Partnership for Good Governance

Գործընկերություն հանուն լավ կառավարման

OPINION

OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE

ON THE DRAFT CRIMINAL CODE OF THE REPUBLIC OF ARMENIA

Prepared on the basis of comments by:

Jeremy McBride and John Wadham

September 2017

Table of Contents

Executive Summary

This Opinion examines the compliance of the draft Republic of Armenia Criminal Code with European standards. It first addresses certain provisions in the General Part and then turns to an Article by Article examination of the provisions in the Special Part. It recognises the considerable efforts made to ensure that the Draft Code takes into account the requirements of European standards but finds that there continue to be certain matters that still require attention. Many of the problems identified relate to a perceived lack of sufficient precision for the purpose of imposing criminal liability in respect of particular conduct. Although this perception may not always be correct, there are certainly some provisions that need to be supplemented by definitions that clarify their meaning. In addition, the actual need for certain provisions or text to be retained is unclear and in some instances the language used should perhaps follow more closely the formulation of the international norms being implemented. There are a number of provisions whose application could lead to violations of rights and freedoms under the European Convention on Human Rights. In some cases this can be addressed through guidance to those tasked with implementing them but in other instances there will be a need for some addition to, modification of or deletion from the text concerned. However, the issues requiring attention are not extensive and resolving them should be quite straightforward. The result of doing so will be a Criminal Code that imposes criminal liability and penalties in a manner consistent with European human rights standards.

A. Introduction

1. This Opinion is concerned with the draft Criminal Code of the Republic of Armenia ("the Draft Code") prepared by a working group of the Ministry of Justice. The Draft Code, while re-enacting some of the provisions in the Criminal Code of the Republic of Armenia that was adopted on 1 August 2003 ("the 2003 Code"), is intended to replace many of them.

2. The present Opinion reviews the compliance of all the provisions in the Draft Code with European standards and, in particular, with the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ('the European Court').

3. A particularly important consideration for the evaluation of the Draft Code arising from these standards is the need for the proposed provisions in it to satisfy the requirement that they be formulated with sufficient precision or clarity to enable someone to regulate his or her conduct. Compliance with this requirement is essential not only for any restriction on a right or freedom under the European Convention to be

admissible[1] but also for the application of any criminal offence not to be regarded by the European Court as entailing retrospective criminal liability contrary to Article 7 of the European Convention[2]. This is unlikely to be achieved where use is made of broad, unclear or vague formulations, without these being given further definition in the legislation itself or in well-developed case law.

4. Remarks will not be made with respect to those provisions in the Draft Code that are considered appropriate or unproblematic unless this is relevant to an appreciation of their impact on other provisions.

5. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised*

6. The Opinion first addresses certain provisions in the General Part and then turns to an Article by Article examination of the provisions in the Special Part. It concludes with an overall assessment of the compatibility of the proposed amendments with European standards.

7. This opinion has been based on an unofficial English translation of the Draft Code.

8. The preparation of the Opinion has greatly benefited from the discussions with members of the working group regarding provisions in an earlier version of the Draft Code in the course of meetings held in Strasbourg on 21-22 January 2016 and in Yerevan on 15-17 April 2016. The Opinion also takes account of the Concept of new Criminal Code of the Republic of Armenia[3], which guided the preparation of the Draft Code.

9. The comments on which the Opinion has been based have been prepared by Jeremy McBride[4] and John Wadham[5] under the auspices the Project "Supporting the criminal justice reform and combating ill-treatment and impunity in Armenia", funded within the European Union and Council of Europe Framework for Partnership for Good Governance in the Eastern Partnership Countries for 2015-2017.

[1] See *Sunday Times v United Kingdom (No 1)* [GC], no. 6538/74, 26 April 1979, at para. 49.
[2] See, e.g., *Kafkaris v Cyprus*, [GC], 21906/04, 12 February 2008, at para. 140 and *Korbely v Hungary* [GC], no.9174/02, 19 September 2008, at para. 70.
[3] Appendix to Republic of Armenia government protocol decision no. 25, dated 4 June 2015.
[4] Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest.
[5] Solicitor, Chair of the United Kingdom's National Preventive Mechanism and Associate Member of Doughty Street Chambers, London.

B. The General Part

Section 1. Criminal Legislation of the Republic of Armenia

Article 1. Basic Concepts Used in this Code

10. The definitions given in this provision are generally clear and appropriate but the following aspects of some of them might need to be improved if the points noted do not stem from issues of translation or do not take account of established practice in applying the terms concerned :
    - "Helpless person" – the stipulation "*deprived* of the opportunity to show resistance" (emphasis added) gives the impression in the English text of an external factor being the cause when it would be appropriate for inherent ones also to be relevant for this purpose;
    - "Theft" – it seems superfluous to require that the taking of the property be "without compensation" as well being done "illegally";
    - "Relative" – the stipulation that this be a person "whose life, health, interests and well-being are precious (dear)" for someone else has – depending upon the feelings or sensitivities of the latter person - the potential not only to cover a very wide group of persons in at least some instances but also to give rise to uncertainty as to whether or not a particular person is to be so regarded since it is not clear whether or not the relevant concern is a matter of subjective attitudes or is to be objectively established. The need for clarity on this point – and in particular the evidence that would be relevant for this purpose – is important since being a "relative" can result in the commission of an offence attracting an enhanced penalty. An objective test would undoubtedly be more appropriate in this context;
    - "Blackmail" – the term "disgraceful information" seems a little vague unless it is one that already has a well-established understanding in the practice of the courts. In particular, it is not clear whether the information needs to be true or false. Moreover, the emphasis on the information being "disgraceful" would not necessarily cover information that a person simply does not want revealed but which might be positive about him or her or someone else and yet the threat to reveal it could be used as a means of extracting money or other advantage. It may be that this latter consideration is dealt with by the rest of the definition, although that is not evident from its formulation. However, the issue as to whether or not the "disgraceful information" can be false as well as true would still need to be addressed;
    - "Vulnerable condition" – the point made about the use of "deprived" in respect of "Helpless persons" is equally applicable to this term

11. *There is thus a need to address these concerns insofar as they are not already resolved by the formulation of the original text or well-established practice*.

Article 2. Criminal legislation of the Republic of Armenia

12. There is a certain circularity in the definition of "criminal legislation" in paragraph 1 in that it involves a reference to "criminal law". In the present context it might be more appropriate for "criminal law" to be replaced by a phrase such as "criminal liability".

13. However, the phrase "criminal law" is frequently found in the Draft Code and it is not evident whether this is meant to be something distinct from the latter's provisions. That would certainly be appropriate since paragraph 3 precludes provisions providing for crime or punishment being applied unless they are included in the Criminal Code itself. In the circumstances, it might be better generally to refer in the Draft Code to "provisions of the Criminal Code" than to use the rather unspecific term "criminal law".

14. This point will not be repeated in respect of the various provisions discussed below that use the term "criminal law".

15. The need for paragraph 1 is also questionable since there is no other reference to the term "criminal legislation" in the Draft Code other than in the following provision.

16. *There is thus a need for the foregoing issues to be addressed.*

Article 3. Objectives of the Republic of Armenia Criminal Legislation

17. In view of the preceding comments on Article 2, it would be more appropriate for the objectives being specified to be those of the "Criminal Code" rather than those of "Criminal Legislation".

18. Furthermore, while the stated objectives are generally appropriate, the reference to "prevention of crime" not only overlaps somewhat with "criminal abuse" but it is also more relevant to measures concerned with law enforcement than the articulation of liability. The "deterrence of crime" would be perhaps be a more appropriate objective in this context.

19. The formulation of the last phrase perhaps does not make it sufficiently clear that the person being referred to is the person who has committed a crime and it might be clearer if this phrase was not separated from the preceding one.

20. *The foregoing concerns thus need be addressed.*

Article 8. Operation of the Criminal Law in Time

21. The scope of paragraph 6 could potentially be contrary to the prohibition on retrospective criminal liability since it envisages liability being determined by the law "at the moment of completing, terminating or averting" an act even though this may be different from the law applicable at the moment. Certainly, where there is a change in

the law governing an act, any liability imposed pursuant to this change should only apply to conduct committed after that has occurred.[6]

22. *The effect of this provision should thus be limited accordingly*.

Article 10. The Effect of the Criminal Law with Regard to Persons who Committed Crime in the Territory of the Republic of Armenia

23. The text in English of paragraphs 3 and 4 does not seem to be materially different and it may be that some element distinguishing them has been lost in the course of translation.

24. *There is thus a need to clarify how these two paragraphs differ*.

