



Kingdom of the Netherlands



# HATE SPEECH AND HATE CRIMES IN KOSOVO

## ROLE OF INSTITUTIONS IN PREVENTION



The Embassy of the Netherlands in Kosovo does not necessarily share the views and interpretations expressed in this document.



This report was prepared under the “Combat Hate in Kosovo” Project, implemented by ATRC in partnership with RADC and supported by the Embassy of the Netherlands in Kosovo.

# Introduction

The pluralistic and multiethnic character of the Republic of Kosovo implies the need for the existence of legal rules and norms to govern the development of interculturalism and social integration, as a precondition for harmonious social development.

Indeed, the consolidation of democracy and overall development in the Republic of Kosovo relies on the existence of a high degree of tolerance, non-discrimination, equality, and respect for the rights and freedoms of everyone.

Based on the culture of tolerance that has existed in the Kosovo society, but also the negative experiences that took the form of extreme nationalism and culminated in the armed conflict in 1998, as well as its European integration aspirations, the Republic of Kosovo had to develop a legal concept of hate speech and hate crimes and the sustainable implementation of such a concept.

This requirement arises from the duty to ensure the respect and protection of human rights and freedoms and the international agreements and instruments directly applicable in the Republic of Kosovo.

The development of a sustainable system for the prevention of hate speech and hate crimes demonstrates the determination and capacity of the state to continue to respect human rights and freedoms. With effective prevention and punishment, a clear message is sent to the instigators and perpetrators of such acts that such extreme expressions of discrimination shall not be tolerated.

The purpose of this report is to provide a legal analysis of the legal concept of hate speech and hate crimes in the Republic of Kosovo, i.e., its legal-technocratic meaning, providing a summary of the reports submitted by monitoring activities,

as analyzed and described by local organization activists and students who previously received training on human rights topics and on monitoring hate speech and hate crimes. The report attempts to provide an analytical approach so that the content of individual reports is enhanced with legal references to help the citizens of the Republic of Kosovo to better understand and grasp the legal concept of hate speech and hate crimes and to adequately respond to such occurrences. The report is further enhanced by noting the role of state authorities and civil society in combating and preventing hate speech and hate crimes.

Therefore, through this report and the presentation of concrete cases, citizens will have an easier opportunity to identify the use of hate speech on religious, ethnic, gender, racial, and other grounds in public and to combat this phenomenon which incites hate acts or crimes.

It should be noted that although the monitored activities are redacted, the facts described have not been checked, therefore the presented cases represent the recollection, perception, and research of the respective authors of the monitoring activities. We believe that they are written in good faith and serve as a practical indicator of cases which are believed to potentially constitute use of hate speech or commission of hate crimes.

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# 1. Hate Speech

## 1.1. Notion of “Hate Speech”

Despite the frequent use of the term “hate speech”, there is no universally accepted notion of the term.<sup>1</sup> In the most general sense, the term “hate speech” means communication in any form or public expression of public opinion which in itself contains the intent, based on prejudice, to discriminate, harass, provoke a reaction or incite a negative attitude, intolerance, hostility, or violence against individuals or groups of people, based on their racial or gender affiliation, age, ethnicity, nationality, religion, sexual orientation, gender identity, disability, linguistic affiliation, cultural affiliation, moral or political views, social status, profession, mental and physical characteristics, or any other trait.

One such definition, which encompasses a wide range of what is considered hate speech and guides most European countries, is the definition adopted by the Committee of Ministers of the Council of Europe in Recommendation R (97) 20. According to this definition: Hate speech shall be understood as covering *“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”*.<sup>2</sup> In this sense, hate speech is an expression

of a discriminatory attitude, which is necessarily directed against a particular person or group of persons, and which may spread prejudice and create intolerance, hostility or provoke violence against groups or individuals which belong to these groups.

Both definitions mentioned above cover a wide range of what is prohibited, while on the other hand most states have enacted positive law sanctioning expressions that constitute ‘hate speech’, though the definitions vary slightly when determining what characteristic is prohibited.

The notion of hate speech can also be found in the case law of the European Court of Human Rights (ECtHR), although it is yet to provide a precise definition of hate speech. In some of its judgments, the Court has simply referred to hate speech as *“all forms of expressions that seek to spread, incite, promote, or justify hatred based on intolerance”*.<sup>3</sup>

The problem of accurately defining hate speech exists in the fact that this term expresses the tension between freedom of expression and its restrictions. Therefore, any discussion of hate speech must strike a balance between the fundamental right to freedom of expression and its restriction.

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<sup>1</sup> Anne Weber, Manual on Hate Speech (Council of Europe: 2014)

<sup>2</sup> Council of Europe, “Factsheet – Hate Speech” [www.coe.int/t/DC/Files/Source/FS\\_hate\\_en.doc](http://www.coe.int/t/DC/Files/Source/FS_hate_en.doc), accessed on 27 April 2021.

<sup>3</sup> GÜNDÜZ v. TURKEY, Application no. 35071/97 (ECHR 4 December 2003).

Despite the lack of definition, many intergovernmental bodies, and the states themselves have tried to establish a uniform legal framework on hate speech, which on the one hand includes guaranteeing freedom of expression and on the other hand leaves enough room for defining some necessary restrictions. The establishment of this legal framework presumes the definition of some general principles. Particularly influential are the *Camden Principles*, which are recommended as a general form of interpretation of international standards on freedom of expression and practices of its restriction in different countries.<sup>4</sup> Restrictions to freedom of expression and the notion of hate speech are addressed in the fourth set of principles. *Restrictions to freedom of expression should be provided by law, serve to protect the rights or reputations of others, national security or public order, or public health or morals, and be necessary in a democratic society to protect these interests (Principle 11).*<sup>5</sup> While Principle 12, states that *all States should adopt legislation prohibiting any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence (hate speech).*

These principles imply that the state

has a duty to counter hate speech and its harmful effects, as the risk of some groups becoming more marginalized and isolated increases, and as noted above this language can lead to hate crimes. The obligation of the state to ensure equality between citizens and non-discrimination, and at the same time the sanctioning of hate speech, is determined in the framework of international instruments and agreements.

It should be noted that when we talk about the obligation of the state to ban 'hate speech' it implies its legal concept, i.e., in the narrow sense of this concept which is used explicitly or implicitly, within the legal provisions. The legal notion must be distinguished from the common understanding that the notion of 'hate speech', which is used by people who are not lawyers and has a range of uses in various fields, whether political, economic, or social. As we will see below, under Kosovo's legal system hate speech entails expressions which in essence constitute hatred based on protected characteristics and which have the potential to incite harm of any kind.

## 1.1.1 Elements of Hate Speech

The ECtHR case law has provided for the practical development of several elements of hate speech, including intent, content, i.e., context of expression, and the prohibited consequence.<sup>6</sup>

- By *intent*, hate speech includes expressions with the underlying intent to provoke

intolerance, racism, incitement to violence or other forms of hatred, and this should be distinguished from the intent to inform the public about matters of general interest (e.g., *Jersild v.*

<sup>4</sup> Article 19, 'The Camden Principles on Freedom of Expression and Equality' (2009) <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>, accessed on 2 May 2021.

<sup>5</sup> Ibid.

<sup>6</sup> Weber (n1) p. 33.

*Denmark (1994)*,<sup>7</sup> where the production of a documentary on a racist organization was not considered hate speech, as the documentary sought to highlight a social phenomenon that is of general interest to the broader public).

- The *context* determines whether an expression constitutes hate speech or not. Therefore, depending on the circumstances of the case, i.e., in addition to the content of the language, it depends on whether the statements are made by a politician, journalist, artist, ordinary citizen, etc.
- The prohibited *consequence* includes harmful social consequences caused by such an expression and how and in addition to violating the dignity of the person or group to which it is addressed, such an expression has the potential to disrupt public order and security, to promote hatred or violence against others, so even though there may not be real action to cause the most serious consequences, we are still dealing with hate speech.

## 1.1.2. Characteristics Protected from Hate Speech

Hate speech refers to the physical or personal characteristics of the individual to whom it is addressed, and is intended to highlight differences between the sender of such messages and the recipient. This means that a form of communication or expression is recognized as hate speech if it focuses in a discriminatory manner either on his/her personal characteristics or connection to a specific vulnerable group. There is a wide range of personal characteristics that can be subject to hate speech, such as: race, national and ethnic origin, religion, language, sex, gender, sexual orientation, religion, social status, etc. In Kosovo,

for example the Law on Protection from Discrimination in Article 1 paragraph 1 prohibits discrimination based on “nationality, or in relation to any community, social origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds.”<sup>8</sup>

<sup>7</sup> Jersild v. Denmark, Application no.15890/89 (ECHR 23 September 1994).

<sup>8</sup> Law No. 05/L-021 on Protection from Discrimination, Article 1 paragraph 1 (OG, No. 16/2015, 26 June 2015).

## 1.2. International Standards and Hate Speech

It is often said that all human rights are universal and inalienable; indivisible; interdependent and interrelated. On the notion of hate speech, there is an inextricable link between the right to freedom of expression, the right to equality before the law, and the right to non-discrimination. However, setting the boundaries where freedom of expression turns into hate speech is a legal challenge in itself. Therefore, the general notion of hate speech should be distinguished from the concept of hate speech in legal terms. In this regard, hate speech can be defined and regulated in different terms by different areas of legislation. This means that hate speech is not comprehensively regulated in an act or

single legal document but is included in a variety of documents.

Internationally, there are many human rights instruments that prohibit discrimination, including hate speech as a form of discrimination. Article 22 of the Constitution of the Republic of Kosovo stipulates the obligation for the direct applicability of several international agreements and instruments related to human rights and freedoms, therefore the following sections expand on the obligations and recommendations under international agreements and instruments directly applicable in the Republic of Kosovo.

