regulations, and in light of the fact that not all hate crimes are necessarily complex in terms of their prosecution. Paragraph (1) of the said article, in fact, provides that:

“If a prosecutor, while working on a case, believes that the value assigned to a particular case does not correspond to its true value, he can make a reasoned written request to the chief prosecutor requesting a larger valuation of the case. If the chief prosecutor decides to comply with the request, he may decide for such a case to be valued more than others.”

This provision fully opens the possibility of a greater valuation of hate crime cases for the purpose of stimulating their prosecution. Hence the conclusion that the existing legal framework already offers a possibility of stimulating prosecution of hate crimes, in cases of more complex crimes; it is only necessary to adequately promote and ensure its appropriate implementation.

6.2 The Underdeveloped Relationship between the Prosecutors' Offices, the Police and Various Civil Society Actors in Hate Crime Prosecution

Good communication between all participants of the criminal prosecution is a necessary prerequisite for progress in the prosecution of hate crimes. The relationship between the prosecution and the police officers as those who first come into contact with the crime is crucially important for the subsequent process. As previously mentioned, the police officers are “gatekeepers” of the criminal justice system; the prosecution process begins with them, so their cooperation with prosecutors is a very important factor in successful hate crime prosecution.²²⁰ Numerous experts emphasize the importance of adequate training and good communication between all actors in the fight against hate crimes.²²¹ The BiH prosecutors interviewed were also aware of the importance of cooperation with other actors in the criminal prosecution of hate crimes. Although generally satisfied

²²⁰ Bell, *Policing Hatred*.

²²¹ Jacobs and Potter, *Hate Crimes*, pp. 92–101.

with their communication with the police, the prosecutors thought that, given the sensitiveness of the issue, the communication should definitely improve. Namely, prosecutors cited deficiencies of the initial police reports on hate crimes as the most common problem in communication with the police, which is discussed within section 5.2 of this study. Difficulties sometimes arise during the investigation (after bias as a motive has been recognized and identified) in obtaining the evidence necessary to confirm the bias motive of the offense. Prosecutors believe that the problems in communication between the police and prosecutors arise from the previously observed lack of sensitization of police officers and the impact of their value systems, but also from a lack of knowledge and training in respective issues.

The practice of other countries offers several models for improving policing and communication between the police and prosecutors that can serve to improve hate crime prosecution in BiH. In the BiH context, one of the possible solutions would be to establish specialized units for investigating hate crimes the way it is done in New York, Boston, Baltimore, Chicago and San Francisco in the USA.²²² It should be noted that the model is applicable only in the larger police departments, while for smaller ones a model that Bell promotes is more suitable.²²³ Namely, Bell presents a model of “filtering” which implies an additional training offered to one of the police officers who then becomes responsible for checking and filtering information regarding offenses that patrolmen suspect of bias motivation. The said police officer would check each report received from patrolmen, and forward the report to the prosecutor’s office after further verification of the facts and confirmation of bias motivation. When asked about the application of these models in the police structures in BiH, the BiH prosecutors had conflicting views. Some prosecutors explicitly stated that everyone (both prosecutors and the police force) had to be trained to do everything, and that specialization for only certain forms of criminality would not be purposeful. This would be a problem especially in small communities. Contrary to this view, a number of prosecutors thought the presented model appropriate; pointing out that it could improve the recognition, identification, registration and investigation of hate crimes, which would ultimately present a method of general prevention.

Training of police officers is certainly a prerequisite for successful hate crime prosecution. As elaborated in section 5.1 of this study, the deficiencies in police reports indicate, among other things, a lack of sensitization of police personnel and a lack of knowledge necessary for the recognition, identification and detection of bias motivation in hate crimes. Namely, the police officers interviewed pointed out that they had never had any kind of training on this issue and that their work in hate crimes cases is led by intuition. The importance of adequate and continuing training of police officers has been recognized both in the legislation and in the practice of

²²² *Ibid*, p. 93.