Article 12. Effect of Criminal Law with Regard to Acts under Criminal Law Committed Outside the Territory of the Republic of Armenia

25. The content of this provision is generally appropriate but criminal liability should not be imposed pursuant to paragraph 1 on persons with refugee status, asylum seekers or persons who have received asylum where the impugned act is connected with their entry into the Republic of Armenia, such as would be the case with the falsification by such persons of travel documents. The imposition of liability in such circumstances would be contrary to Article 31(1) of the Convention relating to the Status of Refugees.[7]

26. *There is thus a need to ensure that this consideration is taken into account when applying this provision*.

Article 13. Extradition or Transfer of a Person who has Committed an Offence

27. The content of this provision is generally consistent with European standards. However, the reference to "a person who has committed an offence" in the text both of the heading and specific paragraphs seem to be inconsistent with the presumption of innocence and the European Convention on Extradition in that there is no recognition that – even if there may be an accusation – the guilt of the person may not have been established.[8]

---

[6] See, e.g., *Veeber v. Estonia (No.2)*, no. 45771/99, 21 January 2003 and *Puhk v. Estonia*, no. 55103/0, 10 February 2004.

[7] "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or
are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

[8] See, e.g., the finding in *Ismoilov and Others v. Russia*, no. 2947/06, 24 April 2008 of a violation of the presumption of innocence where a court decision ordering a person's extradition declared his guilt. See also the text of Article 1 of the Convention on Extradition: "The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are *proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence* or detention order" (emphasis added).

28. *It would thus be more appropriate for this provision to refer to both a person who has been convicted of an offence and to one who is the object of proceedings for an offence*.

Section 2. General Conditions for Criminal Liability

Article. 16. Criminal Liability Based on the Complaint of the Victim

29. The stipulation in paragraph 1 that a person may be subjected to criminal liability only on the basis of a complaint of the victim for various crimes against health, threatening life and health, against freedom, honour, dignity, physical or mental integrity and against constitutional human rights and freedoms in Chapters 24, 25, 26 and 28 could result in particular cases inaction that is potentially inconsistent with the obligation not to tolerate conduct which could constitute violations of the prohibition on inhuman and degrading treatment and on interferences with moral, physical and psychological integrity.[9]

30. *The appropriateness of a victim's complaint always being a prerequisite for imposing liability in respect of these offences should thus be reconsidered*

31. The exceptions to the necessity of a complaint in the cases covered by paragraphs 2 and 4, as well as the restriction in paragraph 3 on withdrawing a complaint are entirely appropriate. However, it should be appreciated that withdrawal by an adult may be the result of pressure, fear and emotional confusion. In such cases the ready acceptance of a withdrawal could amount to tolerating the breaches of the criminal law concerned[10] and should not, therefore, be automatic.

32. *There is thus a need to provide for the ability to scrutinise the withdrawal of an adult's complaint to ensure that its acceptance would not be incompatible with the European Convention.*

Article 17. The Notion of Crime

33. The phrase in this definition beginning "which is prohibited …" seems superfluous, particularly in view of the definition of "an Act" in Article 19.

34. *The phrase beginning "which is prohibited …" could thus be deleted.*

Article 19. An Act

35. The second paragraph has the potential to create uncertainty as to the scope of criminal liability since it defines the basis of criminal liability by reference to obligations to perform acts arising from legal acts, professional role, commitments undertaken and

[9] See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009 and *Eremia v. Republic of Moldova*, no. 3564/11, 28 May 2013

[10] As was found to be the case in *Opuz v. Turkey*, no. 33401/02, 9 June 2009.

previous conduct and yet Article 2 provides for criminal liability to arise only for norms included in the Criminal Code. Liability for action or inaction should surely only be based on specific requirements set out in the Criminal Code, even if its provisions explicitly deal with liability arising from the existence, e.g., of a professional responsibility or a previous course of conduct. It would be more appropriate to specify that liability for inaction will arise where an obligation to act has been imposed pursuant to the Criminal Code.

36. *Paragraph 2 should thus be amended accordingly*.

Article 21. Special Subject of the Crime

37. The effect of this provision is not entirely unclear as it is predicated upon the Special Part of the Draft Code defining features which provide grounds to hold a person "liable for a respective offence provided for by the Special Part of this Code". However, the Special Part does not ever refer to the term "features" or "special subject". It may be that the intention is to refer to provisions enhancing criminal liability on account of the crime being committed by a criminal organisation or by someone who has special responsibilities[11] but since the term "special subject" is only otherwise used in Article 49, the added value of this provision is not evident.

38. *The need to retain this provision thus needs to be clarified*.

Article 28. Criminal Liability of a Person Who has Committed an Act Prohibited by Threat of Punishment as Provided for by Criminal Code in the State of Alcohol Intoxication (Drunkenness).

39. There is no problem, in principle, with drunkenness not precluding the imposition of criminal liability but the present provision is unclear in that it gives no guidance as to whether or not a person who is drunk is nonetheless to be regarded as being able to commit a wilful crime or only a crime just through negligence. Certainly, in some systems the fact of intoxication can result in certain elements of intent being considered as absent but this is not always so. The issue here, however, is not which approach would be appropriate but the need for clarity regarding the nature of the liability being imposed. This is particularly important given intoxication can amount to circumstances aggravating the punishment for the purpose of sub-paragraphs 17 and 18 Article 73(1).

40. *There is thus a need to clarify what impact, if any, intoxication has on liability for the committal of wilful crime*.

Article 33. Necessary Defence

41. There is a need to clarify what is understood in paragraph 3 by "wilful actions that are obviously for the defender inadequate with the nature and extent of danger of the

[11] Such as a "pedagogue" in Article 284(3).

encroachment". This formulation would seem inconsistent with the view of the European Court that any use of force against someone that is not strictly necessary – i.e., involving an objective and not a subjective test - as a result of the latter's conduct is, in principle, an infringement of Article 3 of the European Convention.[12]

42. *There is thus a need to clarify the effect of paragraph 3 and, if necessary, to modify it in order to meet this concern*.

43. The formulation of paragraph 4 would generally seem to satisfy the requirement under Article 2 of the European Convention of any use of force leading to the loss of life being absolutely necessary. However, the stipulation that the person using the force is excused liability where he or she does not realise that there are no other means of defence could in some instances fail to satisfy that test as there might be no need to establish that there was an honest and reasonable belief in that regard.[13]

44. *Paragraph 4 should thus be amended to require that there be an honest and reasonable belief that there were no other means of defence than those actually used*.

45. The possibility envisaged in paragraph 6 that subjective factors could be used to excuse a person from realising that there was no illegal encroachment or threat of one could result in an unjustified interference with rights under Articles 2 and 3 of the European Convention since, as has been seen, a belief should be "reasonable" and not just "honest".

46. *Paragraph 6 should thus be amended to require that there be an honest and reasonable belief about the existence of an illegal encroachment or the threat thereof.*

47. It is not evident that the special provision in paragraph 7 for self-defence when a person is aware of the attacker being insane or not reaching the age of criminal liability is necessary since such awareness might be relevant as to whether or not a particular response was necessary or proportionate in the particular case but should not entail a different test for judging the acceptability of conduct that could affect rights under Articles 2 and 3 of the European Convention.

48. *The need to retain paragraph 7 should thus be reconsidered*.

Article 34. Inflicting of Harm when Capturing the Person who has Committed an Illegal Encroachment

49. The stipulations in paragraph 1 that the person using the force is excused liability where he or she does not realise that there are no other means of capturing a person

[12] *Ribitsch v. Austria*, no. 18896/91, 4 December 1995.
[13] See, e.g., *McCann v. United Kingdom* [GC], no. 18984/91, 27 September 1995 and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24 March 2011.

and in paragraph 4 that subjective factors could be used to excuse a person from realising that there was no illegal encroachment or threat of one could result in an unjustified interference with rights under Articles 2 and 3 of the European Convention since, as has been seen, a belief should be "reasonable" and not just "honest".

50. *Paragraphs 1 and 4 should thus be amended to require that there be an honest and reasonable belief about the absence of other means of capture and the existence of an illegal encroachment or the threat thereof.*

Article 36. Force Majeure, Physical or Psychiatric (Mental) Enforcement

51. The meaning of paragraph 3 is far from clear. It states a need to take into account the present provision as a whole when resolving the issue of criminal liability where damage is inflicted to legally protected interests by means of physical or psychiatric enforcement which does not deprive the person of the possibility to control his or her actions? Certainly, it is not evident that this provision could be helpful in this regard.

52. *There is thus a need to to elaborate how exactly the present provision is to be taken into account when dealing with the situation specified in it*.

Article 37. Justified Risk

53. The exclusion of criminal liability envisaged by this provision where a justified risk has been taken is generally appropriate. However, the condition in paragraph 2 that measures "be taken to prevent the danger" seems an inadequate safeguard to protect the interests that could be affected, in particular those that might be protected by Articles 3 and 8 of the European Convention and Article 1 of the First Protocol. This condition is imprecise as to the nature of the measures necessary and it would be more appropriate if there was an objective standard added for the assessment of the adequacy of the ones taken.