### 1.2.1. International Covenant on Civil and Political Rights and its Protocols

The foundation of human rights protection was laid in 1948 by the Universal Declaration of Human Rights, which primarily focuses on human dignity. This area is further governed in detail by the International Covenant on Civil and Political Rights, adopted in 1966.

According to Article 19 of the International Covenant on Civil and Political Rights, freedom of expression includes all stages of identifying and disseminating information, but also ideas as processed information, regardless

of form or media in which they appear. This type of freedom of expression is subject to obligations and responsibilities, and consequently to certain restrictions which are defined by national legislation and are necessary: to respect the rights or reputations of others; to protect the national security or public order, and to protect public health or morals. Article 19 is closely linked to Article 20, which prescribes a clear obligation to prohibit national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

## 1.2.2. International Convention on the Elimination of All Forms of Racial Discrimination

Article 4 of the Convention explicitly requires States Parties to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons

of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.

## 1.2.3. Convention on the Elimination of All Forms of Discrimination Against Women

Article 5 obliges all States Parties to take all appropriate measures to modify the fundamental patterns of conduct, stereotypes

and prejudices that can lead to the marginalization and discrimination of women and girls.

## 1.2.4. European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) stipulates that everyone has the right to freedom of expression. The importance of this right has been emphasized by the ECtHR in the case *Handyside v. United Kingdom*, where it determined that: ‘Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.’<sup>9</sup> It ‘protects not only the content and substance of information but also the means of dissemination’<sup>10</sup> and ‘it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter

*of indifference, but also to those that offend, shock or disturb the State or any sector of the population.*<sup>11</sup> However expressions – that offend, shock or disturb – are subject to paragraph 2 of Article 10.<sup>12</sup> Paragraph 2 of Article 10 of the ECHR provides that the freedom of expression carries with it duties and responsibilities and may be subject to restrictions to protect national security; territorial integrity or public safety; health, morals; reputation or rights of others; and for the prevention of disorder or crime; disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>9</sup> Mario Oetheimer, eds., Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights, Human rights files, No.18 (Council of Europe, 2007), p. 85, <https://www.combattingcybercrime.org/files/virtual-library/safeguards/freedom-of-expression-in-europe-%E2%80%93case-law-concerning-article-10-of-the-european-convention-on-human-rights.pdf>, accessed on 3 May 2021.

<sup>10</sup> *Murphy v. Ireland*, Application no. 44179/98 (ECHR 10 July 2003) para. 61.

<sup>11</sup> *Handyside v. The United Kingdom*, Application no. 5493 (ECHR 7 December 1976), para. 49.

<sup>12</sup> *Ibid.*

In the case of *Gündüz v. Turkey*, the Court though noted that: ‘...*There can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.*’<sup>13</sup> Thereby, noting that hate speech cannot be protected as a form of freedom of expression. However, in the matter at hand, while interpreting whether the expressions used by Mr. Gündüz constituted “Hate speech”, the Court held that his expressions fell within the domain of freedom of expression. Mr. Gündüz spoke on a live program, which was about a sect whose followers had attracted public attention. Mr. Gündüz, whose views were already known to the public, was invited to take part in the program for a particular purpose, namely to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was widely debated in the Turkish media and concerned a matter of general interest. Some of the comments for which the domestic courts had convicted the applicant demonstrated an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey. However, these cannot be construed as a call to violence or as “hate speech” based on religious intolerance. Furthermore, in the context where the comments were made, in balancing the interests of free speech and those of protecting the rights of others under the necessity test in Article 10 (2) of the Convention, it is appropriate to attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as “hate speech”. In light of the context, the Court considered that the need for the restriction in issue had not been established convincingly. The Court held that the interference with the applicant’s freedom of expression was not based on sufficient reasons for the purposes of Article 10.

The ECtHR found a breach of Article 10 of the Convention. Consequently, to conclude this issue: although the prohibition of hate speech was provided by law, and although the ECtHR agreed with the Turkish Court that the program ban was in accordance with the Turkish law and concluded that the national courts had a legitimate aim in banning the program – the Court still found that the ban itself was not necessary in a democratic society.

Therefore, when evaluating whether limitation of freedom of expression by the state is legitimate or not, the ECtHR determines it through the proportionality test criteria which need to be met:

1. Prescribed by law, meaning that the limitation on the freedom of expression can be imposed solely on the basis of previously established and stipulated rule.
2. Legitimate aim may very well be national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.
3. Restriction is necessary in a democratic society.<sup>14</sup>

However, in the absence of a definition of hate speech, the ECtHR faces a major problem. Not only is it difficult to prevent hate speech, but in the same manner it is difficult to show that a given expression constitutes hate speech. Consequently, this makes it difficult to determine legally whether any expression of opinion constitutes hatred.

<sup>13</sup> *Gündüz v. Turkey*, Application no. 35071/97 (ECHR 4 December 2003) para. 41.

<sup>14</sup> Elena Mihajlova, Jasna Bacovska, Tome Shekerdjiev, *Freedom of Expression and Hate Speech* (OSCE 2013).

Although, the Council of Europe defines hate speech as follows:

*"...The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred."*<sup>15</sup>

However, such a definition is not sufficient in practice. This is because although hate speech implies an expression that incites hatred and violence, at the moment when a certain issue is tried, as a definition it is not enough and it is difficult to adapt it to the factual reality. Therefore, the ECtHR does not limit itself to any precise definition when dealing with hate speech, but merely uses it as a point of reference, consequently the Court decides each case on its merits, assessing the elements of hate speech and the facts of each case individually.<sup>16</sup>

In fact, the ECtHR itself admits that "[t]here is no universally accepted definition of . . . 'hate speech'".<sup>17</sup> Furthermore, one of its factsheets with the purpose of simplifying

for the general public the meaning of the legal concept behind "hate speech", defines "hate speech" as: (1) without definition, (2) difficult to identify, and (3) speech that can sometimes appear *rational* and *normal*.<sup>18</sup>

However, the Court tends to side with the applicants where the expression did not reach the level of effective incitement to violence. This contrasts with cases involving anti-Semitic or anti-immigrant propaganda.<sup>19</sup> In the latter, even if the expression did not incite violence, propaganda is considered hate speech.

It should be noted that the significance of the ECtHR case-law for the Republic of Kosovo coincides with the fact that Article 53 of the Constitution of Kosovo stipulates that constitutional rights and freedoms "*shall be interpreted consistent with [the court decisions of the European Court of Human Rights]*", which imposes a duty to follow the contours of the ECtHR interpretation, as a means of advancing the interpretation of constitutional provisions.<sup>20</sup>

<sup>15</sup> Weber (n1), p. 3.

<sup>16</sup> François Tulkens, "When to say is to do *Freedom of expression and hate speech in the case-law of the European court of Human Rights*" (2012), p. 3. [https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/TULKENS\\_Francoise\\_Presentation\\_When\\_to\\_Say\\_is\\_To\\_Do\\_Freedom\\_of\\_Expression\\_and\\_Hate\\_Speech\\_in\\_the\\_Case\\_Law\\_of\\_the\\_ECtHR\\_October\\_2012.pdf](https://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/TULKENS_Francoise_Presentation_When_to_Say_is_To_Do_Freedom_of_Expression_and_Hate_Speech_in_the_Case_Law_of_the_ECtHR_October_2012.pdf), accessed on 5 May 2021.

<sup>17</sup> Roger Kiska, "Hate Speech: A Comparison Between the European Court of Human Rights and The United States Supreme Court Jurisprudence", p. 110.

<sup>18</sup> Ibid. See also: Weber (n1), p. 5.

<sup>19</sup> Oxford Pro Bono Publico, *Comparative Hate Speech Law: Annexure* (Research prepared for the Legal Resources Centre, South Africa, March 2012) p. 26 [https://www.law.ox.ac.uk/sites/files/oxlaw/1a\\_comparative\\_hate\\_speech\\_annex.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/1a_comparative_hate_speech_annex.pdf), accessed on 7 May 2021.

<sup>20</sup> Visar Morina, Fisnik Korenica, Dren Doli, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' (2011) *International Journal of Constitutional Law*, Volume 9, Issue 1, 292



## 1.3. Legal Framework on Hate Speech in the Republic of Kosovo

In addition to the Constitution of the Republic of Kosovo, the legal framework of the Republic of Kosovo includes provisions on hate speech under the Law on Protection from Discrimination, Criminal Code of the Republic of Kosovo, and under the Media Legislation. Consequently,

in the Republic of Kosovo, in addition to the sanction imposed by criminal law against hate speech, such conduct may also constitute administrative and civil liability.

### 1.3.1. Constitution of the Republic of Kosovo

Article 40 paragraph 1 of the Constitution states that *“Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.”* While paragraph 2 of the same article stipulates that *“The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.”* At first glance, one might get the impression that freedom of expression under our Constitution can be limited only where necessary to prevent conduct seeking to incite and provoke violence and hostility based on racial, national, ethnic or religious hatred. However, limitations on freedom of expression should be read in conjunction with Article 55 of the Constitution, which stipulates that fundamental rights and freedoms guaranteed by this Constitution may only be limited by law and only to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.

Consequently, should freedom of expression restrict other rights, then the limits of restriction may be extended beyond what is provided in Article 40, paragraph 2. For example, Article 24 paragraph 1 of the Constitution states that *“no one shall be discriminated against on*

*grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.”* Protection against discrimination, which includes more protected personal characteristics than paragraph 2 of Article 40, is therefore a legitimate aim on the basis of which freedom of expression may be restricted.