²²³ Bell, “Deciding When Hate is a Crime,” p. 55.

many states. The relevant policies for combating hate crime in a number of states of the USA introduced mandatory police training as early as in 1994.²²⁴ In 2000, the improved model started providing different types of initial and ongoing training programs in this field, separately for patrolmen, inspectors and management, as well as joint training programs.²²⁵

However, the lack of joint training of prosecutors and police officers is also a factor that negatively affects the identification and elimination of problems in the cooperation and communication between relevant actors in hate crime prosecution. The successful prosecution of hate crimes, and of all other crimes, requires the timely and adequate response of all links in the chain of criminal prosecution. The prosecutors we interviewed pointed out that certain forms of joint training could serve as a platform for identifying problems regarding cooperation in the prosecution of these crimes and finding solutions to them. Similar models have been applied in other countries. For example, the City of Richmond and the New Jersey Prosecutor's Office (USA), recognizing these problems, have organized a joint training on hate crimes for prosecutors and the police.²²⁶ Although the Ministry of Security and the OSCE Office for Democracy and Human Rights in BiH organized a training program for police officers in combating hate crimes, there has never been a joint training for police officers and prosecutors.²²⁷

Formalized and regular communication and exchange of plans and experience between the police and prosecutors is certainly good practice. One of the focus group participants suggested a possible way of improving cooperation between the police and prosecutors, a model of cooperation with the police used in his office: regular two month meetings of all prosecutors and the police managerial bodies, a rule which "has turned out to be an excellent practice." Using this model could directly help in identifying and solving problems in the investigation and subsequent prosecution of specific hate crime cases. Naturally, the successful implementation of these matrices would require comprehensive training of both prosecutors and police officers in recognizing, identifying, researching and proving hate crimes.

Cooperation between prosecutors' offices (and the police) with different actors of civil society organizations (CSOs) also represents untapped potential to improve hate crime prosecution in BiH. The importance of civil society actors in

²²⁴ See more in OSCE/ODIHR, *Hate Crime Laws*, pp. 30–31 and 38; Terry A. Maroney, "The Struggle Against Hate Crime: Movement at a Crossroads," *New York University Law Review* 564, no. 73 (1998), p. 591.

²²⁵ Wessler, *Addressing Hate Crimes*, pp. 5–11.

²²⁶ APRI, *A Local Prosecutor's Guide for Responding to Hate Crimes*, p. 16.

²²⁷ This seminar was first implemented in BiH in order to strengthen the cooperation between police agencies and non-governmental organizations in preventing and combating hate crime. See more in "Saopćenje za javnost: Uspješno proveden Program obuke policijskih službenika za suzbijanje zločina iz mržnje" [Press Release: Successfully Implemented Training Programs for Police Officers in Combating Hate Crime], Ministry of Security BiH.

hate crime prevention and prosecution has been recognized by a range of experts and organizations dealing with hate crimes. In “Preventing and responding to hate crimes,”²²⁸ the OSCE stresses the importance of the civil society sector (NGOs) in establishing a bridge between the actors of criminal prosecution and society in general, in improving relations between the police and the wider community, data collection, the monitoring and reporting of these offenses, helping and supporting hate crime victims, raising awareness about the harmful effects of these acts, running campaigns on proactive action in preventing and punishing hate crimes and a number of other activities immanent to the sector.²²⁹ Stressing the importance of civil society organizations in this domain in transitional societies, Levine and Rabrenovic²³⁰ advocate the significant involvement of CSOs in hate crime prevention and repression. By comparing the role of civil society actors in the United States, England, Germany and France, Erik Bleich²³¹ concludes that the potential for cooperation between official and informal mechanisms of the fight against hate crimes is inconsistently exploited, due to policy makers’ inflexibility and the general tendency to adhere to the existing mechanisms for the fight against hate crimes - those already incorporated and established in their way of working.

Keeping this in mind, the importance of cooperation between civil society actors and prosecutors is not insignificant. First of all, civil society organizations often register these crimes and gather information about them. Although the data collected in this way cannot and should not replace the official statistics, in situations where these data are not available officially (as is the case in BiH), these registers can indicate hate crime occurrence for the prosecutors’ offices which, due to numerous factors, they are not even aware of.²³² When asked about cooperation between prosecutors and different actors of civil society, the prosecutors interviewed unanimously responded that they were not familiar with any forms of cooperation between NGOs and prosecution offices.

In recent years, there have been some initiatives within civil society in BiH regarding hate crime prevention. The strengthening of NGOs in combating hate crimes is also supported by the OSCE Mission to BiH and in 2011 the OSCE organized two workshops for NGOs entitled “Preventing and Responding to Hate Crimes.” One of the workshops was realized in co-operation with the ODIHR. In 2012, the OSCE Mission, in collaboration with the Human Rights Defenders, organized a training for ten non-governmental organizations dealing with human rights, entitled “Hate

²²⁸ OSCE/ODIHR, *Preventing and Responding to Hate Crimes*.