54. *Paragraph 2 should thus be amended so as to require that "appropriate" measures be taken to prevent the danger concerned.*

Article 39. Sport Risk

55. Paragraph 3 is a little unclear in that it does not – unlike paragraph 2 – qualify the manner in which the rules are broken. It would seem that, if the structure of paragraph 2 is to be followed, the breach should have occurred "negligently" but this cannot be assumed.

56. There is thus a need to clarify whether or not the breach of the rules in paragraph 3 is to be negligent.

Article 41. Execution of an Order or an Instruction

57. The terms of this provision are generally appropriate. However, the formulation of paragraph 2 runs the risk of encouraging persons not to advert to the risk of orders being illegal. This is because, unlike other provisions in this part of the Draft Code, it does not refer to the possibility that such persons "could have realised" the nature of those orders as much as actually having done so. This could pose a risk for the safeguarding of rights under many provisions of the European Convention but especially those under articles 2, 3 and 5.

58. *Paragraph 2 should thus be amended to provide the alternative possibility that the person could have realised that the order was illegal*.

Article 42. Performance of an Assignment to Detect or Prevent Crime

59. Paragraph 1 of this provision might give the impression of allowing detention of crime and its prevention to ride roughshod over the rights of others, particularly in view of the apparent exception in paragraph 2 for grave and particularly grave crimes. However, any damage must be the consequence of action performed "in the manner prescribed by law". Such a requirement effectively renders this paragraph otiose as the activity concerned is already adequately covered by the terms of Article 40.

60. *There is thus no need to retain paragraph 1 and it should be deleted*.

61. Paragraph 2 is also unnecessary since a person acting in accordance with the terms set out in paragraph 1 should not actually commit a crime of any level of gravity.

62. *There is thus also no need to retain paragraph 2 and it should be deleted.*

Article 43. Completed and Incomplete Crime

63. The meaning in paragraph 4 of the phrase "as the completed crime" in the context of the qualification of Articles in the Special Part seems unclear, particularly as Article 76 provides for the Assignment of Punishment for an Uncompleted Crime.

64. *There is thus a need to clarify both the meaning of and the need for this ph*rase.

Section 3. Punishment

Article 62. Public Works

65. The imposition of public works as a sanction is not, in itself problematic but it should be noted that Article 4(3)(a) of the European Convention only exempts forced labour as a punishment from its prohibition on such labour where this is carried out during detention or "during conditional release from such detention".[14] As a result, the

[14] The obligation under these provisions must be regarded as prevailing over the exemption of any work or service exacted as a consequence of a conviction from the definition of forced labour in Article 2 of ILO

imposition of public works cannot be a standalone punishment but must either be linked in some way to the possibility of being subjected to a sentence of imprisonment – with the court first considering a sentence of imprisonment appropriate but then imposing the public works as a condition of release - or to the consent of the convicted person. Neither possibility would be feasible under the structure of the present provision.

66. *There is thus a need to revise this provision to meet the requirements of Article 4(3)(a) of the European Convention*.

Article 64. Deportation of a Foreign Citizen or a Person without Citizenship from the Territory of the Republic of Armenia

67. The first paragraph of this provision refers both to foreign and stateless citizens but there is no reference to the latter in subsequent paragraphs. This omission could be particularly problematic since the protection afforded by the *non-refoulement* principle in paragraph 3(3) might not then be available to stateless persons.

68. Furthermore, the reference to the *non-refoulement* principle in paragraph 3(3) would benefit from a specific reference to the European Convention in this regard as the scope of this principle under it is much wider than under the Convention relating to the Status of Refugees.

69. *This provision should thus be revised to take account of these concerns*.

Article 65. Restriction of Freedom

70. The specific restrictions listed in paragraph 2 are not inappropriate but that provision also allows for unspecified restrictions to be imposed by a court. It will be important to ensure that the latter restrictions are consistent with the principle of proportionality and do not unjustifiably encroach upon rights under the European Convention. Furthermore, such restrictions should not affect the freedom of the family members of

---

Convention No. 29, the Forced Labour Convention, 1930. Thus, the European Court has stated that it: "has noted the specific structure of Article 4. Paragraph 3 is not intended to "limit" the exercise of the right guaranteed by paragraph 2, but to "delimit" the very content of that right, for it forms a whole with paragraph 2 and indicates what the term "forced or compulsory labour" is not to include ("n'est pas consideré comme 'travail forcé ou obligatoire'"). This being so, paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs"; *Stummer v. Austria* [GC], no. 37452/02, 7 July 2011, at para. 120. See also the ruling of the former European Commission of Human Rights in *X v. Switzerland* (dec.), no. 8500/79, 14 December 1979 that: "unlike other provisions of international treaty law, the Convention does not merely exclude from the notion of "forced or compulsory labour" work which is required of a convicted person (cf. ILO Convention No. 29 of 10 June 1930 on forced or compulsory labour, Article 2, para. 2 (c)) or of a person in detention in consequence of a lawful court order (International Covenant on civil and political rights, Article 8, para. 3(c)(i))". The exemption in the ILO Convention is subject to a requirement that "the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations".

the person on whom they are imposed, such as by preventing them from having contact with certain persons.

71. *There is thus a need for suitable guidance to be prepared for prosecutors and courts as to what might be the subject of the unspecified restrictions authorised by paragraph 2.*

Article 72. Circumstances Mitigating the Punishment

72. The specified circumstances that might lead to a mitigation of the punishment in a particular case are not in themselves inappropriate. However, the inclusion in paragraph 1(7) of "committal of crime by breaching the condition of lawfulness of the circumstance excluding criminal liability" has the potential to lead to a violation of Article 3 of the European Convention. This would certainly be the case where mitigation – pursuant, e.g., to Articles 33 and 34 of the Draft Code[15] - leads to a significantly reduced penalty as that would not be regarded by the European Court as an adequate response to conduct incompatible with the prohibition on inhuman and degrading treatment.[16]

73. *There is thus a need for suitable guidance to be prepared for courts and prosecutors regarding the application of this provision.*

Article 73. Circumstances Aggravating the Punishment

74. The concept of "severe consequence through crime" is not defined in the Draft Code and it is a term that lacks sufficient precision for the purpose of the European Convention.

75. *A definition should thus be introduced for this term so as to give a more specific indication of what is understood to constitute a severe consequence unless there already exists a well-established body of case law that serves this purpose.*

Article 75. Assignment of a Softer Punishment than Envisaged by Law

76. The possibility envisaged in paragraph 1 of imposing a milder punishment on account of the crime being due to the victim's "immoral behavior" not only introduces a concept which is very imprecise – unlike "illegal behavior" - but also has the potential to infringe upon the rights of the victim under Articles 8 and 10 of the European Convention in that what some regard as "immoral" may be matters of identity and expression protected by those two rights.

77. *The reference to "immoral behavior" should thus be deleted from paragraph 1.*

[15] See paras. 42-51 above.
[16] See, e.g., *Gäfgen v. Germany* [GC], no. no. 22978/05, 1 June 2010 and *Austrianu v. Romania*, no. 16117/02, 12 February 2013.

78. The possibility envisaged in paragraph 2 of imposing milder punishment pursuant to cooperation and reconciliation proceedings runs the risk of the penalty concerned not being regarded as an adequate response to conduct that involves a violation of rights under the European Convention.[17]

79. *There is thus a need for suitable guidance to be prepared for courts and prosecutors regarding the application of this provision.*

Section 4. Exemption from Criminal Liability and Punishment

Article 85. Exemption from Criminal Liability on the Ground of the Crime being Less Dangerous

80. The definition of the term "less dangerous" in paragraph 2 by the phrase "if the concrete willfulness of the criminal has been aimed to cause a non-sufficient damage" does not really help to explain what is involved since the term "non-sufficient damage" is not defined anywhere in the Draft Code.

