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REGULATING A BAN ON DENIAL, TRIVIALISATION, JUSTIFICATION OR CONDONATION OF GENOCIDE, THE HOLOCAUST, CRIMES AGAINST HUMANITY OR WAR CRIMES IN BOSNIA AND HERZEGOVINA

Calling War Atrocities by their Right Name

forumZFD – TRIAL International

Sarajevo, 2020.

CONTEXT

In Bosnia and Herzegovina, in the period from 1992 to 1995, severe atrocities have been committed – genocide, ethnic cleansing, rape, mass killings, detention camps, torture – the entire spectre of war crimes and crimes against humanity. Many perpetrators have been tried before international and national courts and many will be tried in the coming years.

Although twenty-five years have passed since the end of the war, conflicting war narratives are now widely present in public space, provoking tensions and divisions, and leaving room for disputes and manipulations to build identities in a divided society. The society of Bosnia and Herzegovina faces open denial, trivialisation, justification and condonation of crimes committed and facts established by courts, both with respect to the responsibility of the perpetrators and in terms of disputing that the crimes took place at all. Over time, there has been an exacerbation and intensification of this type of rhetoric corresponding to political events, which normalises and institutionalises such behaviours in public space, while there is a lack of moral and social responsibility of persons who deny, trivialise, justify or condone crimes committed and facts established in criminal proceedings for genocide, war crimes and crimes against humanity.

Court-established facts must become part of social and political reality. Selective recognition of decisions by competent courts, i.e., their non-acceptance, constitutes disrespect for the judicial system and the rule of law in general, which creates distorted values that gain social status and significance and thus grossly disrupt all democratic processes in the country. It is necessary to build a state based on the principles of rule of law, democratic values and respect for justice, as a pillar of a democratic society, for Bosnia and Herzegovina in order to end the systematic blocking of democratic development and to proceed on the path of European Integration. War crimes established by courts must not be denied and there must be a legal basis for the sanctioning of such occurrences. This was pointed out by numerous international stakeholders, including an independent legal expert of the European Union, Reinhard Priebe, who emphasised a number of deeply concerning shortcomings in the rule of law in BiH in his Expert Report on the Rule of Law Issues in Bosnia and Herzegovina.¹ Therefore, it is necessary to regulate – to ban denial, trivialisation, justification or condonation of committed crimes and court-established facts.

¹ Available at: http://www.fcjp.ba/analize/PRIE-BE_Izvjestaj.pdf

KEY POINTS

- *Denial and glorification of court-established war crimes in public discourse is ubiquitous and normalised.*
- *The lack of a legal framework to sanction denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes has led to contesting not only the nature of the crimes but also their existence.*
- *The existing nationalist political environment and the lack of adequate regulation strengthens the manipulation of established facts and uses them for political purposes. This leads to further social divisions and makes it impossible to build a society on democratic principles.*
- *Selective application of law and non-acceptance of judgments calls into question the judiciary and democratic institutions.*
- *Adoption of a law is part of the effort to establish the rule of law.*
- *Regulation will contribute, at least symbolically, to improving the status of survivors.*

HOW ARE DENIAL, TRIVIALISATION, JUSTIFICATION AND CONDONATION OF CRIMES AND CRIMINALS MANIFESTED?

- Naming public spaces (streets, public institutions) after convicted war criminals;
- Using war narratives for political purposes by denying, trivialising, justifying or condoning the crimes committed;
- Showing photos of war criminals at public gatherings;
- Awarding decorations to convicted war criminals;
- Memorial events and erection of monuments glorifying war criminals;
- Painting murals with images of convicted war criminals in divided communities;
- Establishment and operation of associations and organisations by war criminals or for the purpose of supporting war criminals and promotion of criminal ideology;
- Establishment and operation of fascist organisations, their public gatherings and positioning;
- Revisionism of historical events and rehabilitation of controversial personalities;
- Direct or indirect financial support from public budgets for convicted war criminals and their families.

EXISTING REGULATIONS

The Criminal Code of the Federation of BiH, Article 163 (5), recognises denial and justification of genocide, crimes against humanity or war crimes as a criminal offence.