²²⁹ *Ibid*, pp. 27–33.

²³⁰ Levin and Rabrenovic, “Hate Crimes and Ethnic Conflict,” p. 586.

²³¹ Erik Bleich, “Responding to Racist Violence in Europe and the United States” (Article presented at the Stockholm Criminology Symposium of the European Institute for Crime Prevention and Control, Stockholm, 2006 and 2007).

²³² *Ibid*, pp. 33–42.

Crimes and Hate Speech: Monitoring, Advocacy and Litigation Strategies.” In 2013, the OSCE Mission announced the continuation of cooperation with these, as well as other non-governmental organizations working on the prevention of and response to hate crime.²³³ Furthermore, in 2013 the Association for Democratic Initiatives Sarajevo (ADI), under the auspices of Civil Rights Defenders, the international organization for the protection of human rights, began the implementation of a project entitled “Combating Hate Speech and Hate Crime”. The main objectives of the project are to increase the capacity of CSOs in the monitoring and reporting of hate crimes, to intensify public pressure on local authorities, and, finally, to increase public awareness of the importance of proper sentencing of hate crimes. In early January 2013, ADI, the Youth Initiative for Human Rights, Mediacycenter and Sarajevo Open Centre, with the support of Civil Rights Defenders and the OSCE, formed a coalition to combat hate speech and hate crimes, aimed at advocating for adequate regulation of hate speech and hate crimes in BiH penal laws.²³⁴ The first training on hate crimes based on sexual orientation and gender identity, organized for the Sarajevo Canton Police, certainly presents a step further in strengthening the cooperation between bodies of criminal prosecution and civil society organizations in the fight against hate crimes. The seminar was held in September 2013, in the framework of the project entitled “Coming Out! Advocacy and protection of the rights of LGBT persons”. The project was funded by the European Union and implemented by the Heinrich Böll Foundation together with partner organizations – Sarajevo Open Centre and Foundation CURE. The objective of this training was to sensitize police officers on LGBT issues, and on the need for full implementation of human rights protection of LGBT persons in BiH. Indeed, bearing in mind the intensified activities of civil society organizations in this field in BiH, the question remains as to why cooperation between the CSOs and the judicial structures in the fight against hate crimes is still the exception rather than the rule.

The concept of “community based policing” (CBP) can also significantly contribute to improving the prevention as well as the prosecution of hate crimes. The importance of the concept of community policing in the prevention and prosecution of hate crimes has been recognized in both theoretical and professional literature and in the practice of certain countries.²³⁵ Given that cooperation between the police and the local community is one of the key elements of hate crimes prevention,

²³³ See OSCE Mission to Bosnia and Herzegovina website: www.oscebih.org/Default.aspx?id=143&lang=HR (Accessed on December 2, 2013).

²³⁴ See Sarajevo Open Centre, “Ljudska prava i politička participacija” [Human Rights and Political Participation].

²³⁵ E.g. Office of Community Oriented Policing Services (COPS) was established within the USA Ministry of Justice, and it defines specific programs (including community policing and hate crimes), sharing information and releasing grants to local police agencies across the United States. See COPS website: www.cops.usdoj.gov (Accessed on September 25, 2013).

the CBP concept can be useful in multiple ways.²³⁶ CBP considerably facilitates the identification of bias motivation, the understanding of the context of a crime, the gathering of evidence, the neutralizing of the harmful consequences of the offense, etc. The officers in charge of CBP (especially in smaller communities) are in a position to have in depth knowledge of the prevailing social climate and the value systems of a community and its individuals, which can considerably facilitate the identification of hate crimes and contribute to their prosecution.²³⁷

However, the CBP concept is not used in BiH for hate crime prevention and the improvement of hate crime prosecution. Although the concept of community based policing was recognized and systematically introduced in the 70s and 80s of the past century,²³⁸ its implementation in BiH is relatively recent and we cannot say it is used at full capacity.²³⁹ A review of available documents²⁴⁰ and the relevant web pages of the BiH Ministries of Interior indicate that this concept is not used for preventing or improving the prosecution of hate crimes in BiH. Such findings have been confirmed by the interviewed police officers, who pointed out that there have been no activities within this concept to combat hate crimes, which was certainly an omission.²⁴¹

²³⁶ Neil Chakraborti, "A Glass Half Full? Assessing Progress in the Policing of Hate Crime," *Policing* 3, no. 2 (2009), pp. 121–128.