81. *There is thus a need to elaborate the definition provided in paragraph 2 so as to ensure that its meaning is sufficiently precise for the purpose of the European Convention.*

Article 87. Exemption from Criminal Liability on the Ground of Refusal by the Victim to Complain (Dropping the Complaint); Article 88. Exemption from Criminal Liability on the Ground of Reconciliation between the Victim and the Person who Committed a Crime

82. The possibility of exempting persons from criminal liability where the victim drops the complaint or there is a reconciliation ought not to be automatic – as seems to be the effect of these provisions - needs to be applied with care as in some cases it could result in a breach of the obligation not to tolerate conduct amounting to violations of the prohibition on inhuman and degrading treatment and on interferences with moral, physical and psychological integrity.[18]

83. *There is thus a need for the exemption of liability in the cases envisaged by these provisions to be approved by a court after considering the obligation not to tolerate a violation of Article 3.*

Article 103. Public Works assigned to a Minor

84. The comments made in respect of Article 62 are equally applicable to this provision. In addition, it should be noted that ILO Convention No. 138 on the Minimum Age for

[17] As the European Court found, e.g., in *Dimitrova and Others v. Bulgaria, no.* 44862/04, 27 January 2011 (unlawful killing) and *Eremia v. Republic of Moldova*, no. 3564/11, 28 May 2013 (domestic violence).
[18] See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009 and *Eremia v. Republic of Moldova*, no. 3564/11, 28 May 2013. See also paras. 29-32 above.

Admission to Employment, 1973 limits any public works imposed on minors aged 15 to that which is non-hazardous in character.[19]

85. *There is thus a need to revise this provision to meet the requirements of Article 4(3)(a) of the European Convention and to ensure appropriate guidance is provided to courts as to the type of work that can be imposed*.

C. The Special Part

Section 6. Security Measures and Confiscation of Property

Article 117. Grounds and Conditions of Assigning Security Measures

86. Any restriction measure – such as those provided for in Articles 118-126 - is likely to engage such rights as the rights to freedom of movement, privacy, family life, religion, assembly, expression or use of property etc. As such it will need to be designed and focused to achieve a legitimate aim (such the prevention of further offences). Any such ban will also need to be proportionate (necessary in a democratic society) and prescribed by law.[20] A court considering whether to impose of such a ban will need to consider the nature of the ban and whether it have a particular effect on these rights, whether the aim of the ban can be met by less onerous controls and whether the interference with the right is a proportionate response. Also, if the restriction is to be imposed for long periods, it will need to be reviewed by the court.[21] However, the achievement of these requirements will potentially be undermined by the possible contradiction between "inner belief" and "expert conclusion" as to the need for applying a measure. Indeed, the admissibility of a restriction is only likely to be regarded as justified where there is an evidential basis for its imposition.

87. *The reference to a decision being based on "inner belief" should thus be deleted*.

[19] Article 3.
[20] *Olivieira v Netherlands*, 33129/96, 6 November 2002.
[21] *Bartik v. Russia*, no. 55565/00, 21 December 2006.

Article 119. Grounds for Application of Medical Enforcement Measures

88. This provision allows a person to be subjected to enforced treatment by a psychiatrist to ensure "his or another person's safety" but also to prevent further crimes or "to ensure the fulfilment of the punishment aims." However, there will be a violation Article 3 of the European Convention if any power of compulsory treatment is not of therapeutic necessity from the point of view of established principles and is not in the interest of person's physical or mental health.[22] Furthermore, medical treatment without consent has also the potential to raise issues under Article 8 of the European Convention.[23]

89. *This provision should thus be revised to require that compulsory psychiatric treatment cannot be imposed unless the foregoing conditions are met.*

Article 121. Enforced Treatment in Psychiatric Hospital; Article 122. Assignment, Change and Termination of Enforced Medical Measures

90. The detention of a person on the basis that he or she is mentally ill needs to comply with the principles elaborated by the European Court in relation to Article 5(1)(e) of the European Convention. An individual cannot be considered to be of "unsound mind" and deprived of liberty unless the following three minimum conditions are satisfied: firstly, the person must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of any continued confinement depends upon the persistence of such a disorder.[24]

91. The decision to detain a person in hospital must not be based solely on the likelihood that they will commit further offences but only when it is necessary to prevent the person causing damage to himself or to others.

92. Furthermore, a decision on confining a person who is considered by the court to have a mental disorder must be based on a proper medical assessment in order to conform with the requirements of Article 5(1)((e)[25] and a mental condition must be of certain gravity in order to be considered as a "true" mental disorder.[26] A person's personality which is found not to be pathological cannot be considered as a sufficiently serious mental disorder so as to be classified as a "true" mental disorder for the purposes of Article 5(1) (e).[27]

93. The confinement of a person with unsound mind may be necessary not only when it is required for his or her treatment with medicines or any other clinical methods for

[22] *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, at para. 69.
[23] See *X v. Finland*, no. 34806/04 19 November 2012 and *Shopov v. Bulgaria*, no. 11373/04, 2 September 2010.
[24] *Winterwerp v. Netherlands*, no. 6301/73, 24 October 1979.
[25] *Ruiz Rivera v. Switzerland*, no. 8300/06, 18 February 2014 and *S R v. Netherlands*, no.13837/07, 18 September 2012.
[26] *Glien v. Germany*, no. 7345/12, 28 November 2013.
[27] See *Glien v. Germany*, no. 7345/12, 28 November 2013, at para. 88.

treating or improving his or her state but also when it is necessary for the prevention of damage being caused to him or herself or to others.[28]

94. The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained.[29] The burden of proof in establishing these criteria lies on the authorities.[30]

95. There is increasing international concern that a person compulsorily detained in a psychiatric hospital, even when this detention is compliant with the principles set out by the European Court, should not be subject to treatment without consent. Thus, the European Committee for the Prevention of Torture has stated:

> The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorising treatment without his consent. It follows that every competent patient, whether voluntary or involuntary, should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances.[31]

96. It is not clear that the present provisions – and the protection envisaged in Article 425 of the draft *Criminal Procedure Code* - which allow for detention and compulsory treatment sufficiently comply with the principles to be respected pursuant to Article 5(1)(e) of the European Convention.

97. *There is thus a need for the present provisions to be amended in order both to make the decision making process clearer and to be more explicit in requiring the principles discussed above to be taken into account. It may also be sensible to ensure that there are separate criteria and procedures for deciding on whether a person who has been detained should be treated without consent.*

Article 122. Assignment, Change and Termination of Enforced Medical Measures

98. Although the Medical Commission has a duty under paragraph 2 to review the medical measure every six months, it is not clear how that review triggers a review by the court pursuant to paragraph 3.

99. It is recalled that Article 5(4) provides that:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[28] *Hutchison Reid v. United Kingdom*, no. 50272/99, 20 February 2003, at para. 52.
[29] See *Witold Litwa v. Poland,* no. 26629/95, 4 April 2000, *at* para. 78 and *Varbanov v. Bulgaria*, no. 31365/96, 5 October 2000, at para. 46.
[30] *Hutchinson Reid v. United Kingdom*, no. 50272/99, 20 February 2003.
[31] *Extract from the 8th General Report of the CPT*, published in 1998, at para. 41.

100. Where a person is deprived of his liberty pursuant to a conviction by a competent court, the supervision required by Article 5(4) is incorporated in the decision by the court at the close of judicial proceedings.[32] However, in cases where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time – such as where a person has a mental disorder - the possibility of recourse to a court satisfying the requirements of Article 5(4) of the Convention will then be required.[33]

101. Furthermore, the need for continued detention for this reason must be regularly reviewed and on each review the authorities have to prove that the person needs to remain in the compulsory detention and that this is required as a result of his or her state of health. The European Court has referred to the fact that preliminary and continued detention of mental patients will be in conformity with Article 5(1) only in the cases when "it is convincingly proven that the person suffers from a sufficiently serious mental disorder which may serve as a ground for his detention". In other words, in both cases – i.e., when the person is detained and when his detention is continued - the burden of proof is on the authorities. In such a case, attempts to shift the burden of proof on to the person detained to show that he or she is no longer ill would be contrary to Article 5(4).[34] Nonetheless, the fact that the onus is on the medical authorities to prove this to the court has not been clearly set out in the present provision.

102. Moreover, a person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings "at reasonable intervals" to put in issue the lawfulness of his detention.[35] As a result a system of periodic review in which the initiative lies solely with the authorities will not be sufficient on its own.[36]

103. The criteria for "lawful detention" under Article 5(1)(e) entail that the review of lawfulness guaranteed by Article 5(4) in relation to the continuing detention of a mental health patient should be made by reference to the patient's contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments and not by reference to past events at the origin of the initial decision to detain.[37]

104. *The principles of regular review of detention by the court, the possibility of the detained person initiating a court review and the requirement for the onus to be on the authorities to prove the need to continue to detain a person thus need to be more precisely set out and this provision should be amended accordingly.*

[32] *De Wilde, Ooms and Versyp v. Belgium*, no. 2832/66, 18 November 1970.
[33] *Kafkaris v. Cyprus* [GC], 21906/04, 12 February 2008.
[34] See *Hutchison Reid v. United Kingdom*, no. 50272/99, 20 February 2003.
[35] *M H v. United Kingdom*, no. 38267/07, 16 December 2008.
[36] *X. v. Finland*, no. 34806/04, 3 July 2012 and *Raudevs v. Latvia*, no. 24086/03, 17 December 2013.
[37] *Ruiz Rivera v. Switzerland* no. 8300/06, 18 February 2014 and *H.W. v. Germany*, no. 17167/11, 19 September 2013.

