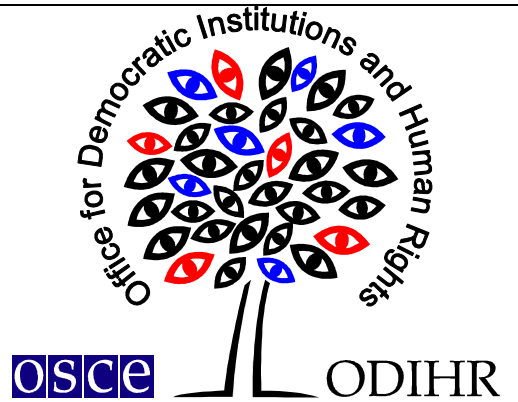


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OSCE/ODIHR OPINION

ON DRAFT

AMENDMENTS TO THE FEDERATION OF

BOSNIA AND HERZEGOVINA CRIMINAL CODE

**Based on a translation of the draft amendments provided by the
OSCE Mission to Bosnia and Herzegovina**

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I. BACKGROUND

1. In February 2009, draft amendments to the Federation of Bosnia and Herzegovina Criminal Code (hereinafter referred to as the “draft amendments”) were submitted to the OSCE Mission in Bosnia and Herzegovina (“the Mission”) for review by the Ministry of Security. The draft amendments relate to the regulation of hate crimes, hate speech and discrimination. The Mission prepared and submitted a comment to the Ministry of Security (“the Ministry”).
2. On 8 July 2009, an English translation of the draft amendments and a request for a legislative review was sent to the ODIHR by the National Point of Contact on hate Crimes, Mr Mario Janecek, The Opinion makes a number of references to the ODIHR publication *Hate Crime Laws: A Practical Guide*, which can be downloaded in English and the local language from the ODIHR website.¹

II. SCOPE OF REVIEW

3. The Opinion analyzes proposed amendments to articles 2², 49³, 163⁴, 166⁵, 172⁶, 177⁷ and 203⁸ of the Criminal Code of the Federation of Bosnia and Herzegovina in terms of their compatibility with relevant international and regional standards and the OSCE Commitments. This does not purport to be a comprehensive review. Rather it highlights the strengths and weaknesses of the draft amendments and provides recommendations that future drafts should take into account.
4. The ODIHR notes that the Opinion provided herein is without prejudice to any other opinions or recommendations that the ODIHR may wish to make on the issues under consideration in the future.

¹ See <http://www.osce.org/odihr/>

² Meaning of Terms as Used in the Code

³ General Sentencing Provisions

⁴ Inciting National, Racial or Religious Hatred, Discord, or Hostility

⁵ Murder

⁶ Aggravated Bodily Injury

⁷ The Infringement of the Equality of Individuals and Citizens

⁸ Rape

III. EXECUTIVE SUMMARY

5. The proposals are a welcome and positive step to preventing and responding to bias-motivated violence. Some changes would strengthen the law and make the amendments more compatible with international standards and good practice.

6. The key recommendations of this review are summarised below:
 - The definition of hate crime should be expanded to include *crimes committed against property or objects* associated with persons who share a particular protected characteristic.
 - The list of protected characteristics proposed in the amendments relating to hate crimes should be restricted to certain key immutable or fundamental characteristics, such as language, sexual orientation, ethnicity and nationality. Religion should be defined to include believers and non-believers.
 - The draft amendments should use the ‘selection’ model rather than the ‘hostility’ model.
 - The draft amendments should explicitly include cases of mixed motivations.
 - A consistent list of protected characteristics should be applied throughout the Criminal Code, including in provisions relating to hate crimes and hate speech.
 - Terminology in the provisions relating to speech should be clarified, and defined carefully so as not to breach the right to freedom of expression.

VI. ANALYSIS AND RECOMMENDATIONS

7. It should be stressed at the outset that, on the whole, the draft amendments are thoughtfully structured and represent a considered attempt to respond in a comprehensive and integrated way to the problem of intolerance and discrimination. The inclusion of sexual orientation and other protected characteristics such as nationality and religion ensure that these provisions meet current international standards, and mark a strong positive step forward. The inclusion of a number of specific aggravating provisions, namely for the offences

of murder, aggravated bodily injury, and rape, also ensures that offenders who are found to have committed such offences with a bias motivation will be subject to an enhanced sentence. However there are some technical aspects of the legislation which could lead to inconsistencies and difficulties for enforcement. This analysis attempts to highlight such issues and proposes improvements.