²³⁷ Michael Palmiotto, *Community Policing: A Policing Strategy for the 21st Century* (Gaithersburg: Aspen Publisher, 2000), pp. 295–299.

²³⁸ C. Benet-Gbaffou, "Police-Community Partnership and Response to Crime: Lesson from Yeoville and Observatory Johannesburg," *Urban forum* 17, no. 4 (2006), pp. 301–326.

²³⁹ The concept came to life in BiH during the period 1996-2002, with the help of the international community, in the form of pilot projects in the municipalities of Prijedor, Žepče, Zenica and Dobož. After the success of the pilot projects, the strategy was developed for community policing, and adopted in 2007. Afterwards, a number of CBP projects were developed and implemented at local level with various themes, all aiming at strengthening ties of trust between the police and communities. See: Irma Deljković and Marija Lučić-Čatić, "Implementing Community Policing in Bosnia and Herzegovina," *Police, Practice and Research* 12, no. 2 (2011), pp. 172–184.

²⁴⁰ Council of Ministers of Bosnia and Herzegovina, *Strategija rada policije u zajednici u BiH* [National Community-Based Policing Strategy], (Sarajevo: Council of Ministers of Bosnia and Herzegovina, 2007); The Council of Ministers of Bosnia and Herzegovina Working Team for the implementation of the National Community Based Policing Strategy, *Operativni priručnik o partnerstvu policije i zajednice* [Operational Handbook on Police-Community Partnership], (Sarajevo: The Council of Ministers of Bosnia and Herzegovina Working Team for the implementation of the National Community Based Policing Strategy, 2010); Damir Čutura et al., *Rad policije u zajednici u Bosni i Hercegovini – Priručnik* [Community Policing in Bosnia and Herzegovina - Manual], (Sarajevo: CPU, 2010).

²⁴¹ An interview with a police officer of the Sarajevo Canton Ministry of Internal Affairs, July 4, 2013, and interviews with police officers of the BDBiH Ministry of Internal Affairs, June 18, 2013 and June 27, 2013.

7.

Concluding Remarks

This study, focused primarily on examining the prosecutorial side of implementation of the relevant legal provisions on crimes motivated by hatred, has aimed to identify the key problems in the criminal prosecution of hate crimes in BiH and to explore ways of stimulating the police and prosecutors to adequately recognize bias motive and take it into account when dealing with criminal offenses. The issue is observed through the prism of the implementation of the existing regulations, prosecutorial practices and structural problems present in this field.

When the relevant regulation *is considered from the perspective of practice*, it becomes evident that the BiH legal framework in this area, although largely meeting the international and regional standards, has certain shortcomings which cause difficulties in its implementation. First of all, the BiH criminal laws are too vague in defining the base criminal offense of incitement to hatred, which is a significant problem when identifying and determining whether a behavior violates the laws under this standard. Additional problems in the prosecution of criminal acts of incitement to hatred include the absence of a consistent definition of the term “hatred” in all BiH jurisdictions and a too broad list of protected characteristics in the existing definitions of the CCBDBiH. Moreover, the BiH criminal codes do not define even basic concepts such as “incitement”, “discord” and “intolerance”, which is certainly a problem regarding the interpretation of these terms and, ultimately, the prosecution of criminal acts of incitement to hatred, discord and intolerance. Another shortcoming of the relevant BiH legislation is the fact that the criminal codes of BDBiH and RS do not include “public (expression)” as an essential element of the offense of incitement to national, racial and religious hatred, discord or intolerance, while the criminal code of BiH does – but without a definition of public (expression). Furthermore, the almost identical definitions of the offense of incitement to hatred in legislative solutions at the state and entity levels causes confusion and problems in determining the territorial jurisdiction at both levels (between the state and entity /and BDBiH/ levels, and between the different entity /and BDBiH/ prosecutions). The problem is further complicated by the fact that neither the existing regulations nor the limited judicial BiH practice set clear boundaries between the concepts of freedom of expression, hate speech which does not necessarily constitute a crime, and hate speech which constitutes a crime of incitement to hatred and intolerance. All these deficiencies cause problems in the implementation of the given standards and directly affect the (non) prosecution of hate crimes.