Article 124. A Ban on Visit to Certain Places

105. The formulation of this provision does not require the court to be clear about the precise nature of the threat to public safety, how the future restriction is linked to the behaviour that the led to the conviction, what rights under the European Convention are engaged for the person concerned, whether these restrictions are particularly important and, overall, whether the ban is proportionate, and provides for a system of review by the courts for long term bans. As a result there is a risk that the requirements previously mentioned in connection with Article 117 will not be fulfilled.

106. *This provision should thus be revised to require account to be taken of the considerations just mentioned.*

Article 126. Confiscation of the Crime Tools and Means and Property or Proceeds Obtained through Crime

107. It appears implicit in this provision that any order for confiscation is to be made by the criminal court and only once a person has been convicted of an offence. However the provision does not seem to be restricted in its use against the convicted person nor does it set out the procedure to be used to ascertain what property should be confiscated and what the criteria are to determine such questions as what are "proceeds obtained through crime". Wide powers of confiscation, especially available without an order of the court or without proper procedural safeguards maybe not sufficiently prescribed by law for the purposes of the right to peaceful possession of property under Article 1 of Protocol No. 1.[38] Indeed, the European Court has stated that:

> an interference cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issues relevant for the outcome of the case.[39]

108. Although, the peaceful possession of property is not an absolute right, any removal of any property which constitutes the proceeds of a crime will need to be justified. This will be significant since there are likely to be disputes as to who property belongs to, whether any particular property is the proceeds of a crime, and what constitutes the proceeds of crime and how those proceeds should be calculated. Yet, as regards the issue of calculation the stipulation in paragraph 3 that "equivalent property" is to be subject to confiscation where the proceeds of crime cannot be found leaves it uncertain as to how this is to established.

109. The right to a fair trial under Article 6(1) is applicable to the resolution of such disputes[40] but, although paragraph 10 provides for resolution of disputes between a third party and a victim, it does not provide a dispute resolution process for any other person (including the convicted person).

[38] *Hentrich v. France*, no. 13616/88, 22 September 1994.
[39] *NKM v. Hungary*, no. 66529/11, 4 November 2013, at para. 45.
[40] *Phillips v. United Kingdom*, no. 41087/98, 5 July 2001.

110. Furthermore, the present provision does not make it clear that those acquitted are not to be subject to this provision, which would be incompatible with the presumption of innocence under Article 6(2) of the European Convention.[41]

111. *There is thus a need for this provision to be amended so as to make clear to whom it applies, whether a court order is required in advance of confiscation, what procedures should apply to the court process and whether the order can only be made after conviction.*

Section 8. Crimes against Peace and Humanity

Article 139. Aggressive War

112. The offences that would be created by this provision are problematic in that their reference to "starting or conducting an aggressive war" or joining someone doing this does not give any clear indication as to what conduct is actually being prescribed. This is in marked contrast to definition of the crime of aggression that was formulated in the Kampala Amendments to the Statute of the International Court that were adopted in 2010.[42] As a result the scope of the offence is insufficiently precise.

113. However, despite the clarity of the latter definition, it is still not binding in international law as the Kampala Amendments have still to be promulgated and it has yet to be ratified by the Republic of Armenia.

114. It should also be noted that the International Criminal Court would only be able to exercise jurisdiction over a crime of aggression when the Kampala Amendments have been promulgated.[43] Furthermore, even if this occurs, it could only exercise such

[41] *Geerings v. Netherlands*, no. 30810/03, 1 March 2007.

[42] "**Article 8 *bis* Crime of aggression** 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; c) The blockade of the ports or coasts of a State by the armed forces of another State; d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

[43] Pursuant to Articles 5(2), 121 and 123 of the Statute of the International Criminal Court.

jurisdiction where the United Nations Security Council has made a determination that an act of aggression has been committed by a specific State and could not do so in respect of any crime of aggression committed by the nationals of a State that is not party to the Statute or on the territory of such a State[44], qualifications that are also absent from the present provision.

115. *There is thus a need to introduce into this provision a definition for "aggressive war" which takes account of the qualifications just mentioned.*

Article 140. Public Call for Genocide or Aggressive War

116. The two proposed offences in this provision other than that concerning calls to start or participate in genocide, namely, "public calls to start or participate in … aggressive war or armed conflict" are only problematic insofar as the latter activities are, as already noted[45], insufficiently defined in Article 139.

117. *The compatibility of these two offences with the requirement that their scope be foreseeable is thus dependent upon an appropriate amendment being made to the proposed Article 139.*

Article 142. Failure to Comply with the Conditions of Ceasefire or Peace Agreement

118. This proposed offence is not, in principle, inappropriate. However, there is a lack of precision as to when a ceasefire or peace agreement is to be regarded as having been concluded. In particular, it is not clear whether or not there has to be some official basis for this having occurred. As a result, the present formulation leaves open the possibility of liability being imposed on someone who has not complied with a ceasefire that was concluded between combatants in breach of orders from their superiors, notwithstanding that the person concerned was him or herself acting in compliance with those orders. It is doubtful whether this is the intention but the language of the proposed provision does not preclude such a possibility.

119. *There is thus a need for the proposed provision to be more specific as to the circumstances in which a ceasefire or peace agreement is to be regarded as having been concluded for the purpose of creating the obligation to comply with the relevant conditions*.

[44] Pursuant to the proposed Article 15*bis.*
[45] See para. 112 above.

Article 143. Creation, Provision, Testing or Use of Weapons of Mass Destruction (WMD)

120. The content of this provision is generally appropriate but there is a lack of specificity as to the international agreements or treaties which impose the relevant prohibitions. In particular, it is unclear whether or not the proposed provision applies to any such agreement or treaty, even if it is not one which has been ratified by the Republic of Armenia. The imposition of liability in a case where some States other than the Republic of Armenia had agreed on the prohibition of certain weapons would be unreasonable given the potential difficulty in establishing that such a prohibition had been agreed.

121. *There is thus a need to specify that the relevant international agreement or treaty is one that has been ratified by the Republic of Armenia*.

Article 144. International Humanitarian Law Violations; Article 145. Inaction or Making an Illegal Command During Armed Conflict; Article 149. Genocide; Article 150 (Racial Discrimination, Isolation

122. The content of these provisions is not in itself problematic but, given that the object is to give effect to international humanitarian norms, it would be better to use the formulation found in Articles 6, 7, 8 and 28 of the Statute of the International Criminal Court so as to avoid any possible inconsistency in the imposition of the criminal responsibility required under international law.

123. *These provisions should thus be revised accordingly*.

Article 146. Destruction, Theft or Seizure of Cultural Values during the Time of War or Armed Conflict; Article 147. Breaking the Rules of Protection of Cultural Values at War Time or During an Armed Conflict

124. These provisions seem to be directed to implementing Article 15 of the Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954 – which the Republic of Armenia ratified on 18 May 2006 - but this is not necessarily the clear effect of the phrase "cultural value specified in international documents". This could lead to uncertainty as to how to apply these provisions and thereby result in a failure to give full effect to the obligation under Article 15. This risk could be avoided by using the formulation found in Article 15 of the Second Protocol.

125. *This provision should thus be revised accordingly*.

Article 148. Mercenaries

126. This provision does not define the term "mercenaries" and, in view of the various elements potentially involved in it – as seen, e.g., Article 1 of the International

Convention against the Recruitment, Use, Financing and Training of Mercenaries[46] - this could result in difficulties in applying the proposed offence. The Republic of Armenia has not ratified this Convention but it would be better if it included in the present provision a definition of the term "mercenaries", whether based on that treaty or on other factors considered relevant.

127. *This provision should thus be revised accordingly*.

Article 151. Denial or Justification of Genocide, Apartheid, Aggressive War or an Act Seriously Violating the International Humanitarian Norms

128. This provision is similar to the requirement in Article 6 of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems to establish the conduct mentioned as a criminal offence. However, unlike Article 6, the present provision is not limited to distributing or otherwise making available to the public of material through a computer system and does not specify that the conduct must be "committed intentionally and without right".

129. It is recalled that the European Court found in *Perinçek v. Switzerland*

> there were no international treaties in force with respect to Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. Nor does it appear that it was compelled to do so under customary international law. It cannot therefore be said that the interference with the applicant's right to freedom of expression was required under, and could hence be justified by, Switzerland's international law obligations.[47]

Unlike Switzerland, the Republic of Armenia has ratified the Additional Protocol.[48] Nonetheless, the distinctions previously noted between its Article 6 and the formulation of the present provision would probably be sufficient to defeat any claim that the latter's adoption was required by the Republic of Armenia's international obligations.