Moreover, as stated above, the Constitution of Kosovo in Article 22 stipulates the direct applicability of some international agreements and instruments that address hate speech, in addition to the Article 53 provision stating that human rights and freedoms guaranteed by the Constitution shall be interpreted consistent with the court decisions of ECtHR.

Therefore, Article 40 which guarantees freedom of expression and defines its limitations, pursuant to Articles 22 and 53 of the Constitution should be read and interpreted in conjunction with the equivalent article of the ECHR, namely Article 10 of the ECHR, where paragraph 2 provides a broader range of grounds for imposing restrictions to freedom of expression, exceeding those determined in Article 40 paragraph 2 of the Constitution of the Republic of Kosovo.

### 1.3.2. Law on the Protection from Discrimination

Law No. 05/L-021 on the Protection from Discrimination is the most important legislative act regarding hate speech in the Republic of Kosovo. The Law establishes a general framework for preventing and combating discrimination and provides an exact list of protected personal characteristics (Article 1). Personal characteristics protected by law are nationality, or in relation to any community, social origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.

Article 3 defines the concept of discrimination as any distinction, exclusion, restriction, or preference on any grounds of personal characteristics provided by

law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.

Article 4 paragraph 1 subparagraph 1.4 refers directly to hate speech: *“Incitement to discrimination shall be prohibited when it amounts to promoting hatred based on one or more of the protected grounds listed in Article 1 of this law [protected personal characteristics] and*

*when done intentionally”* inferring that hate speech is considered a basic and very serious form of discrimination. According to this provision, to ascertain that an expression constitutes hate speech, in terms of *intent* it must be deliberate, expressed in a *context* that can incite discrimination, and its *consequence* is promotion of hatred. Without satisfying these requirements, it cannot be established that a certain expression constitutes hate speech.

### 1.3.3. Criminal Code of the Republic of Kosovo

In Chapter XVII on Criminal Offenses against Liberties and Rights of Persons, the Criminal Code of Kosovo provides punishments for violations of guaranteed human rights, including various forms of hate speech.

In relation to this matter, Article 141 paragraph 1, states that: *“Whoever publicly incites or publicly spreads hatred, discord and intolerance between national, racial, religious, ethnic, and other groups or based on sexual orientation, identity*

*gender identity and other personal characteristics, in a manner which is likely to disturb the public order shall be punished by a fine or imprisonment of up to five (5) years.”*<sup>21</sup>

Whereas Article 70 stipulates that if the criminal offense is a hate act, then it is considered a special aggravating circumstance in criminal sentencing: *“if the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property, motivated*

<sup>21</sup> Code No. 06/L-074 Criminal Code of the Republic of Kosovo, Article 141 paragraph 1 (OG, No. 2/2019, 14 January 2019).

*motivated upon the race, color, gender, gender identity, language, religion, national or social origin, relation to any community, property, economic condition, sexual orientation, birth, disability or other personal status,*

*or because of their affinity with persons who have the aforementioned characteristics, except if one of the enumerated characteristics constitutes an element of a criminal offense.”<sup>22</sup>*

### 1.3.4. Hate Speech and Media Legislation

The media are extremely powerful. Accordingly, for example, intolerance expressed directly towards a certain person based on his/her personal characteristics does not produce any consequences as powerful as words expressed publicly or disseminated through the mass media. Therefore, there should be an immediate response to any case of hate speech either produced or disseminated by the media. However, a distinction must be made between the concept of hate speech within the documents and legislative acts mentioned above (Constitution of the Republic of Kosovo, Criminal Code, Law on Protection from Discrimination) and hate speech in the media, falling under the scope of legislation governing the media.

#### A. Law on the Independent Media Commission

The Law on the Independent Media Commission contains several legal provisions which indirectly prohibit hate speech. Article 27 paragraph 4 of this Law states:

*“Commercial audiovisual communications may not prejudice:*

- 4.1. respect to human dignity;*
  - 4.2. discrimination on the basis of gender, race, ethnic origin, nationality, religion or faith, disabilities, age and sexual orientation;”*
- prohibiting any*

*direct or indirect discrimination by media editors, journalists, or other persons involved in the field of public information broadcasting.”<sup>23</sup>*

#### B. Regulation on Audiovisual Commercial Communications

On the other hand, the Regulation on Audiovisual Commercial Communications, as a bylaw for the implementation of this Law, in Article 6 paragraph 1.4.2 states that:

*“Audiovisual commercial communications shall not: Demean or intimidate anyone or incite to violence or discrimination against a person or a group based on sex, race, ethnicity, nationality, religion or belief, disability, special needs, age, sexual orientation, social background or any other circumstance which has the purpose or effect to nullify or to impair the recognition, enjoyment or exercise, on an equal footing, of any person’s rights and freedoms in all fields of public life.”<sup>24</sup>*

Article 26 of this bylaw states that: *“Noncompliance with this Regulation shall result with the application of sanctions as foreseen in the Law on Independent Media Commission.”* This means that

<sup>22</sup> Ibid., Article 70 paragraph 2 subparagraph 2.12.

<sup>23</sup> Law No. 04/L-44 on the Independent Media Commission, Article 27 paragraph 4 (OG, No. 5/2012, 04 April 2012).

<sup>24</sup> Regulation on Audio-Visual Commercial Communications, Article 6.1.4.2 < <https://www.kpm-ks.org/assets/cms/uploads/files/1353598810.1419.pdf>>, accessed on 10 May 2021.

pursuant to Article 30 of the Law on the Independent Media Commission, hate speech may result in a fine, suspension of programming, change of license conditions or its termination.

### C. Press Code for Kosovo

Media self-regulation is one way to ensure greater professionalism and responsibility in journalism. This can be achieved through a process where self-regulatory bodies gradually take over the tasks of regulatory bodies, which will encourage the media to adhere to ethical and professional principles in reporting and other media activities. In Kosovo, the supreme self-regulatory body for the press and online media is the Press Council of Kosovo, which was established in 2005. Its activities are based on a professional code, the Code of Ethics for Journalists. This self-regulatory body has resolved many cases related to the violation of the ethical standard that governs the professional conduct of journalists in various media. In contrast to court proceedings, self-regulation is free of charge and its main advantage is the expediency and efficiency of handling media complaints.

The media are professionally and morally bound to the Kosovo Press Code, and it has a special section on incitement and hate speech. Section III of the Code states that:

*“1. The press, news portals and agencies shall under no circumstances incite criminal or violent acts.*

*2. The press, news portals and agencies shall do their utmost not to incite or fuel hatred or encourage discrimination by engaging in the following:*

*a. Treat with contempt an individual or group based on ethnicity, religion, sex, race, color, marital status, age or disability.*

*b. Employ derogatory terms likely to hurt and intimidate an individual or a group based on ethnicity, religion, sex, race, color, marital status, age or disability.*

*3. References to a person’s ethnic group, race, religion, gender, sexual orientation or physical or mental illness or disability shall be made only when such directly relevant to the event being reported.”<sup>25</sup>*

<sup>25</sup> Press Code for Kosovo, Section III <http://presscouncil-ks.org/wp-content/uploads/2018/11/Press-Code-for-Kosovo-eng.pdf>, accessed 10 May 2021.

## 1.4. Recognition of Hate Speech According to the Legal Concept in Practice

From the above overview of both international and national legal provisions applicable in Kosovo it is apparent that in the absence of a concrete definition, the concept of hate speech can often take on a subjective character and be applied differently in similar circumstances.

Therefore, to summarize the legal concept of hate speech and the distinction between this concept in civil and criminal proceedings and note potential indicators of when an expression constitutes hate speech, we will address the elements of two provisions related to hate speech in the Law on Protection from Discrimination and the Criminal Code of Kosovo, respectively.

As noted above, the Law on Protection from Discrimination considers as hate speech any incitement to discriminate based on the protected personal characteristics defined in Article 1 of this Law and prohibits any promotion of hatred when done intentionally.

While the Criminal Code provides that *“Whoever publicly incites or publicly spreads hatred, discord and intolerance between **national, racial, religious, ethnic, and other groups or based on sex, orientation, gender identity and other personal characteristics**, in a manner which is likely to disturb the public order shall be punished by a fine or imprisonment of up to five (5) years.”*

In terms of protected personal characteristics, the Law on Protection from Discrimination in Article 1 provides a wide range of protected groups, while the Criminal Code, although it notes only several of them, has left some discretion for sanctioning in relation to other personal characteristics, which should be considered analogous to the provisions in the Law on Protection from Discrimination.

The difference between these two provisions is that the Criminal Code stipulates that incitement or spread of hatred must be conducted **‘publicly’** and in a manner which is likely to disturb the public order, while the Law on Protection against Discrimination does not make this determination. The latter determines **“intent”** as an element of the offense, while the Criminal Code does not.

However, in essence these two provisions do not set measurable substantial criteria for making the determination when an expression constitutes an “incitement” or “promotion” of hatred.

For an expression to meet the elements of a criminal offense, however, there is a practical perspective that the offense should have encouraged “serious” consequences for the freedom and rights of others or severe humiliation of others on discriminatory grounds. Such a qualification is based on a number of cumulative conditions, such as the perpetrator’s intent to incite hatred, discord or intolerance based on personal characteristics; the content of the statement regarding the actions it encourages; the scope of expression, in terms of the position of the perpetrator and the audience; the actuality of the assertion, in terms of the timing of inciting hatred, discord or intolerance on discriminatory grounds; the probability of the statement to provoke incitement to hatred (context of expression within the broader social context).