Draft Amendments to Article 2 (34)

8. The proposed amendment to Article 2 (34) sets out the definition of a hate crime. The ODIHR supports the recommendation put forward by the Mission that **the provision should explicitly apply to crimes committed against property or objects associated with persons who share a particular protected characteristic as well as crimes committed against persons**. Hate crimes are commonly committed against objects or property, such as places of worship, and should be prohibited under hate crime legislation.
9. **The list of protected characteristics contained in the proposed amendment is extensive and open-ended and should be narrowed**. The amendment contains a number of key protected characteristics, including sexual orientation, nationality, and language which are in line with Bosnia and Herzegovina's obligations under international law.⁹ However, the list may be too extensive to enforce. By removing certain non-visible characteristics, such as birth, education, and social status the hate crime provisions would be stronger. Not only would the law then focus on the immutable or fundamental characteristics which are the target of most hate crimes, it would avoid creating a law that is too wide to be meaningfully enforced and that would dilute the concept of hate crimes.
10. The inclusion of religion as a protected characteristic is another positive aspect. However, it is not clear that the current proposed amendment protects the rights of non-believers. International standards do not speak of religion in an isolated sense, but of religion or belief. **The amendment should therefore specify that religion includes a lack of religious belief**.

⁹ Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD), to which Bosnia and Herzegovina is a party, for example, requires that states criminalise "all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin". The full text can be accessed at <http://www2.ohchr.org/english/law/cerd.htm> (last accessed on 17/07/2009).

11. Terms such as “race” and “colour” are often used interchangeably in English and have no defined meaning. The term “race” in particular is a social construct that has no scientific basis as a concept. Experience has shown that this can lead to interpretations which are inconsistent, and not in keeping with the intention of drafters. For example, in the United Kingdom, the meaning of ‘race’ includes people of African, Jewish and Sikh affiliation, but not Muslims or Christians. In the Czech Republic and Hungary, courts have held that anti-racism laws do not cover Roma because they are not a separate race. **It would be preferable if the amended law used the terms ethnic and national origin.**
12. The draft amendments adopt a ‘hostility’ approach to the definition of hate crime requiring that the crime is committed “out of hatred”, rather than the ‘selection’ approach where the victim is chosen “because of” or “by reason of” a protected characteristic. This distinction is important as hate crimes are not always committed out of hatred towards a victim and the current wording would limit the number of offences which would be captured under the provision, and make proof of motive extremely hard. **The ODIHR therefore strongly supports the Mission’s recommendation that the selection approach is adopted instead.** The different approaches and the advantages of adopting the selection approach are described in pages 48 and 49 of *Hate Crimes: A Practical Guide*.
13. Similarly, **the ODIHR supports the Mission’s recommendation that the amendment include crimes that are committed out of mixed motivations.** The motives behind hate crimes are complex and the perpetrators of hate crimes can be motivated in part or in whole by bias.

Draft Amendments to Article 49(a)

14. The inclusion of a general aggravating provision which obliges the court to sentence hate crime offenders more severely is a positive aspect of the draft amendments. Some small amendments would strengthen the provision.
15. For the sake of consistency, the proposed amendment need only refer to the hate crime definition contained in proposed amendment 2(34).
16. The phrase “unless otherwise provided by this Law” is not sufficiently clear. **The ODIHR supports the recommendation of the Mission that the amendment**

should explicitly state that an increased penalty should be imposed unless a more severe sanction is provided for in the legislation.

Draft Amendments to Articles 166 (Murder), 172 (Aggravated Bodily Injury), and 203 (Rape)

17. The draft amendments have taken an approach adopted by a few other OSCE States that is to enact both specific hate crime provisions and a general aggravating provision. The proposed amendments to Articles 166, 172, and 203 fall into the former category, and require that a minimum sentence be imposed where a bias motive has been established for the specific offences of murder, aggravated bodily injury and rape. For the sake of consistency and for the reasons provided above, the general recommendations provided for in paragraphs 8 through 13 should be applied to these provisions.