[46] This provides that "1. A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces. 2. A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken".

[47] [GC], no. 27510/08, 15 October 2015, at para. 268.

[48] On 16 November 2016, entering into force on 1 March 2017.

130. This does not necessarily mean that the imposition of criminal liability pursuant to the present provision would necessarily result in a violation of the right of freedom of expression under Article 10 of the European Convention. The crucial issue in any determination as to whether such a violation has occurred will be – as the European Court made clear in *Perinçek v. Switzerland* – whether or not a proper balance has been struck between the right to freedom of expression of the person making the impugned statement and the rights of those who might be harmed by it.[49]

131. In finding that no such balance had been struck in that case, it emphasised that

> the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.

132. Undoubtedly different considerations might apply to the application of the present provision by the courts of the Republic of Armenia in the circumstances of a particular case. Nonetheless, the present provision does not contain any explicit obligation on a court determining whether or not someone has committed the offence to take into account the right to freedom of expression under Article 10 of the European Convention. As a result there can be no guarantee that the balancing exercise required by the European Court will be undertaken.

133. Furthermore, the present provision does not provide for the possibility of the liability for this offence arising from recklessness in making the impugned statement as opposed to intent to do so. This approach can be contrasted with the recommendation to the governments of member States in ECRI General Policy Recommendation No. 15 on Combating Hate Speech that they:

> take appropriate and effective action against the use, in a public context, of hate speech which is *intended or can reasonably be expected* to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected …[50]

134. The General Policy Recommendation was adopted after the judgment of the European Court in *Perinçek v. Switzerland* but the approach to intent in it is consistent with

[49] At para. 274.

[50] Recommendation 10. "Hate speech" for the purpose of this General Policy Recommendation includes "the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes".

rulings of the European Courts that have upheld the compatibility with Article 10 of the European Convention of the imposition of criminal sanctions for remarks made where it should have been appreciated that these were likely to exacerbate an already explosive situation.[51] As a result it can be expected that the European Court would have regard to the element of intent involved in imposing liability pursuant to the present provision when determining whether or not this entailed a violation of Article 10 of the European Convention.

135. *There is thus a need to introduce into this provision a clause requiring a trial court to undertake the balancing exercise expected under Article 10 of the European Convention. Consideration should also be given to specifying that that liability can arise from recklessness in making the impugned statement.*

Section 9. Crimes against Man

Article 157. Murder by Exceeding the Necessary Defence; Article 158. Murder by Exceeding the Measures Necessary to Catch a Person who has made an Illegal Encroachment

136. There is one particular issue in relation to these provisions and this concerns the possibility that they will benefit law enforcement officials who have violated the fundamental right to life under Article 2 of the European Convention. Therefore the question arises as to why, given that law enforcement officials will not be guilty of a crime if they only use justified force, these proposed reduced sentences should be applicable where the force is not justified. Certainly, the use of such a provision may not comply with the principles set out by the European Court in its case law on Article 2 and to extent that they provide an unjustified difference in the treatment between law enforcement officials and citizens, will raise issues under the prohibition against discrimination under Article 14 of the European Convention.

137. The right to life in Article 2 is obviously a very important right but allows lethal force to be used where it is "absolutely necessary". Where law enforcement officials cause a death the State must justify the use of force to this highest of standards.[52] However, the present provisions might be taken to imply that lower standards could apply to law enforcement officials than apply to other persons.

138. Thus, a law enforcement official using excessive force in trying to catch an offender could be sentenced to as little as two months in prison.

139. Article 2 of the European Convention "requires States, in particular, to put in place a legislative and administrative framework designed to provide effective deterrence

[51] See paragraph 18 of the Explanatory Memorandum to the General Policy Recommendation.
[52] See also the discussion of Articles 33, 34 and 41 of the Draft Code above

against threats to life…"[53] Reduced sentences for law enforcement officials who kill a person unlawfully may not comply with this principle.

140. Moreover, there is a "growing tendency in international law" to recognise the "obligation of States to prosecute and punish grave breaches of international human rights".[54]

141. Finally, although the police are entitled to use lethal force against a fugitive where this is absolutely necessary[55], Article 158 would be applicable even where a relatively trivial offence was involve or the person concerned could be arrested on another occasion. The use of lethal force in such circumstances would be obviously disproportionate and would violate Article 2. As the European Court has stated:

> potentially deadly force cannot be considered absolutely necessary where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committee a violent offence.[56]

142. Provisions which required a court when deciding on a sentence to take into account of the role of law enforcement officials and their specific power to use force in their work would not necessarily breach the European Convention. However, the possibility of drastically reducing the sentence for very serious crimes by law enforcement personnel does not comply with the obligations under Articles 1 and 2.

143. *The present provisions should thus be amended to avoid their potential to allow sentencing that would be inconsistent with the requirements of the European Convention.*

Article 167. Causing Heavy or Moderate Damage to Health by Exceeding the Measures Necessary to Catch the Person who has Committed an Illegal Encroachment

144. The issue in relation to this provision also concerns the possibility that they will benefit law enforcement officials who have violated the fundamental rights of others citizens. Therefore the question arises as to why, given that law enforcement officials will not be guilty of a crime if they only use justified force, why these proposed much reduced sentences should also apply to them. Such an arrangement may not comply with the principles in the ECHR, particularly Article 3, and to extent that they provide an unjustified difference in the treatment between law enforcement officials and citizens, will raise issues under Article 14 (the prohibition against discrimination).[57]

[53] *Oneryildiz v. Turkey*, no. 48939/99, 30 November 2004, at paras. 89 – 90.
[54] *Margus v. Croatia* [GC], no. 4455/10, 27 May 2014, at para. 139.
[55] *Nachova and Others v. Bulgaria* [GC], no. 43577/98, 6 July 2005.
[56] *Ibid.*, at para. 95.
[57] See also the discussion above of Article 34 of the Draft Code.

145. A State must have a 'framework of law' that provides 'adequate protection against ill-treatment by state agents or private persons'.[58] For there to be a violation of Article 3 of the ECHR 'it must in the view of the Court be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3.'[59] The European Court has also stated that:

> the obligation on the State to bring to justice perpetrators of acts contrary to Article 3 of the Convention serves mainly to ensure that that acts of ill-treatment do not remain ignored by the relevant authorities and to provide effective protection against acts of ill-treatment.[60]

146. For law enforcement officials that use unjustified violence there is a clear overlap in behaviour between the concepts of torture, ill-treatment - contrary to Article 3 of the European Convention - and assaults that could be dealt with using the present provision. The United Nations Committee Against Torture has stated that short sentences of several days, 61 days to two years are insufficient to deal with cases of torture and that even sentences of three years or more may be insufficient.[61] The sentence range of three to six years for torture in Article 413 of the Draft Code with higher sentences where the victim is a vulnerable person or where the offence is also a hate crime seems appropriate. However, the conviction of a law enforcement for ill-treatment in violation of Article 3 of the European Convention but just below the torture threshold requires considerable higher sentences than provided for in the present provision to comply with European and international human rights law.

147. Provisions which required a court when deciding on a sentence to take into account of the role of law enforcement officials and their specific power to use force in their work would not necessarily breach the European Convention However, the possibility of drastically reducing the sentence for very serious crimes by law enforcement personnel does not comply with obligations arising under Articles 1 and 3 of the European Convention (or under the United Nations Convention against Torture).

148. *The present provisions should thus be amended to avoid their potential to allow sentencing that is inconsistent with the requirements of the European Convention and should be amended to avoid it applying in the situation referred to above.*

Article 173. Infecting with AIDS Virus; Article 174. Negligently Infecting with AIDS Virus; Article 175. Infecting with Sexually Transmitted or Life-Threatening Disease

149. It is not thought that this issue has been raised before the European Court but there is certainly likely to be the potential for a violation of Article 8 of the European

[58] *Mahmut Kaya v. Turkey*, 28 March 2000, no. 22535/93, at para. 115.
[59] *Beganovic v Croatia*, no. 46423/06, 25 June 2009, at para. 71.
[60] *Beganovic v Croatia*, no. 46423/06, 25 June 2009, at para. 79.
[61] *The United Nations Convention Against Torture: A Commentary,* Nowak and McArthur, OUP, 2008, page 241.

Convention should liability be imposed in this context for conduct that was merely careless as opposed to reckless. However no objection is likely to be raised to liability in respect of such conduct that was intentional.