An example illustrating the difference between criminal and civil actions for sanctioning hate speech is a case in Germany, where the Higher Regional Court of Frankfurt am Main (*Oberlandesgericht Frankfurt am Main*), held that there was no violation of dignity (disturbance of public order) where a publican installed a sign at the entrance door with the words:

*“Turks may not enter this pub.”*<sup>26</sup> The court held that while the sign clearly discriminated against Turks in Germany, it could not be assumed that the applicant had intended to deny Turks an equal right to life in society. Therefore, there was no proven violation of public order.<sup>27</sup> According to our legal provisions, in the above fact pattern the business proprietor could be considered liable for ‘hate speech’ under the provisions on protection from discrimination, but in criminal terms since the posted sign lacked the potential to disrupt public order, i.e., encourage serious consequences, then the conduct would not constitute a criminal offense.

It should be noted that the Law on Protection from Discrimination provides that any person who claims to be a victim of discrimination has the right to file suit against the defendant in contested procedure, while additionally providing for discriminatory conduct to be subject to punishment in administrative misdemeanor proceedings.

To gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of incitement to national, racial, or religious hatred, while ensuring full respect for freedom of expression, experts of the United Nations developed the Rabat Action Plan,<sup>28</sup> as concrete guidance in distinguishing between hate speech, low-value speech, and speech likely to achieve higher social impact.

The Rabat Action Plan outlines a six-part threshold test to help draw the line between objectionable and offensive, but not punishable, expression and hate speech which is against the law. The six parts or

factors are: Context, Speaker, Intent, Content and form, Extent of the speech act, and Likelihood, including imminence, of speech causing serious social consequences.

The factors of the Rabat Action Plan imply that the context of the case is of great importance. Such factors on the basis of which hate speech is more easily identified and must be met for hate speech to exist include:

**A. Speaker’s Conduct:** The speaker addresses an audience, and the expression contains

- incitement, advocacy, or provocation
- of hatred targeting a protected group based on protected personal characteristics,
- which constitutes incitement to discrimination, hostility, or violence.

**B. Speaker’s Intent:** The speaker must

- specifically seek to engage in advocacy of discriminatory hatred, and
- seek or have knowledge that the audience is likely to be incited to discrimination, hostility, or violence.
- there is a potential and inevitable risk that the audience will be incited to commit an act of discrimination, hostility, or violence as a result of advocacy to hatred.

<sup>26</sup> OLG Frankfurt [1985] NJW 1720. Oxford Pro Bono Publico (n19) p. 42.

<sup>27</sup> Oxford Pro Bono Publico (n19) p. 42.

<sup>28</sup> United Nations Human Rights, Office of the High Commissioner, ‘Freedom of expression vs incitement to hatred: OHCHR and the Rabat Plan of Action’ <

## 1.5. Difference between Hate Speech / Hate Crime

Before addressing the monitored cases, a distinction must be made between hate speech and hate crimes. Organization *Article 19* defines this best providing that ‘Hate speech’ and ‘hate crimes’ are often conflated and used interchangeably, but they should be distinguished.<sup>29</sup> Both are symptomatic of intolerance and prejudice, but most ‘hate crimes’ do not involve the exercise of freedom of expression.

Although the term ‘hate crime’ is widely used, the use of the emotive term ‘hate’ may lead people to believe that any manifestation of ‘hatred’, including ‘hate speech,’ is a criminal offense. This is not the case. While all ‘hate speech’ is a cause for concern, it will not always constitute a criminal offense, and therefore is not a ‘hate crime.’

The essential distinction between these concepts is that ‘hate crimes’ are characterized by the existence of two conjoined elements:

- A “base” criminal offense (e.g., murder); and
- The crime being committed out of a “bias motivation” (e.g., against ethnic background), which means the perpetrator chose the target of the crime based on the victim’s protected personal characteristic.

Meanwhile, according to our legislation hate speech is a criminal offense only when the perpetrator publicly incites or publicly spreads hatred, discord, and intolerance between national, racial, religious, ethnic and other groups or based on sexual orientation, gender identity, and other personal characteristics, in a manner which is likely to disturb the public order. So, the essential element required for the criminal offense to exist in the case of hate speech is the possibility to disrupt public order.

## 1.6. Monitored Cases of Language Alleged as Hate Speech

The following part provides some cases from reports submitted by monitoring activities, as analyzed and described by activists of local organizations and students who previously received training on topics of

human rights and monitoring hate speech and hate crimes. The cases were targeted based on the perception that they could constitute hate speech, nevertheless, a brief legal analysis will be presented below.

<sup>29</sup> Article 19, “Hate Speech’ Explained A toolkit” ( 2015 edt) p. 24 <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>, accessed on 19 May 2021.

## 1.6.1 Use of Expression “Gërrnaç” by Journalist Valon Sylja

In December 2020, journalist Valon Sylja, through his account on Facebook, expressed some comments about the Albanian diaspora, calling them “*gërrnaç*” and criticizing their way of life.

In a televised debate, journalist Sylja explained the meaning of the word. He noted that by “*gërrnaç*” he refers to all Albanians living in the diaspora and for whom “the clock stopped with the 90s”, primitive and violent persons as opposed to the “functional and successful diaspora”.

He further added that a “*gërrnaç*” is essentially a type of person who lives in the diaspora yet his mind is in Kosovo, living in a vacuum, manifesting themselves mostly as social network lynch actors and rude commentators using violent language. He states that he used this term for disgruntled people, unable to be happy about neither good nor bad, who seek to fulfill themselves either with political-religious activism, with violent activism, such as his case, or by engaging in social network lynching mobs.

As a result of these statements by journalist Sylja, the case escalated to a physical assault against him in the center of Pristina by a person who subsequently turned himself in to the police. Many media, journalists, politicians, and public figures have strongly condemned the attack and demanded a serious and immediate response from the competent authorities.

There was also a reaction from the Association of Journalists of Kosovo, a member of the SafeJournalists network, where the Chairwoman of the AJK Board said that “such an attack, in broad daylight, in the center of the capital and in the presence of many passers-by, proves how easily and without any fear of the rule of law journalists are attacked, only because they dare to think differently and express themselves differently”, adding that “such an attack must be severely punished to send a clear message to all that dissent and freedom of expression are values of a democratic state and not something that should be silenced, attacked and suppressed.”

The Pristina Basic Court found the accused guilty of assault on journalist Sylja, sentencing him to a fine in the amount of EUR 4,500. An aggravating circumstance, according to the Court, is that the criminal offense was committed in a public place and in the presence of bystanders, causing public distress. At the initial hearing, the defendant stated that he felt guilty of the criminal offense he was charged with and pleaded guilty according to the indictment, stating he was sorry for what happened, expressing remorse, apologizing for his actions against the injured party, and promising the court that he would never again act against the law.

As for a criminal sanction against the journalist Valon Sylja, regarding hate speech, the Basic Court in Pristina did not impose any.



### 1.6.1.1 Assessment whether Hate Speech existed

To evaluate the situation in question, each element of ‘hate speech’ contained in the legal concept of this notion should be examined against Article 141 paragraph 1 of the Criminal Code of the Republic of Kosovo and Article 4 paragraph 1 subparagraph 1.4 of the Law on Protection from Discrimination.

Consequently, although through his expression journalist Valon Sylja publicly used an offensive term for a category of the Albanian diaspora, it cannot be said that his expression constitutes hate speech in legal terms. Hatred in the general sense is a state of mind, characterized by intense and irrational emotions of insult, hostility, and disgust towards a target group based on a protected characteristic. In his expression, journalist Sylja does not seem to have intended to address the entire diaspora, but within the diaspora he labels a certain group he targets not because of their identity or personal characteristics, but because of their specific actions or activities, designating them ‘*gërrnaç*’. Additionally, his expression was not shown to be dangerous having the potential to cause any tension with members of the Albanian diaspora.

Recalling cases *Surek v. Turkey* and *Gündüz v. Turkey*, where the ECtHR held that for an expression to be considered hate speech it does not suffice to argue that words offend, shock or disturb, but the expression must have the potential to incite hatred or violence, it must be assessed whether a certain expression could incite hatred towards the diaspora. In this regard, the examination of the expression does not identify any specific call for incitement to hatred towards the diaspora, which would indicate a close relationship between the expression and the potential to incite hatred towards the diaspora. Even by looking at empirical evidence it cannot be proven that at the time he made these statements there was any incitement to hatred or hostility towards the diaspora present. Consequently, it can be concluded that the journalist in question simply expressed himself in an unconventional style, which in this case could have offended certain individuals, but that his expression did not exceed the limits of freedom of expression.

Both in the purview of Article 141 paragraph 1 of the Criminal Code of the Republic of Kosovo and Article 4 paragraph 1 subparagraph 1.4 of the Law on Protection from Discrimination, it is not possible to establish the existence of hate speech which could be prosecuted or pursued in contested or minor offense proceedings.

### 1.6.2. Indictment against Hoxha Irfan Salihu for inciting hatred and discord between national, racial, religious, and ethnic groups

Hoxha Irfan Salihu is suspected that, in March 2013, he publicly incited and spread “hatred, discord and intolerance between national, religious, ethnic or other groups living in the Republic of Kosovo”, while preaching on “How to Increase

Barakah” (*Divine Blessing*) in front of the participants he emphasized that “*in different periods during the Ottoman Empire rule in our lands, Albanians were 1 percent. Now they curse the Muslim who gave them acres of land and brought them to live in Kosovo. He both brought them to*

*live in Kosovo, and made them rulers of the Balkans,”* he is quoted saying. The media in Kosovo disseminated one of his lectures, where he had stated that *“Kosovo in 1445 had one percent Albanians, while the Turks brought the Albanians to Kosovo to subsequently give them land.”* The Imam from Prizren was notorious and had often been criticized, both on social media and in the public, for his lectures in the mosque and those published on YouTube, but also for his sermons on certain social topics such as marriage, virginity, even on using sexist language.