The research of *problems in prosecutors' practice* has led to the identification of several factors that significantly affect the (non) prosecution of hate crimes. The difficulties arise from the very beginning, i.e. when police officers register a specific criminal act. Given the fact that police officers are the first people that come to the site and register the facts on committed criminal offenses, any flaws at that stage are extremely difficult to correct later. There are several reasons for failure in the process of registration of crimes, i.e. entering the facts in police reports. First of all, if the police officers are not sensitized to hate crimes, this can directly affect the identification of, and thus the inclusion of bias motive in their reports. Furthermore, not including a bias as a motive in the police reports can clearly be influenced by the personal attitudes of police officers, which may be a result of the influences of their social environment and the dominant values in a particular community. Given that the initial stage of investigation does not imply investigating the motives of hate crime offenders, this can also present an insurmountable obstacle to any further work on such cases. Practical difficulties are also caused by the lack of appropriate indicators for identifying bias motive, which often impedes the police and prosecutors in the recognition and identification of the bias motive of the offense. In addition, the absence of defined criteria and specified methods of investigation of bias motivated crimes causes a series of problems and inconsistencies in criminal proceedings. Some of the problems in prosecutors' practice regarding perceptions of the ubiquity of these crimes, highly expressed in the BiH context, result in difficulties in distinguishing between "relevant" and "irrelevant" hate crimes. This is directly reflected in the identification of hate crimes, as well as in making decisions on whether to include bias motivation in indictments. Closely related to the previous problem are some particular problems of a practical nature, first of all the lack of training in hate crime, at all levels. There is an evident lack of training programs in hate crime for prosecutors, professional associates and the police. Training in hate crime for prosecutors and police officers is sporadic, unorganized and unsystematic, with an evident absence of planned activities and constructive dialogue among the participants of the prosecution process. One of the practical problems is most certainly the lack of, i.e. the inaccessibility of, practical literature and case law in the area of hate crimes in BiH, in the region, before the European courts and beyond, which could provide guidance in solving practical problems and dilemmas in prosecuting these crimes.

The prosecution of hate crimes in BiH is surely also affected by certain *structural problems*, most of all the lack of protocol / instructions / guidelines on hate crime criminal proceedings, such that would include appropriate guidance and solutions to practical problems. None of the four jurisdictions in BiH provides a document that would clarify doubts regarding the obligations of the competent authorities involved in identifying, processing and monitoring hate crime prosecution, or the manner and content of co-operation between these bodies and their other activities and obligations in this area. A substantial failure of the existing model of conduct of the hate crime prosecution participants is the lack of cooperation

between the prosecutors and the police and various civil society actors. Although a number of civil society organizations in BiH are focused on hate crimes (keeping records, assisting victims, building tolerance and restoring broken relationships in the community, etc.), a formal and systematic cooperation between the prosecutors' offices and police and such organizations is totally absent. The concept of community based policing is certainly untapped potential for improving hate crime prosecution (and prevention). So far this concept has not been used in BiH for the prevention and repression of hate crimes, which must be corrected. A more comprehensive application of this concept would enable a reduction in the aforementioned difficulties the police and prosecutors encounter in their work in this area.

Therefore, given the importance and repercussions of hate crimes in the BiH context, it is clear that BiH needs urgent changes in the current approach to this issue in order to correct the identified deficiencies and to improve the identification and prosecution of hate crimes. Attempting to offer possible solutions to some of the key problems identified, the next chapter provides the main recommendations arising from this research, addressing them to the relevant institutional actors.

8.

Recommendations

Recommendations to the legislature

- A comprehensive harmonization of the BiH criminal codes is necessary in order to create equal conditions for the successful sanctioning of hate crimes in BiH and to ensure equality of all citizens before the law in all BiH jurisdictions.
- In this context, there is a particular need to ensure identical protected characteristics in all the BiH laws which, in accordance with best European practices, should include disability; the latest CCRS amendments of 2013 do not include it.
- In addition, the CCBiH, CCRS and CCFBiH need to define the term “hatred” modeled on the definition provided by the CCBDBiH; the CCFBiH needs to define it as an aggravating circumstance for all offenses.
- All BiH jurisdictions need to define the terms “incitement”, “discord” and “intolerance” in the same way in the general part of their criminal laws.
- The CCBDBiH and the CCRS should include the element of “public (expression)” as an essential element of the criminal offense of incitement to national, racial and religious hatred, discord or intolerance; this element should be defined in the general parts of the criminal codes of all the BiH jurisdictions.
- Legal provisions regarding the criminal offense of incitement to hatred and intolerance should be clearly distinguished between the CCBiH and entity/ BDBiH criminal codes (all of which are almost identically worded), in order to avoid potential conflicts of territorial jurisdiction. One possible way to avoid conflicts of territorial jurisdiction in regard to criminal acts of inciting hatred and intolerance would be to define them only in CCBiH.