(Inciting National, Racial or Religious Hatred, Discord or Hostility)

Whoever publicly incites and inflames ethnic (national), racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation (...) by public denial or justification of genocide, crimes against humanity or perpetrated war crimes established under a final and binding decision of the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY) or any national court, shall be punished by imprisonment for a term between three months and three years.

The above provision does not constitute a standalone criminal offense, it is one of the forms of the offense of inciting ethnic, racial or religious hatred, discord or hostility. This means that public denial or justification of these crimes exists and is punishable only if it incites hatred, discord or hostility.

Thus far, no case has been prosecuted under this incrimination of the FBiH Criminal Code.²

² On the other hand, in 2017, the Court of Bosnia and Herzegovina adjudicated on a case in which the accused were acquitted of the criminal offense of inciting national, racial or religious hatred, discord or hostility under Article 145a of the Criminal Code of Bosnia and Herzegovina. For more on the case, see: <http://www.sudbih.gov.ba/predmet/3589/show>.

PREVIOUS REGULATIVE INITIATIVES AT THE LEVEL OF BOSNIA AND HERZEGOVINA

Several initiatives have thus far been raised at the state level to legislate against denial, trivialisation, justification or condonation of the the Holocaust, war crimes, genocide and crimes against humanity – all unsuccessful.

The initiatives for the adoption of a special law:

- Proposed Law on the Ban of Denial, Trivialisation, Justification, or Condonation of the Holocaust, Crimes of Genocide and Crimes against Humanity (2011)
- Proposed BiH Law Banning Public Denial, Trivialisation, Justification or Condonation of the Holocaust, Genocide Crimes and Crimes against Humanity (2016)

Initiatives to regulate the offence in the existing criminal legislation:

- Proposed Law Amending the BiH Criminal Code (2009)
- Proposed Law Amending the BiH Criminal Code (2017)

None of these initiatives received the majority needed for adoption.

CURRENT LEGISLATIVE INITIATIVES

- **Initiative of *Naša stranka* political party at the level of the Federation BiH (2016)**

Naša stranka submitted to the Parliament of the Federation of Bosnia and Herzegovina a Draft Law to Ban Denial of Genocide, the Holocaust and Other Crimes against Humanity, which was adopted in 2016 by the House of Representatives of the Parliament of the Federation of BiH, but it never appeared on the agenda.

- **Initiative of *Demokratska fronta* political party at the level of BiH (2019)**

Zlatko Miletić, an MP in the House of Peoples of the BiH Parliamentary Assembly, submitted a proposal to amend the BiH Criminal Code in June 2019, which aimed at amending the legislative framework and enabling the denial of genocide and war crimes to be recognised and sanctioned.

There have been no initiatives in the Republika Srpska and Brčko District of BiH.

MODELS OF POSSIBLE REGULATION

When considering potential models for regulating a ban on denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes, it is important to take into account four segments: what is being banned (legal qualification of prohibited acts), by which legal act (separate law or amendments to criminal codes), at what level (state or entity) and sanctions. The criteria that determine what genocide, the Holocaust, war crimes against humanity really are should be based on final judgments of international and domestic courts. Ideally, it would be a separate law at the state level (with the obligation to harmonise the relevant entity regulations) that would regulate a ban on *denial, trivialisation, justification or condonation of the following crimes: genocide, the Holocaust, crimes against humanity or war crimes*. Sanctions should follow the standards set in comparative practice³ and include fines and imprisonment.

³ For more, see a comparative table overview of Laws on Denial in other countries, available at: http://www.dwp-balkan.org/bh/library.php?cat_id=5&text_id=35

- amendments to criminal codes (BiH Criminal Code, entity and BDBiH criminal codes)
- separate law



- state level (BiH)
- entity (FBiH, RS, BDBiH)
- local (cantons)
- *The ban at different levels (if not at the state level) risks fragmented regulation and different application on the territory of BiH. However, even a ban in one part of the country could make progress in eliminating harmful practices and reducing tensions between war narratives.*

- prohibited acts: denial, trivialisation, justification or condonation
- of what: genocide, the Holocaust, crimes against humanity or war crimes confirmed by judgments (qualified as such).