Imam Irfan Salihu had denied having committed a criminal offense when questioned by state authorities. His excuse was that he based the statement on the percentage of Albanians on a *“scientific thesis”* by orientalist Hasan Kaleshi, read at the International Congress of Turkology in Istanbul in 1973. In a statement given to the Prosecution on November 11 last year, Salihu defended his lecture that the Ottoman Empire brought good to Kosovo. He also said that during the lecture *“How to Increase Barakah”* he emphasized that

the Ottoman Empire in the Balkans made the Albanians into *Agas* (or *Agha*, honorific title). *“That’s how I see it. It did this for us after hundreds of years of previous occupations starting from the Roman Empire, before the new era, then the Bulgarians, Serbs, Byzantines, Venetians,”* he had pointed out.

However, since Law No. 04/L-209 on Amnesty stipulated, inter alia, that all perpetrators of the criminal offense of inciting national, racial, religious or ethnic hatred, discord or intolerance committed prior to June 20, 2013, shall be granted complete exemption from criminal prosecution or from the execution of punishment for such offenses, consequently, all persons under criminal prosecution or persons who could be subject to criminal prosecution within the territory of the Republic of Kosovo were granted amnesty.

Therefore, since this lecture was given by the former Imam of Prizren in March 2013, exactly three months within the provided amnesty deadline, Hoxha Irfan Salihu was acquitted of criminal charges because his conduct fell under the scope of the Law on Amnesty.

### 1.6.2.1. Assessment whether Hate Speech existed

On the above case of the expression used by the Imam in question, there are no elements of inciting hatred towards any group or individual based on their protected personal characteristics. In fact, from the context of his speech, the Imam in his lecture does not seem to have intended to incite hatred towards a certain group and such an expression cannot be established to constitute

any potential risk of discrimination, hatred or hostility towards a certain group. Consequently, such expression is within the bounds of freedom of expression, however an assessment should be made whether it could constitute defamation, as it is possible that his expression was based on disputed or unfounded historical facts.

### 1.6.3. Sharing of Cartoons of the Prophet Muhammad by Ambassador Qëndrim Gashi

On 19 October 2020, Ambassador Qëndrim Gashi retweeted a tweet posted on the social network Twitter containing two cartoons of the Prophet Muhammad. A section of the Muslim community deemed these cartoons offensive to the Islamic religion. A part of the society in the state of Kosovo reacted to his action as well, with reactions escalating to calls containing threats for the assassination of Ambassador Gashi.

Following the retweet, Mr. Qëndrim Gashi was targeted with calls containing threats to life by the suspect Fehmi Musa. Mr. Musa from the town of Fushë Kosovë had posted on Facebook: *“there are still people like you and this dog qendrim gashi will also be killed”* and *“simply put qendrim gashi must be*

*killed.”*

Immediately after this threat, the Kosovo Police responded by arresting the suspect Fehmi Musa, with the arrest taking place on 20 October 2020.

Following his arrest, the case was assigned to the Special Prosecution Office of Kosovo. The Special Prosecution of Kosovo on 8 December 2020 announced that it had filed an indictment against the suspect Fehmi Musa. Meanwhile, after the defendant pleaded guilty, the Court on 18 December 2020 sentenced the defendant to imprisonment for a period of one year and six months, for the commission of the criminal offense, incitement to commit a terrorist offense under Article 134 of the Criminal Code of Kosovo.

#### 1.6.3.1. Assessment whether Hate Speech existed

For the case in question, in assessing whether the sharing of these cartoons on Twitter constitutes hate speech, it is sufficient to examine the intent of the speaker and the context of the situation. Initially, it should be noted that the speaker holds the position of Ambassador to France, the country where the topic of the Charlie Hebdo magazine cartoons was making a comeback. This happened after the brutal murder of a French teacher, because while having a classroom discussion on the freedom of expression, he showed his students the cartoons from the Charlie Hebdo magazine portraying the Prophet Muhammad.

One of the cartoons portrayed a naked Prophet Muhammad with his genitals exposed, while the other cartoon portrayed him holding a sign that read *“I am Charlie.”* The newspaper *‘Le Figaro’* published both these cartoons in the context of explaining the chronology regarding the murder that took place, explaining that these are the two cartoons that the teacher had displayed in front of his students.<sup>30</sup>

<sup>30</sup> Caroline Beyer and Marie-Estelle Pech, ‘Décapitation de Samuel Paty: signalements, appels menaçants, plaintes, vidéos... Onze jours d’engrenage’ *Le Figaro* (Paris, October 2020), <https://www.lefigaro.fr/actualite-france/decapitation-de-samuel-paty-signalements-appels-menacants-plaintes-vidéos-onze-jours-d-engrenage-20201018>, accessed on 20 May 2021.

Ambassador Gashi on his Twitter profile retweeted the link to the article on “Le Figaro,” without expressing any opinion or comment regarding the cartoons, or the general context of the event. Following a heated debate whether his post contained “hate speech” or was “grossly offensive” to the Muslim community, Ambassador Gashi stated that *“I would never offend any community from any official position, for human decency reasons and not because of potential legal consequences. Anyone who suspects that I have broken the law by sharing an article providing the chronology of a terrorist act should challenge me in court, in Kosovo or France...”* The fact that the retweet was of an

article explaining the situation cannot be considered as use of hate speech, because the information contained in that article was intended to provide an explanation of the situation around the murder of the French teacher, which at the time was of interest to general to the general public. Hence similar to the case *Jersild v. Denmark* (1994),<sup>31</sup> where the production of a documentary on a racist organization was not considered hate speech, as the documentary sought to highlight a social phenomenon that was of general interest to the broader public, it cannot be concluded that Ambassador Gashi’s intent was to incite or promote hatred.

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<sup>31</sup> Ibid (n7).

# 2. Hate Crimes

## 2.1. Notion of Hate Speech

“Hate crime” is an umbrella concept that refers to different types of crimes as defined by the criminal statutes under domestic law. A hate crime is not a separate act, on the contrary it can take many forms from damaging property to killing people.

According to the Organization for Security and Cooperation in Europe (OSCE), hate crimes are “*criminal acts motivated by bias or prejudice towards particular groups of people.*”<sup>32</sup> Hence, a hate crime encompasses two elements. The first element is that the committed act must constitute a criminal offense under positive criminal law. The second element is that the act must have been motivated by bias.

The second element makes hate crimes different from ordinary crimes. The perpetrator’s motivation for committing a criminal offense is his bias towards the target because of their real or perceived connection, affiliation or support of a protected group based on their protected personal characteristics.

Therefore, in cases of hate crimes, the perpetrator is driven by bias towards the group to which the victim belongs, and this is the only or main motive behind the crime. Consequently, hate crime are meant to send a wider message that a certain community is unwanted in the society. This is also why a state response is necessary to counter this message.

It should be noted that the use of the word “hate” can mislead people into thinking that the perpetrator must hate the victim or the victim’s group for a criminal act to be considered a hate crime. This is not the case. The key factor that turns an ordinary crime into a hate crime is the perpetrator’s selection of a victim based on a bias or prejudice about the group to which the victim belongs.<sup>33</sup>

### A. Protected Characteristics

A protected characteristic is a common feature shared by a group, such as race, religion, ethnicity, nationality, gender, sexual orientation, or any other similar common factor that is fundamental to their identity.

### B. Hate v. Bias

A hate crime does not require the perpetrator to feel hatred. Rather, it only requires the criminal act to be committed with a bias motive. Bias means that a person has preconceived ideas towards a group. Since hate crimes are committed because of what the targeted person, community, or property represents, the perpetrator may have no feelings whatsoever towards the individual victim.

32 OSCE, ‘What is hate crime’, < <https://hatecrime.osce.org/what-hate-crime>>, accessed on 21 May 2021.

33 OSCE, ‘Prosecuting Hate Crimes: A Practical Guide’ (OSCE/ODIHR 2014)

<https://www.inclusion.gob.es/oberaxe/ficheros/documentos/ProsecutingHateCrimes.pdf>, accessed on 21 May 2021.

## 2.2. International Standards and Hate Crimes

There is a wide range of international standards and guidelines that come into play when discussing hate crimes and often certain fundamental rights and freedoms are violated when

one commits a hate crime. Various international standards require states to adopt legislation that punishes bias motivated crimes.

### 2.2.1. International Covenant on Civil and Political Rights and its Protocols

Considering all its provisions as a whole, the Covenant obliges States to investigate violence against individuals and to carry out such tasks without discrimination.

Articles 6 and 7 oblige states to investigate violations of the right to life and inhuman treatment committed by public or private actors. Article 2 echoes the same principle of equality as the Universal Declaration of Human Rights: *“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Article 26 requires equality before the law, equal protection by law and protection against discrimination:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

### 2.2.2. International Convention on the Elimination of All Forms of Racial Discrimination

Article 4 of the Convention explicitly requires States Parties to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons

of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.

### 2.2.3. European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms represents the basis for combating hate crimes stipulating that *‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’*

The ECtHR reiterated the responsibility of State authorities stating that it is their duty *“to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.”*<sup>34</sup> Failure to do so and *“Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”*<sup>35</sup> This was the issue in the case of *Šečić v. Croatia* in connection with an assault carried out by members of a ‘skinhead’ group on Mr. Šečić who belonged to the Roma community.

In the case of *Stoica v. Romania*,<sup>36</sup> where the alleged ill-treatment of a 14-year-old Roma boy by the police left him permanently disabled, the Court held that the military prosecutors

based their findings on the statements of police officers, who had reason to seek to exculpate themselves and their colleagues of any liability. At the same time, the prosecutors discarded all the statements by Roma villagers, because of an alleged bias. Furthermore, the prosecutors ignored the remarks from the police report describing the villagers’ alleged aggressive behavior as “pure Gypsy”, which the Court held demonstrated stereotypical views by the police.