150. Advice from the United Nations states that the application of the criminal law to the transmission of the HIV virus:

> risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it.
>
> In other instances, the application of criminal law should be rejected by legislators, prosecutors and judges. In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person:
>
> - did not know that s/he was HIV positive;
> - did not understand how HIV is transmitted;
> - disclosed his or her HIV-positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means);
> - did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences;
> - took reasonable measures to reduce risk of transmission, such as practising safer sex through using a condom or other precautions to avoid higher risk acts; or
> - previously agreed on a level of mutually acceptable risk with the other person."[62]

151. *It is therefore suggested that Articles 174 and 175 should be omitted from the Draft Code. In addition, it should be made clear in Article 173 that the offence concerns the transmission of the HIV virus and that the offence can only be committed where the person concerned (a) knew about his or her HIV status and intended to transmit the virus to the other person or (b) knew about his or her HIV status and acted recklessly in this regard.*

Article 190. Violent Actions of Sexual Nature (Sexual Violence); Article 191. Forced Violent Sexual Acts (Sexual Abuse); Article 192. Act of Sexual Nature towards a Person Under Sixteen

152. These provisions use the expression "natural" and this might be taken to imply a difference between homosexual and heterosexual sex, giving the latter a different (and higher) status. Insofar as this term is also used in the original text and the suggested construction of it is correct, there would then be a risk that the victim or perpetrator of a sexual assault might be treated differently by the courts solely as a result of their sexual orientation, which would be in violation of the equal protection required for compliance with Articles 1 and 14 of the European Convention.[63]

---

[62] UNDP, *Criminalisation of HIV transmission*.http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

[63] On the European Court's approach to the treatment of sexual orientation, see *Salgueiro da Silva Mouta v. Portugal*, no.33290/96, 21 December 1999 and *E B v. France* [GC], no.43546/02, 22 January 2008.

153. *There is thus a need to ensure that the language used in these provisions does not have any such discriminatory understanding or effect.*

Article 194. Discrimination

154. The list of attributes protected by this provision does not include disability or sexual orientation. Discrimination on these grounds is clearly unlawful and has been condemned by the European Court.[64] Whilst the provision does include the expression "or other personal or social circumstances", the inclusion of a long list of named protected characteristics but the absence of these two very important characteristics leaves the issue of their protection uncertain. Disability discrimination is very prevalent across Europe and its protection is now regarded as so important that it is one of only three separate and specific UN treaties concerned with discrimination– the Convention of the Rights of People with Disabilities.[65] Any discrimination on the basis of a person's sexual orientation is also prohibited by Article 26 of the International Covenant on Civil and Political Rights.[66]

155. *The expressions "disability" and "sexual orientation" should thus be added to the list of protected characteristics in this provision.*

Article 201. Establishment or Management of Associations Encroaching upon Human Rights, Freedoms or Legitimate Interests

156. The action prohibited in paragraph 1 appears merely to be the establishment of an organisation without clearly requiring any proof of specific action taken by it to encroach on rights.

157. Such a restriction on associations obviously engages the right to freedom of association under Article 11 of the European Convention (and probably the right to freedom of expression under Article 10) so that any conviction would have to be proscribed by law, necessary and proportionate. The protection of human rights by criminalising those involved in encroaching those rights is a worthy aim, mirrors the stipulation in Article 17 of the European Convention, as well as serving a legitimate aim for the purposes of Article 11. However, the offence in this provision is vaguely defined, does not require proof of any action to encroach on rights and is unlikely to meet the test of certainty. As a result a conviction based on this provision is likely to fail the prescribed by law requirement for a restriction on a right under the European Convention

[64] See for sexual orientation, *Salgueiro da Silva Mouta v Portugal*, no. 33290/96, 21 December 1999 or the Grand Chamber case of *EB v France* [GC], no. 43546/02, 22 January 2008. On disability discrimination see *Glor v Switzerland*, no. 13444/04, 30 April 2009 and *GN and Others v Italy*, no. 43134/05, 1 December 2009.
[65] Ratified by Armenia in September 2010.
[66] See the decisions of the United Nations Human Rights Committee in *Young v Australia* (941/00) and *X v Columbia* (136/05). Armenia ratified the International Covenant on Civil and Political Rights in June 1993

158. Furthermore this provision is likely to violate the requirement that the criminal law is sufficiently accessible and foreseeable. Finally, as the offence is one of setting up an association to encroach on rights rather than of more specifically acting to encroach on rights, there is likely to be much difficulty in appreciating what exactly is prohibited.

159. *It is difficult to suggest amendments that would cure this provision of the defects outlined and, as the activities that it is primarily designed to prevent – action to encroach on rights - are dealt with elsewhere in the Code (for instance in Articles 200, 202 and 203), this provision should thus be deleted.*

Article 202. Hindrance to the Exercise of the Right to Elect or Participate in Referenda, to the Work of Election Commissions or to the Implementation of the Authority of a Person Participating in Elections or Referenda

160. The right to vote and participate in elections is an important fundamental right in the European Convention and its protection by this provision is thus welcome. However, there are some issues that need to be considered to ensure it does not lead to any issues of compliance with other rights under the European Convention. For instance, during elections there are likely to be peaceful protests, demonstrations and counter-demonstrations which also need to be protected. It is important that this provision does not unnecessarily restrict these other important democratic freedoms and it is unclear what actions the expression "hindrance" might include and whether it is sufficiently precise.

161. *It is thus suggested that the words "The deliberate or intentional" are inserted before "hindrance" in the text of this provision.*

Article 226. Divulging the Secret of Adoption

162. This protection afforded by this provision is important but it should not prevent the exercise of the right of a child to know whether he or she was adopted once he or she becomes an adult or is old enough to appreciate the information.[67]

163. *This provision should thus be amended to allow for the provision to an adopted child of information about his or her adoption once he or she becomes an adult.*

Section 10. Crimes against Property, Economy and Economic Activity

Article 259. Demanding Illegal Payment to Perform Official or Professional Duties; Article 261. Illegal Use of the Information Available by the Official, Arbitrator, Auditor, Depositor, Administrator, Notary or Attorney of a Trade or Other Organisation

[67] *Gaskin v. United Kingdom* [GC], no.10454/83, 7 July 1989.

164. There is a lack sufficient precision in the terms "heavy consequences" and "significant damage" used respectively in the above provisions since they allow for quite varying interpretation.

165. *A definition should thus be introduced for these terms so as to give a more specific indication of what is understood by them unless there already exists a well-established body of case law that serves this purpose.*

Section 11. Crimes against Public Order and Morality

Article 284. Illegal Dissemination of Pornographic Materials or Items

166. The prohibition on the dissemination of material obviously engages Article 10 of the European Convention. In relation to sexually explicit material the jurisprudence of the European Court is relatively complex and, sometimes, unclear. However, the creation of criminal offences so as to prevent the dissemination of sexually explicit material involving children is unlikely to raise any issues, nor is protecting children from exposure to such material.

167. In relation to the production or dissemination of other sexually explicit material to adults the European Court has set out to some principles. Firstly, the State does have a wide margin of appreciation as to what material is prohibited[68] but the legal regime for prohibition will need to be prescribed by law[69], necessary and proportionate.[70]

168. In a case involving an exhibition of paintings depicting homosexuality and bestiality where visitors where not warned about the content, where there was no entry fee and no age restrictions, the European Court accepted that the State was entitled to impose a criminal sanction and confiscate the paintings.[71] However, in a later case an exhibition depicting a collage of public figures in sexual positions, the European Court found that an injunction was disproportionate and constituted a violation of Article 10.[72]

169. *In order to avoid any convictions under this provision violating Article 10 it is suggested that paragraph 1 is amended by inserting the words "to minors or" after "item of pornographic nature".*

---

[68] *Handyside v. United Kingdom* [GC], no. 5493/72, 7 December 1976.
[69] Though in *Muller v. Switzerland*, no. 10737/84, 24 May 1988, at para. 29, the European Court accepted that laws restricting pornography could not be drafted with absolute precision.
[70] *Sunday Times v. United Kingdom (No 1)* [GC], no. 6538/74, 26 April 1979.
[71] *Muller v. Switzerland*, no. 10737/84, 24 May 1988.
[72] *Vereinigung Bildender Kunstler v. Austria*, no. 68354/01, 25 January 2007. See also *Scherer v. Switzerland* no. 17116/90, 25 March 1994, *Wingrove v. United Kingdom*, no. 17419/90, 25 November 1996, *Otto-Preminger Institut v. Austria*, no. 13470/87, 20 September 1994 and *Perrin v. United Kingdom* (dec.), no. 5446/03, 18 October 2005.