- fine
- imprisonment
- *The primary purpose of a regulation is not to punish but to prohibit under threat of sanction. Sanctions are important from the aspect of effective application of regulations.*

EXPECTED EFFECTS OF LEGISLATION

- Start of building a society on democratic values.
- Change of political and public discourse which is based on denial of court-established war crimes.
- Exercising the right to justice and truth through adherence to court decisions in practice in BiH.
- Stop to the manipulation of narratives and victims in public/political discourse.
- The law constitutes a preventive measure against racism and xenophobia, and as such plays an important role in building a democratic society, and in EU Integration and regional cooperation.
- Reducing tensions between ethnic groups and encouraging the healing process of the society.

The goal of adopting this regulation is to end the culture of impunity: those responsible should be punished and this must not be subject to manipulation. A regulation should prevent the continuation of inflammatory rhetoric and the deepening of divisions in BiH. A regulation will not resolve all the challenges of dealing with the past, but a regulation together with continuous work in other areas (education, culture, civil society, the media) is an important segment of building sustainable peace and democratic development in the BiH context.

RECOMMENDATIONS

- Adopt a separate law at the state level regulating a ban on denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes
- Adopt laws (or harmonise them with state regulations) at the entity and Brčko District levels that would also regulate a ban on denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes within standards relevant to BiH (judgments of national and international courts).
- Without delay, consider the proposals of laws currently in the procedure that propose a ban on denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes at the FBiH and state level.
- Court-established war crimes must be recognised in public regardless of which side in the war committed them. Facts about war crimes should be available in public discourse without their (re)interpretations.
- Change the names of public places, legal entities, events that glorify convicted criminals and war crimes, as well as remove any such symbols from public spaces.
- Ensure the implementation of the legal framework once it is adopted, sending thus a strong message of the commitment of society and the state to prohibit denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or crimes.
- It is necessary to actively involve the international community in insisting on reforms and preventing the spread of denial, trivialisation, justification or condonation of genocide, the Holocaust, crimes against humanity or war crimes in public, through more explicit condemnation and sanctioning of such occurrences.
- Thematised within the Peace Implementation Council the continuous non-acceptance of and non-adherence to judgments passed by the Hague Tribunal and the International Residual Mechanism for Criminal Tribunals.

Forum Civil Peace Service (forumZFD) and TRIAL International, as two organisations active in Bosnia and Herzegovina in the field of transitional justice and dealing with the past, have initiated in 2019 a constructive discourse on the necessity to enact a law to ban denial of genocide, the Holocaust, crimes against humanity or war crimes, in the attempt to establish and maintain open discussions with various stakeholders and relevant groups on this topic but also, ultimately, a broader dialogue and raising of social and political awareness of the topic of dealing with the past. Two policy briefs have been created under this initiative: (*Calling War Atrocities by their Right Name in the Society of Bosnia and Herzegovina* and *Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes in Bosnia and Herzegovina*) with the aim of pointing out at various social and political levels the opportunities for and needs of working to prevent the denial or condonation of war crimes and criminals in BiH.

For more, see both policy briefs and the publication:

POLICY BRIEF:

Calling War Atrocities by their Right Name in the Society of Bosnia and Herzegovina

POLICY BRIEF:

Regulating a Ban on Denial, Trivialisation, Justification or Condonation of Genocide, the Holocaust, Crimes against Humanity or War Crimes in Bosnia and Herzegovina

PUBLICATION:

Calling War Atrocities by their Right Name

(<https://trial.ba/wp-content/uploads/2020/02/Calling-War-Atrocities-by-Their-Right-Name.pdf>)

ABOUT THE ORGANISATIONS



forumZFD

Forum Civil Peace Service (ForumZFD) is a German founded non-governmental organisation that is engaged in the Western Balkans through four country offices. ForumZFD Bosnia and Herzegovina aims at contributing to constructive public debates and initiatives on dealing with the past. Together with local partners, we support the development of sustainable structures for peacebuilding.

More on forumZFD:

www.forumzfd.de/en/western-balkans



TRIAL
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TRIAL International is a non-governmental organisation fighting impunity for international crimes and supporting victims in their quest for justice. The organisation provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward. TRIAL International has been present in BiH since 2008 and provides support to war time victims of serious human rights violations and their families in the quest for justice, truth and reparations.

More on TRIAL International:

www.trialinternational.org,

www.trial.ba