In the case of *Angelova and Iliev v. Bulgaria*,<sup>37</sup> the applicants alleged that the state failed in its duty to carry out a prompt and effective investigation into the death of a person belonging to the Roma community and that the lack of legislation on racially motivated offenses including murder failed to ensure proper legal protection against such crimes. The Court decided that the lack of direct legislation on hate crimes did not hamper the authorities from pursuing racist motives during criminal proceedings and that the general legal framework allows for appropriate and enhanced punishment for these types of crimes. The Court’s judgment underlined that, although states are not required to have specific laws on hate crimes, particularly heinous crimes, including those that cause added social and individual harm, such as hate crimes, require proportionate punishment under the law.

34 Šečić v. Croatia, Application no. 40116/02 (31 May 2007), para. 66.

35 Ibid., 67.

36 Stoica v. Romania, Application no. 42722/02 (4 March 2008).

37 Angelova and Iliev v. Bulgaria, Application no. 55523/00 (26 July 2007)

## 2.3. Legal Framework in the Republic of Kosovo on Hate Crimes

### 2.3.1. Criminal Code of the Republic of Kosovo

Article 70 paragraph 2 subparagraph 2.12 stipulates *“When determining the punishment the court shall consider, but not be limited by, the following aggravating circumstances: “if the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property, motivated upon the race, color, gender, gender identity, language, religion, national or social origin, relation to any community, property, economic condition, sexual orientation, birth, disability or other personal status, or because of their affinity with persons who have the aforementioned characteristics, except if one of the enumerated characteristics constitutes an element of a criminal offense.”* This provision means that for all types of criminal offenses, if the criminal offense was committed based on bias against the protected characteristics, then this will be classified as an aggravating circumstance which the court must consider in sentencing.

The Criminal Code also has specific provisions for the qualification of the criminal offense as more serious when committed based on bias. For example, Article 173 paragraph 1 subparagraph 1.10 in relation to aggravated murder; articles 184, 185, 186 in relation to assault and bodily injury respectively, and Article 321 in relation to destruction or damage to property.

This implies that the legal provisions on hate crimes make a distinction between the two groups of this offense.

The first group in connection to Article 70 of the Criminal Code, consists of all types of criminal offenses (of course those defined

according to the Criminal Code) if committed based on bias (hatred), and in that case, the court has a duty to consider the bias motive (hatred) and impose a more severe sentence. The second group comprises of those criminal offenses where the commission of a hate crime (because of protected characteristics) is a special qualifying circumstance based on which the law provides for a special and aggravated form of the basic criminal offense, with a more severe sentence than the one provided for the basic form of the criminal offense in question. As an example of the second group: according to Article 184 of the Criminal Code if the assault on a person is committed based on bias (hatred) against protected characteristics, then the perpetrator shall be punished by imprisonment of up to three (3) years, despite the basic form of the offense which is punishable by a fine or imprisonment of up to one (1) year.

Hence in the second group committing the offense based on hatred **is a qualifying circumstance**, i.e., an element of the legal description of the offense. While in the first group, committing the criminal offense based on hatred is not a legal element of the criminal offense, but a **required aggravating circumstance** as expressly provided in the Criminal Code in Article 70. In other words, when assessing the sentence for any criminal offense, if there is evidence present that the offense was committed based on bias, the court must consider this as an aggravating circumstance. However, when it comes to an aggravated form of the criminal offense defined in the Criminal Code, the prosecutor must certainly use that provision. Consequently, when the more serious form of the criminal offense has not been defined, the court must



apply the range of punishment determined in the Criminal Code for the basic offense, but proper sentencing considerations must also weigh the bias motivation as an

aggravating circumstance, which in certain cases will cause the balance to tip towards the higher end of the range.

## 2.4. Monitored Cases of Language Alleged as Hate Crime

The following part provides some cases from reports submitted by monitoring activities, as analyzed and described by activists of local organizations and students who previously received training on human rights topics and on monitoring

of hate speech and hate crimes. The cases were targeted based on the perception that they could constitute hate crimes. Therefore, a brief legal analysis thereof will be presented below.

### 2.4.1. Kujtim Veseli Homicide Case

On 11 July 2019, Kujtim Veseli was found murdered in Fushë Kosovë. Kujtim was an 11-year-old child and belonged to the Ashkali community. The perpetrator, Sefedin Osmani, was convicted of aggravated murder and rape of Kujtim, receiving a sentence of 25 years imprisonment.

However, although the trial in the first instance has ended, the family and human rights activists have not accepted the fact that there was no criminal investigation against the prosecutors and police officers, whose negligence, according to them, led to the death of the victim.

This is because Sefedin Osmani is accused of systematically raping the victim even before 11 July 2019, the day he was found murdered. The victim's mother had initially notified Sefedin's family and on 29 January 2019 she reported the case to the Kosovo Police. Police had interviewed the accused only after 65 days, in April 2019. During the interview

Sefedin Osmani had admitted that he had raped and that he had forced Kujtim to take narcotics. Despite this fact, the Police had not issued an arrest warrant against the perpetrator and had not ordered his remand. Prior to the murder, the Basic Prosecution in Prishtina had issued a decision to initiate an investigation, but suspended the investigation on 26 June 2019, because by then the suspect Sefedini had not responded to the invitation of the prosecution. Consequently, Sefedini continued to be free until 11 July 2019, when he committed the crime.

The Ombudsperson Institution in its *Ex-Officio* Report No. 567/2019 of 6 December 2019, found there had been violations of fundamental human rights and freedoms, namely violations of the positive obligations for protection from violence and ill-treatment, as the relevant authorities fulfilled neither their constitutional and legal duties, nor international standards for the protection of life

towards the victim, applicable in the Republic of Kosovo.<sup>38</sup>

While the lawyer of the victim's family, had emphasized that there can be no justice without a criminal investigation of the persons responsible for the case at the police and the

prosecution.<sup>39</sup> Furthermore, she considered that the negligence of the police and the prosecution entails two criminal offenses: violating equal status of citizens of the Republic of Kosovo and failing to perform mandatory duty as required by law.

### 2.4.1.1. Analysis of Potential Connection of this Case to Hate Crime

In relation to these criminal offenses, there is a suspicion that the negligence of the police and the prosecution occurred because the victim belonged to the Ashkali community. If the criminal investigation establishes that the criminal offenses of violating the equal status of citizens of the Republic of Kosovo and failing to perform mandatory duty were present, then the prosecution must also take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or bias

may have played a role in the events. In the case in question, if such facts were established against the responsible officials from the Kosovo police and prosecution, not only would they be convicted of the alleged criminal offenses, but in sentencing the court would also consider relevant aggravating circumstances, i.e., whether the criminal offenses by the officials were committed because of bias motives towards the ethnicity of the victim.

### 2.4.2. Case of Kosovo Police Officers Police abusing a person because of bias towards his real or perceived affiliation with the LGBTI community

After the publication of a video, initially on the portal "Kallxo.com" (with the title "Kosovo Police Abuse Person Accusing Him of Being Member of LGBTI

Community")<sup>40</sup>, the Kosovo Police Inspectorate (KPI), namely its Department of Investigation, initiated an

38 Ombudsperson Institution, 'Report with Recommendations: *Ex-Officio* No. 56/2019 related to the positive state obligations guaranteed by the Constitution of the Republic of Kosovo and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the case of K.V.' (Pristina, 6 December 2019) <https://oik-rks.org/en/2019/12/09/report-with-recommendations-ex-officio-no-5672019-related-to-the-positive-state-obligations-guaranteed-by-the-constitution-of-the-republic-of-kosovo-and-article-2-of-the-european-convention-for-the/>, accessed 23 May 2021.

39 Kallxo, 'The Battle for Justice in the Case of 11-year-old Kujtim Veseli' Kallxo (Pristina, 11 October 2020) <https://kallxo.com/gjate/beteja-per-drejtesi-ne-rastin-e-vrasjes-se-11-vjecarit-kujtim-veseli/>, accessed on 24 May 2021.

40 Naim Krasniqi, 'Shocking Footage: Kosovo Police Abuse Person Accusing Him of Being Member of LGBTI Community' Kallxo (Pristina, 16 November 2018) <https://kallxo.com/shkurt/skandaloze-policia-e-kosoves-abuzon-me-personin-qe-e-akuzon-se-eshte-pjesetar-i-lgbti-video/>, accessed on 24 May 2021.

inquiry. From the video one can hear the voice of an individual reporting an injustice perpetrated upon him. While the police officers seem to be focusing on whether or not the person in question is member of the LGBTI community and had engaged in sexual relations with another man. In a condescending manner, the police officers went beyond not offering first aid and informing him of right to counsel, proceeding to dole out degrading insults directed at the individual. Consequently, the Inspectorate launched an *ex officio* investigation into suspicions that the police officers have committed the criminal offense of “*Mistreatment during exercise of official duty or public authorization*” under Article 195 of the Criminal Code of the Republic of Kosovo and the criminal offense of “*Unauthorized photographing and other recording*” under Article 202 of the Criminal Code. During the inquiry, KPI investigators collected some evidence and managed to

identify five police officers suspected in the case. Furthermore, KPI investigators also found that these police officers had failed to open a case following up on the complainant’s statement of being threatened.

In accordance with the Law on KPI, according to the investigation procedure, yesterday (16 November 2018), the Kosovo Police Inspectorate recommended to the Kosovo Police to suspend the five police officers of the South Police Station (Regional Directorate of Pristina) until the end of this investigation. According to the KPI recommendation, all five police officers suspected in this case were suspended by the Kosovo Police. The prosecutor on duty at the Basic Prosecution in Pristina was contacted accordingly and according to his recommendation the case will proceed according to regular procedure.