Recommendations to the relevant governments in Bosnia and Herzegovina

- A protocol for handling hate crime cases should be developed for the mandatory use of all participants in criminal prosecution in BiH. The protocol should establish the obligations of the bodies involved in detecting, prosecuting and monitoring the results of hate crime proceedings, as well as aspects of cooperation between these bodies and all their activities and obligations in this area. The protocol might be created using the experience and good practice of countries in the region (e.g. Croatia).

Recommendations for HJPC BiH, centers for training of judges and prosecutors and the Ministries of Interior

- To assure an efficient approach to hate crime prosecution it is necessary to adequately train all participants in the criminal prosecution: the police, prosecutors and expert associates. A mandatory part of the training programs should include ways of recognizing bias motive, methods of hate crime investigation, ways of proving these criminal offenses, and the related legislation.
- It is also important to ensure joint trainings for all participants in the criminal prosecution enabling the participants to share experiences and resolve their concerns. In order to achieve better performance, this type of training should be carried out regularly and systematically.
- In order to improve the prosecution of hate crimes it is necessary to make a collection of carefully selected cases from the existing judicial practice in BiH, the region and the relevant European courts, and make it available to all the prosecutors' offices in BiH. These judgments would serve as a guide for solving practical dilemmas that might arise during the investigation of hate crimes.
- It is also necessary to develop a collection of relevant professional literature and make it available to all BiH prosecutors and assistants to prosecutors. This could be done through the existing HJPC website (Judicial Documentation).
- Special attention should be paid to sensitizing the police on the issue of hate crime, focusing on recognition of hate crimes, registering the facts that will enable indictment and the subsequent proving of the offense; and adequate registration of the facts in police reports. Sensitizing should be performed systematically and continuously through activities that will become an integral part of the permanent training of the police forces at all levels. The training should initially be organized separately for each category of the police force, and then as joint trainings that will enable identification and resolution of potential problems and concerns.
- Programs should be developed within a community policing framework in order to improve the prevention and prosecution of hate crimes. This is necessary primarily in those environments where incidents related to hate (and hate crimes) are most frequent.

Recommendations for the prosecutors' offices and the police

- Efforts should be made to establish cooperation between the prosecution and civil society organizations involved in the fight against hate crimes to ensure that CSOs also keep records of the hate incidents reported and that the data they collect are periodically submitted to the prosecutors in charge of relevant jurisdictions.

- Prerequisites should be ensured for hate crime cases to be investigated on “two-tracks”. In addition to the “standard” investigation, bias as a motive should be investigated in parallel and valid evidence collected about it, as this would determine whether to press charges for bias motivation.
- In order to effectively investigate bias motivation, it is necessary to develop guidelines for investigators focusing on the specific steps of such an investigation, which will ultimately lead to a consistency in investigations. The guidelines should be developed following examples of best practices of countries that have already developed this kind of criteria, such as the USA.
- For easier recognition, identification and registration of hate crimes, it is necessary to create a single list of bias motive indicators, intended for the police and prosecutors.