Draft Amendments to Article 163 (Inciting National, Racial, or Religious Hatred, Discord or Hostility)

18. The draft amendments provided to ODIHR indicate that the Ministry of Security is considering introducing an amended provision on hate speech in order to protect groups who are not currently protected under the Criminal Code.¹⁰ This would be a welcome step. **It is recommended that the list of protected characteristics in Article 163 be expanded to cover the same characteristics covered under hate crime provisions.**

19. The following broad guidelines about hate speech legislation are provided to assist drafters in their future efforts.

20. Hate speech provisions should be sufficiently defined so as not to infringe on freedom of expression.¹¹ Such provisions should also be clearly worded to

¹⁰ Article 163 currently imposes criminal liability on an individual who “publicly incites and inflames national, racial, or religious hatred, discord or hostility among constituent peoples and others who live in the Federation...” The full text can be found at Annex I.

¹¹ Article 10 of the ECHR protects the freedom of expression:

(1) *Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a*

conform to the principle of legal certainty. This is a fundamental principle of the European Court of Justice¹² and has been expressed in Article 7 of the European Convention on Human Rights (“ECHR”)¹³. Legal certainty requires that it must be possible to reasonably anticipate what kind of behaviour will be prohibited under criminal law, and the likely consequences for breaching the law. In other words, it must be possible to reasonably anticipate what kind of behaviour will be prohibited under criminal law.

21. Terms such as “inflames”, “discord” and “hostility”, currently employed in the existing provision, can be ambiguous. Discord and hostility, for example, are extremely broad in that they can be interpreted as including speech which was offensive or distressing, which is a relatively low threshold for criminal liability. Moreover, there is a danger that these feelings could be caused unintentionally. Similarly, the Mission has identified the challenges in interpreting the term “public”. **These proposed changes would benefit from being more clearly defined.**
22. Conversely, the phrase “incitement to hatred” is a high hurdle as it appears to require that a court be satisfied that the listener(s) felt hatred; this can be problematic if the listeners’ reaction was revulsion or disgust. The prosecution for hate speech should not be dependent on the feelings of the listeners; a more objective standard would be that the words “intended to”, or alternatively “were likely to” cause hatred.

democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹² See also C-323/88 Sermes (1990) ECR I-3027

¹³ Full text of the ECHR is available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm> (last accessed 17/07/2009).

Article 7, reads as follows: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any persons for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.”

23. It is also recommended that the term “constituent peoples and others” be removed so as to remove the distinction between constituent peoples and others.¹⁴ It would be preferable to draft the provision to cover all persons within the territory of Bosnia and Herzegovina.

Draft Amendments to Article 177 (Infringement of the Equality of Individuals and Citizens)

24. It is understood that a comprehensive draft anti-discrimination law was proposed to the House of Representatives and House of Peoples in June 2009. This is a welcome step and in line with Bosnia and Herzegovina’s international obligations. These draft amendments include anti-discrimination provisions, which are usually dealt with under or in tandem with civil law liability. It is not clear how these draft amendments would interact with the proposed legislation and due care should be taken to ensure that consistent definitions and prohibitions are used in both pieces of legislation.

V. CONCLUSION

25. Participating States of the OSCE have recognized the dangers posed by hate crimes and have committed themselves to combating such crimes. The draft amendments represent a positive step to ensuring that hate crimes will be addressed within the applicable Criminal Codes in Bosnia and Herzegovina, and are therefore welcome and timely. It is hoped that these comments will assist the legislative process.

¹⁴ This recommendation follows the recommendations made by the UN Committee on the Elimination of Racial Discrimination (“CERD”). For a summary of CERD’s recommendations during their 2006 periodic review of Bosnia and Herzegovina’s compliance with CERD, please refer to <http://www.reliefweb.int/rw/rwb.nsf/db900SID/YAOI-6NE8Z8?OpenDocument> (last accessed on 17/07/2009).