### 2.4.2.1. Analysis on Existence of Hate Crime

In the case described above, there is a grounded suspicion that the police officers have committed the criminal offense of “*Mistreatment during exercise of official duty or public authorization*” under Article 195 of the Criminal Code of the Republic of Kosovo and the criminal offense of “*Unauthorized photographing and other recording*” under Article 202 of the Criminal Code. Furthermore, the footage shows that the criminal offenses were committed because of bias, since the victim in the video was perceived to belong to the LGBTI community. Consequently, while investigating the case to establish whether the elements of the criminal offense have been met, the police and the prosecution must take all reasonable

steps to unmask any bias motive towards sexual orientation or affiliation to persons with the above characteristics and to determine whether hatred because of sexual orientation or bias because of sexual orientation may have played a role in this case. If the court finds that a criminal offense has been committed and occurred because of bias by police officers towards sexual orientation, then in sentencing considerations under Article 70 of the Criminal Code, the court should include this as an aggravating circumstance and impose an enhanced sentence.

# 3. Role of Institutions in Combating and Preventing Hate Speech and Hate Crimes

## 3.1. Role of Police and Prosecution (Investigation and Corroboration of Bias Motivation)

Recognizing the concept of *bias motivation on discriminatory grounds* as a distinguishing feature of the most serious forms of certain criminal offenses but also the general provision on aggravating circumstances, allows a practical approach to the implementation of these provisions: detection and prosecution of such acts. In contrast to the *concept of proving the existence of hatred*, which creates difficulties in introducing and examining the topic, through the concept of *bias motivation on discriminatory grounds*, the reasons as a motive for committing the crime are suitable for substantiation and can be based on objective facts.

The fundamental question to answer at the stage of investigating and unmasking a hate crime is: *whether the offense was committed because of the protected characteristics of the victim* included in the set of characteristics specified by law? In other words, it must be established whether there is a cause-and-effect relationship between such protected characteristics and the perpetrator's conduct, in terms of influencing the perpetrator's decision to commit the crime.

The actions of the police and the public prosecutor, as well as of the pre-trial judge, must therefore be aimed at *finding evidence that such a connection exists* between the characteristics of the group to which the victim belongs and the conduct, any time *there are indications* that such a connection is present. Such evidence includes manner in which the crime was committed (cruel, violent, reckless), relationship between perpetrator and victim (constant arguments or hostility because of special characteristics), nature of the object of an act (desecration of places of worship), means by which the crime was committed (use of "demonstrative" means), perpetrator's behavior during or after the commission of the crime (his statements, euphoric public appearances), etc.

If there are such indications in any more serious act, the *police* must take them and direct its investigative activities, in addition to finding the perpetrator and the evidence of what has been committed as a crime, also towards finding the evidence of *bias motivation on discriminatory grounds* that exists as a reason for committing the criminal offense, which in the subsequent proceedings can serve as a basis for qualifying the offense as a more severe form of the basic offense

(aggravated murder, for example), or as an aggravating circumstance for sentencing. The police must take such action regardless of the injured party's report and its assessment of whether or not such a basis exists.

In the indictment, the state prosecutors must, as a result of the inquiry and investigation procedure, present evidence that includes the defendant holding discriminatory motive as a reason (or one of the reasons) for committing the crime, and which can be attributed to a general qualification of the offense, or a more severe form of it, the existence of which provides for *bias motivation on discriminatory grounds*.

For greater efficiency in the detection and prosecution of these acts, the state prosecution, in cooperation with the police, should establish a *monitoring and reporting system* on racial, national, and similar incidents, showcasing the commission of hate crimes and respective forms.

When it comes to an act, where *bias motivation on discriminatory grounds* is a constituent element, the court must

find its existence with the help of evidence, as well as all other elements of the crime. The discriminatory grounds for the commission of the crime, provided as a general aggravating circumstance, have an *impact only on the sentence* imposed on the defendant, and not in connection with the existence of the criminal offense. In the continental legal system, such as that of Kosovo, the existence of such a motive, i.e., reason, is determined together with the existence of the criminal offense, with all its objective and subjective elements (act, consequences, intent, etc.). To have an effect on the sentence, it must be determined with the help of evidence presented during the trial and not on the basis of assumptions.

The effective enforcement of the provisions on hate crimes should be followed by the creation of a separate statistical database on the incidence, prevalence, and trends of hate crime. The criminal code provisions on hate crime can also be assessed from its enforcement outcomes, helping to improve relevant assumptions for more efficient application and improvement of legislation.

## 3.2. Role of Ombudsperson

Any person or group of persons can file a complaint to the Ombudsperson regarding discriminatory conduct on certain grounds, moreover, this institution issues opinions and recommendations on specific cases of discrimination; provides assistance to victims of discrimination in preparing complaints on discrimination and provides essential information to persons who have filed a complaint on discrimination with regard to their rights, obligations and opportunities of the court, as well as other protective tools. Furthermore, the Ombudsperson has the authority to investigate or act on any claim

either filed or *ex-officio* where there are grounds to suspect discrimination by public entities. Consequently, the Ombudsperson institution should further promote its role, but also actively engage in *ex-officio* case investigations, fostering and evoking a sense of institutional care for victims of hate speech and hate crime.

## 3.3. Role of State Officials and Local Authorities

Proper response and condemnation of acts of hate speech and hate crimes by local and central institutions is a crucial component in combating such cases. Lack of public condemnation of such cases, or lack of expression of outrage by those in decision-making position sends a me-

sage that such acts are acceptable and suffer minor consequences. In contrast, an appropriate response from public officials sends a message of support to individual victims and the affected community, while at the same time strengthening the sense of security in the Republic of Kosovo.

### 3.3.1. International Standards

OSCE standards encourage states and their respective authorities to publicly condemn hate speech and hate crimes. A Decision of the OSCE Ministerial Council stipulates that participating States must ensure that officials, at the appropriate level, speak out consistently and unequivocally against acts and manifestations of hatred, especially in political discourse. A further Decision of the OSCE Ministerial Council calls for sustained efforts by political representatives, including parliamentarians, to strongly reject and condemn manifestations of racism, xenophobia, anti-Semitism, discrimination and intolerance, including against Christians, Jews, Muslims and members of other religions, as well as violent manifestations of extremism accompanied by aggressive nationalism and neo-Nazism, while continuing to respect freedom of expression.<sup>41</sup>

The purpose of publicly condemning incidents with bias motives on discriminatory grounds is to prevent and limit the potentially harmful consequences of such incidents. A verbal response prompted by bias rhetoric or a discussion on who initiated the incitement is not an adequate punishment.

The response should focus on the punishment of the act in question, and any other act or incident of a similar nature, and should emphasize the equality of citizens regardless of their nationality, ethnicity, sexual orientation, social origin or any other distinct characteristic. Accordingly, the response to hate crimes should not arise from support for one group or person against another but should be provided in an objective manner by condemning all acts incited by hatred.

Furthermore, local authorities are encouraged to develop sustainable strategies and practices to counter potential expressions of intolerance. There are a number of good practices and very concrete actions that the authorities can adopt. These may include: removing offensive graffiti; promoting school projects to educate students about hate speech and hate crimes; and establishing community partnership fora to enable municipalities and law enforcement agencies to meet with civil society and representatives of the religious community to exchange information and concerns.<sup>42</sup>

41 OSCE MC Decision No. 09/09 and OSCE MC Decision No. 4/03

42 OSCE, 'Understanding Hate Crimes' (OSCE/ODIHR 2011) <https://www.osce.org/files/f/documents/0/9/104166.pdf>, accessed

## 3.4. Role of Schools

Schools as institutions mirror the community. For schools to prevent hate speech and hate crime, it is important to ensure the following:

- **Designate** a specific person from the school management as responsible for dealing with incidents involving bias, hate speech or hate crimes.
- **Each** incident involving bias, hate speech or hate crime must always be reported to the person designated to handle such cases properly.
- **Must** create safe places, grievance boxes allowing students to have privacy when making a report.
- **Schools** must recognize the importance and consequences that hate speech and hate crimes can cause, because this may be reflected in the future even in the wider context within the society.
- **Cases** of hate speech must be clearly identified and recorded by reporting them to the Parents Council, the Principal, and the Municipal Education Department.

## 3.5. Role of Media

The media should play an active role in preventing and combating hate speech, precisely because of the great impact it has and the potential of conveying the wrong message. Therefore, journalists need to be more attentive and selective in the information they convey, regardless of the source. Preventing hate speech requires the proper functioning and active role of the Press Council as a self-regulatory body of the media. Raising awareness and educating

journalists through various training efforts emerges as a necessity. It is also required to further improve the university level curriculum in subjects that address this phenomenon, e.g., Media Ethics. In addition to raising awareness among journalists, further research efforts are needed, focusing not only on journalists, but also on audiences in conditions where there is increased interaction between the media and the audience.

## 3.6. Role of Parents and Educators in Early Childhood

Children are naturally curious about the people and things they see around them. From the time children start talking, they ask their parents about the environment around them, asking questions about people they perceive as different from themselves and other family members. Parents and educators need to understand that children will naturally form clusters to help them understand the changes they perceive around them; therefore, it is the responsibility of parents (and ultimately teachers) to help children better understand those differences and not to form any prejudice about them.

Parents and family have a unique role to play as the first source of information that children use to build not only their own sense of identity but also their own ideas and beliefs about others.

Tolerance, but also intolerance, is sown at a very early age when children are

very young and nurtured by their experiences and the attitudes of those around them as they grow up. Children do not develop their own attitudes about being different in isolation. They are fully aware of how adults respond to the world around them, therefore parents should talk to their children openly and directly about matters of prejudice and related differences. Establishing a model for talking to children about matters of diversity and prejudice can help them develop and maintain an open mind about these issues, and this will help them learn how to engage in thoughtful discussions about diversity as they move towards adolescence. The goal is not only to help prevent behavior motivated by bias, hate speech, and hate crimes, but to help children thrive in a diverse society.