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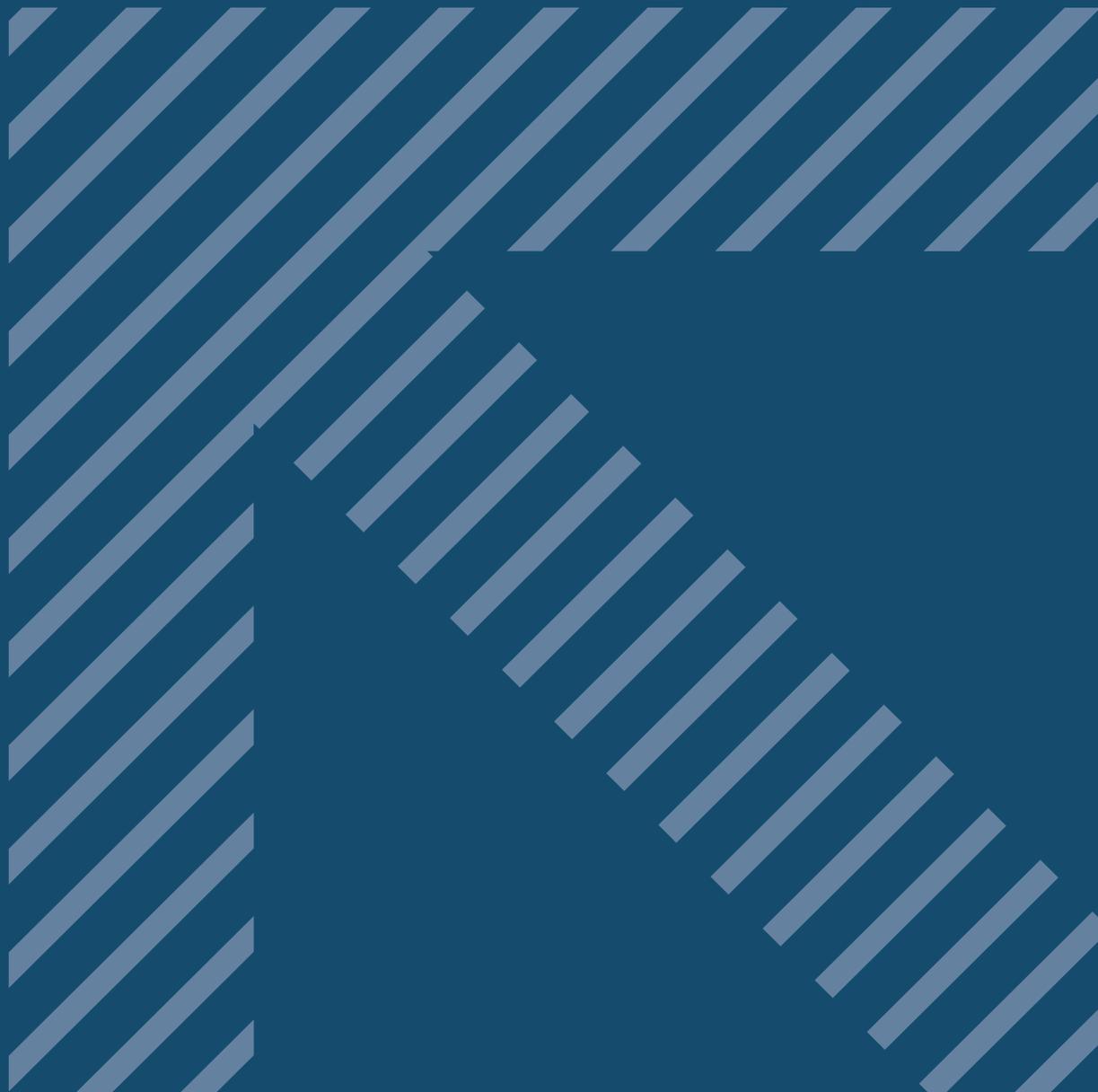
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About the Authors

Marija Lučić-Čatić was born in Sarajevo in 1979. She holds a PhD from the Faculty of Criminalistics, Criminology and Security Studies, University of Sarajevo, where she is currently employed. She has published several co-authored scientific papers in national and international publications and has participated as an expert consultant in the development of strategic planning documents and initiatives of the BiH Ministry of Security. She has also organized and participated in many national and international seminars, conferences and workshops.

Amir Bajrić began as a trainee in the Human Rights Chamber for Bosnia and Herzegovina, and went on to work in the Commission on Human Rights at the Constitutional Court of Bosnia and Herzegovina. He worked in the Office of the Registry – the department of support to the BiH Prosecutor's Office – from January to September 2005 as a coordinator, and later as a legal officer. From mid 2007 he has been a legal officer in the BiH Prosecutor's Office. He was also a researcher for the case of Bosnia and Herzegovina v. Serbia and Montenegro before the International Court of Justice in The Hague. He has participated in several national and international professional conferences and seminars, and lectured on the practical application of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses in Bosnia and Herzegovina. He has co-published two papers on the state of human rights through legislation practice in Bosnia Herzegovina in war crimes cases.



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