Often, when facing challenging questions from children, adults find it difficult to answer them in ways that children understand. Some parents, afraid to say the wrong thing, say nothing at all. Other parents do their best to minimize the differences that children notice. The truth is that while there is no one right way to talk to a

child about diversity, minimizing differences or avoiding the topic altogether, sends to children the message that there is something “wrong” with people who are not like them. Therefore, giving children clear, accurate, and age-appropriate information when they ask questions about race, disability, sexual orientation, or other diversity-related differences will help them begin to process information without prejudice and in a meaningful way.

One of the most important things parents can do is to ensure that their children have a variety of positive experiences with diversity as early as possible. For example, children living in heterogeneous neighborhoods and attending schools where students from different communities attend classes, have the best opportunity to learn first-hand the value of getting to know people, backgrounds, and cultures other than their own. But even children in homogeneous neighborhoods can be exposed to other cultures through books, photographs, music, art, crafts, games, television, and film. Therefore, ways to create a home environment where books and toys reflect the diversity that occurs in society should be researched indirectly.



## 3.7. Role of Civil Society

In addition to the importance of public and appropriate condemnation of hate speech and hate crimes, it is also important that authorities in partnership with civil society adopt a comprehensive approach to preventing and combating bias-motivated incidents. This includes building and strengthening mutual understanding, tolerance and cohesion through various extra-legal and extra-judicial measures. Three elements will be discussed in this section: prevention, victim support services, and the role of NGOs/civil society. Education is broadly regarded as the cornerstone of general preventive measures and an effective means of raising awareness to address the root causes of bias-motivated incidents. However, if a hate-related incident has occurred, the full value of victim support services, by governmental and non-governmental institutions, should not be underestimated and attention should be directed to improving such services. Finally, civil society groups play a key role in combating hate crimes by taking preventive and supportive measures.

### A. Prevention and Education

Existing international guidelines and norms on hate crimes and hate speech relate to judicial measures, but by the same token relate to broader prevention issues too. The OSCE commitments noted below are prevailing in this regard and broad in their reach. Nevertheless, those have been reinforced by more general standards, such as those set by the Committee on the Elimination of Racial

Discrimination, noting that States Parties must promote, through awareness-raising campaigns, and other concrete steps, national unity, tolerance and the peaceful coexistence of members of various nationalities and religious groups.<sup>43</sup>

The OSCE High Commissioner on National Minorities stated that education is an essential element in building mutual understanding between different groups and promoting tolerance and social cohesion by preventing juveniles from inheriting old stereotypes and bias that their predecessors may have had.

Furthermore, in a 2006 Ministerial Decision, the OSCE called on States to “address the root causes of intolerance and discrimination by encouraging the development of comprehensive domestic education policies and strategies,” arguing for “awareness-raising measures.” In addition to OSCE commitments, there are other standards related to education that encourage tolerance in schools. For example, in a Resolution, the European Parliament underlined that it:

*“Points out that education is a primary vehicle for genuine inter-ethnic reconciliation; considers that, in the context of EU assistance, increased attention should be paid to promoting an inclusive, non-discriminatory education system, based on tolerance and respect for diversity and on efforts to reach an understanding of the common history...”<sup>44</sup>*

It must be said that educational measures are not limited to traditional notions of education

<sup>43</sup> Committee on the Elimination of Racial Discrimination, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination’ (August 2020).

<sup>44</sup> European Parliament, European Parliament resolution of 17 June 2010 on the situation in Bosnia and Herzegovina, RSP/2010/2734.

in schools, but also refer to other measures, such as educating communities about the gravity of hate motivated incidents and encouraging victims of hate crimes to report such incidents.

## B. Support Services

Within the international framework, along with the focus on preventive measures, equal attention has been paid to providing assistance and support to victims of bias-motivated incidents. For example, it is recommended that OSCE participating States consider ways to ensure victims of hate crimes have access to counseling and legal assistance, as well as effective access to justice. In addition to more conventional victim support measures, such as legal representation of victims and psychological counseling, OSCE standards also state that participating States should “carry out awareness raising and education efforts, in particular with law enforcement authorities, directed at communities and civil society groups that provide assistance to victims of hate crime.”<sup>45</sup>

## C. Civil Society Inclusion

Civil society organizations are a vital component in efforts to prevent hate speech and hate crimes and to provide effective support to victims. Civil society leaders have on many occasions reminded state authorities of their duty to respond to hate crimes and hate speech, and in some countries, according to ODIHR, “civil society has been essential in empowering communities to foster social change and inspire legal reform.”<sup>46</sup> Related to this, the ODIHR guidelines on how NGOs

can provide support to combating such crimes, covered in their publication “Preventing and responding to hate crimes: *A resource guide for NGOs in OSCE regions*,”<sup>47</sup> provide an overview of how NGOs can assist in the battle against hate speech and hate crimes.

In summary, NGOs can help combat hate speech and hate crime in a number of different ways, such as:<sup>48</sup>

- *Working with governments to improve legislation*
- *Monitoring and reporting incidents*
- *Acting as a voice for victims of hate crimes, especially by serving as intermediaries with the authorities*
- *Providing practical assistance to victims of crimes and hate speech, such as legal advice, counseling and other services*
- *Raising awareness about the existence of discrimination, intolerance and hate speech, and*
- *Campaigning for action to meet the challenges of hate speech and hate crimes.*

45 Supra note (42).

46 OSCE, Preventing and responding to hate crimes *A resource guide for NGOs in the OSCE region* (Warsaw 2010) <https://www.osce.org/files/f/documents/8/a/39821.pdf>, accessed on 29 May 2021.

47 Ibid.

48 Ibid.

# 4. Data Collection and Statistics

Data collection is a vital component of prevention and response to bias-motivated incidents. More specifically data collection: increases the likelihood of victims reporting hate speech and hate crimes; presents the community with the opportunity to discuss ways to deal with speech and hate crimes; places the community on alert to look out for the safety of its residents; and gives lawmakers and government officials the information necessary for them to decide on funding for education, training, prevention and victim assistance.<sup>49</sup>

Kosovo lacks any consolidated statistics that would provide for cases of hate crimes and hate speech; therefore Kosovo needs to establish a systematic, harmonized, and comprehensive mechanism for data collection on hate crimes and hate speech. Data collection on hate crimes and hate speech is one of the most important tools for improving prevention as such data helps the authorities gain a real understanding of the scale of the problem and its potential threat to society.

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49 Ibid.

# 5. Recommendations

Kosovo legislation on addressing and preventing hate speech and hate crimes is quite consolidated, however law enforcement agencies and self-regulatory bodies

of the media should play a much more active role in researching and investigating such cases.

## 5.1. Recommendations to the Ministry of Interior Affairs

- **Ensure** that all law enforcement officers have the appropriate knowledge and skills to identify incidents involving bias-motives and to conduct thorough, prompt, and impartial investigations
- **Include** specialized training on hate speech and hate crimes in the curricula of the Kosovo Police Academy and ensure that there are ongoing training opportunities for officers dealing with hate crimes and hate speech
- **Ensure** that the police draw the prosecutor's attention to the presence of potential bias motive and indicators and encourage effective communication between the police and prosecutors
- **Encourage** community policing strategies and establish close contacts with leaders of vulnerable communities, especially returnee communities, who are often victims of hate crimes or hate speech, and
- **Take** the lead in organizing and coordinating efforts to initiate, develop, and establish mechanisms for the collection and maintenance of data on hate crimes and hate speech at all levels. Such data should include: number and type of bias-motivated incidents reported to the police; number of cases prosecuted; and penalties imposed, including those in minor offense proceedings.

## 5.2. Recommendations to the Municipalities

- **Condemn** bias-motivated incidents in an appropriate and consistent manner that upholds the presumption of innocence and dignity of individuals involved (both the suspect and the victim) and respective communities to which they belong, with the ultimate goal of preventing and combating the potentially broader wider consequences of such incidents
- **Take** immediate measures to counter expressions of intolerance, such as removing graffiti related to prejudice and supporting the refurbishment of public property damaged as a result of hate crimes
- **Create** and roll out comprehensive programs or initiatives aimed primarily at raising awareness of the impact of hate speech and hate crimes

## 5.3. Recommendations to the Prosecutorial and Judicial Council

- **Take** measures, including comprehensive and specialized training, to help prosecutors and judges to adequately proceed in cases of hate crimes and hate speech, and
- **Create** database of all court decisions in Kosovo on all hate crimes and hate speech cases to provide a foundation for the sustainable development of case-law.

## 5.4. To Judges

- **Issue** sentences that consider the relevant aggravating circumstances of the offense for bias crimes and provide substantiated reasoning by listing such circumstances in judgments.

## 5.5. To Prosecutors

- **Ensure** that prosecutors have the necessary knowledge to recognize bias motivation and are familiar with the aggravated forms of certain criminal offenses
  - **Support** an effective and communicative working relationship with the police in cases involving hate crimes
  - **Inform** victims of hate crimes of their right to seek compensation and gather the necessary evidence for such allegations.
- and seek further investigation in cases where there are possible indications of bias motivation, and

## 5.6. To Civil Society Organizations

- **Work** to support victims of hate crimes by providing services and engaging in advocacy, such as assisting victims to report hate crimes; advocating on
- behalf of victims; acting as intermediary in contacts with local and judicial authorities; as well as providing counseling for victims, and
- **Monitor** and raise public awareness of hate speech and hate crimes in Kosovo.

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The Embassy of the Netherlands in Kosovo does not necessarily share the views and interpretations expressed in this document.



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