Section 12. Crimes against Public Security and Computer Information Safety

Article 293. Justifying Terrorism or Calls to Terrorism

170. This provision obviously engages issues of freedom of expression and, whilst generally the promotion or justification of terrorism will not be protected by Article 10, the general nature of the provision and absence of a definition of "terrorism" in this article might be problematic. In other jurisdictions the European Court has found violations of Article 10 where a criminal offence has been imposed for statements which only promoted the causes of minority groups involved in fighting for their independence but not the use of force by them.[73]

171. However, even terrorist offences involving only an indirect incitement to commit violent are capable in principle of being compatible with Article 10, provided they are necessary, defined with sufficient precision to satisfy the requirements of legal certainty, and proportionality. For example, the European Court held in one case that a restriction on expression, in the form of a refusal to allow a radio journalist to interview a terrorist in Germany suspect, was justified because the words spoken by the suspect could possibly be understood by supporters of the terrorist group as an appeal to continue its violent activities.[74]

172. *Nonetheless, the insertion of a phrase such as "which are likely to encourage further acts of terrorism" after "preaching for it" might preclude the risk of a conviction being found to violate Article 10.*

Article 294. Dissemination of False Information about Terrorism

173. Similar considerations are applicable to the formulation of this provision.

174. *A phrase such as "which are likely to encourage further acts of terrorism" should thus be inserted after "information about terrorism".*

Article 302. Organization and Management of and Participation in Mass Disorders

175. Articles 10 and 11 of the European Convention only protect *peaceful* protests and assemblies. However, a person who "participates" in an assembly that is intended to be peaceful but which becomes violent should not be liable to criminal sanctions unless that person commits offences themselves or continues to participate actively in that violent assembly. Where a peaceful demonstration results in a small clash between the police and a few demonstrators whilst the crowd was dispersing, there is no pressing need to sentence the organisers, even when the demonstration was not previously

[73] *Erdogdu v. Turkey*, no. 25723/94, 15 June 2000 (the Kurds in Turkey).
[74] *Hogefeld v. Germany* (dec.), no. 35402/97, 20 January 2000; which concerned a member of the Red Army Faction.

authorized.[75] However, there is a risk that this would occur given the current formulation of this provision.

176. *The insertion of a phrase such as "Active or continued" before "Participation in a mass disorder" could preclude such a possibility occurring.*

Article 319. Handing over a Vehicle to a Person who is Drunk, has a Mental Disorder, is under the Age of Sixteen or Does not Have a Right to Drive that Type of Vehicle

177. This provision is obviously designed to protect persons from people using cars who are not able to drive safely. However, the key issue here is the ability to drive safely and not whether a person has a mental disability or not. The current wording discriminates unnecessarily against people with a mental health disability.

178. *The provision should thus be amended by inserting after "has a mental disorder" the phrase "which affects his or her ability to drive".*

Section 14. Crimes against State Power

Article 388. High Treason; Article 396. Illegally Obtaining or Publicizing of Information Constituting a State Secret; Article 397. Disclosure of State Secret

179. These provisions could lead to individuals or media organizations being convicted for disclosing secrets in the context of disclosing corruption or other illegal activities in the government ("whistle-blowing"). Having regard to the very long sentences that can be imposed following a conviction disclosing secrets, there is likely to be a violation of Article 10 of the European Convention when such disclosure was in the public interest.[76]

180. *These provisions should thus be amended to include a defence for a person to demonstrate that the impugned disclosure was made in the public interest.*

Article 406. Abuse of Authority, Powers, or the Influence Conditioned thereof by an Official

181. The protection of human rights by creating a criminal offence for abusing state powers is a very positive measure. It is important to ensure that the offence is not however too vague. The expression in the English translation "or performing them not properly" could encompass a wide range of failures, including inefficient or slow working. Whilst such failures by an official might justify disciplinary measures or dismissal, it would be disproportionate to subject them to criminal penalties.

[75] *Gun and others v Turkey*, no. 8029/07, 18/09/2013, but see *Rai and Evans v United Kingdom* (dec.), no. 26258/07, 17 November 2009.

[76] See, e.g., *Ceylan v. Turkey*, no. 23556/94, 8 July 1999, *Vereniging Weekblad Bluf? v. Netherlands*, no. 16616/90, 9 February 1995 and *Observer and Guardian v. United Kingdom* [GC], no. 13585/88, 26 November 1991.

182. *The phrase "or performing them not properly" should thus be deleted.*

Article 408. Unjust (Illegal) Enrichment

183. It is important that in this provision there is now no longer any ambiguity about what is understood by a "significant growth" in someone's income. Secondly, because such an offence needs to respect the presumption of innocence under Article 6(2) of the ECHR it is to be welcomed that this has been addressed by establishing a defence to demonstrate that the income or assets came from another lawful source ("which he cannot justify reasonably").

184. *Consideration could also be given to following other countries in adopting legislation that would allow the confiscation of assets as a civil matter where the source of those assets cannot be adequately explained. This generally avoids problems arising with respect to the presumption of innocence.*[77] *However, it should be noted that the presumption of innocence can be breached even in civil proceedings and the European Court has found violations in three cases (two of them involving relatives).*[78]

Article 413. Torture

185. The offence in this provision is a requirement of Article 7 of the United Nations Convention Against Torture. It should be noted that the United Nations Committee against Torture has stated that short sentences of several days, 61 days to two years are insufficient and that even sentences of three years or more may be insufficient.[79] Thus, the sentence range of three to six years with higher sentences where the victim is a vulnerable person or where the offence is also a hate crime seems appropriate. It is also to be welcomed that the offence extends to officials promoting or collaborating with torture perpetrated by others.

186. *Although states are not required to enact an offence of inhuman treatment as a crime in domestic law*[80] *consideration should be given to this to ensure that all intentional violations of Article 3 of the European Convention are prohibited by the criminal law.*

Article 415. Interference with the Official Activity of an Official

187. This provision could lead to individuals or media organizations being convicted for disclosing correct information about an official – perhaps in the context of disclosing corruption or other illegal activities (whistle-blowing). The conviction of a person who has disclosed information where that disclosure was in the public interest is likely to violate Article 10 of the European Convention.[81]

---

[77] *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015. This has, however, been a problem for Portugal.

[78] *Geerings v. Netherlands*, no. 30810/03, 1 March 2007, *Denisova and Moiseyeva v. Russia*, no. 16903/03, 1 April 2019 and *Rummi v. Estonia*, no. 63362/09, 15 January 2015.

[79] See Nowak and McArthur, *The United Nations Convention Against Torture*, OUP, 2008, at page 241.

[80] Article 16, United Nations Convention Against Torture. See also, Nowak and McArthur, *The United Nations Convention Against Torture*, OUP, 2008, at page 571.

[81] See the cases cited at n.76.

188. *This provision should thus be amended to include a defence for a person to demonstrate that the impugned disclosure was made in the public interest.*

Article 436. Failure to Report Crime

189. The current Criminal Code contains an offence of knowing that a crime is about to occur and failing to report it but, apparently, there is a problem for the courts in determining whether the crime concerned has to be serious or especially serious. The proposed offence would apply to any crime.

190. Such a broad provision is not universal in Europe. In some countries it applies only to very specific offences, such as torture and child abuse. However, such an offence does not seem to be contrary to the European Convention since in none of the cases where its existence has formed to background to proceedings in cases before the European Court has there been any comment (adverse or otherwise) as to the appropriateness of a prosecution on account of the failure to report a crime.

191. *If in the Republic of Armenia it is in the public interest for this offence to exist at all it would be better if the precise nature of this public interest was reflected in the offence itself. In particular, that the failure to disclose related to a very serious or grave crime or a violent crime against the person (including terrorist offences). The offence might also be more proportionate if the crime that needed to be prevented was one that affected life, integrity, freedom or sexual freedom. This would underline the general interest in obliging someone to report those kinds of crimes.*[82]

192. *It might also be appropriate for the offence to provide some defence to non-reporting, namely, where this failure occurs as a result of a threat from the principal responsible for committing the offence or on account of the pressure that can result from the existence of a family or employer-employee relationship. In addition, there should be an exemption from liability for any persons who would be themselves be exempt from testifying in a trial with respect to the particular relevant offence.*

Article 451. Slandering the Judge, Prosecutor, Ombudsman, Head of Investigation Department, the Lawyer, the Person Performing Representative Functions in the Case, the Person Exercising Criminal prosecution, the Expert, the Interpreter (translator) and the Court Bailiff

[82] *As in Article 450 of the Spanish Criminal Code, which provides that: "Whoever is able, by his immediate intervention and without risk to himself or another, and does not prevent a felony being committed that affects the life, integrity or health, freedom or sexual freedom of persons, shall be punished with a sentence of imprisonment of six months to two years if the offence is against life, and that of a fine from six to twenty- four months in the other cases, except if the offence not prevented is subject to an equal or lower punishment, in which case a lower degree punishment than that for the actual felony shall be imposed. The same penalties shall be incurred by whoever, being able to do so, does not resort to the authority or its agents in order for them to prevent a felony of those foreseen in the preceding Section when informed that it is about to be, or is being committed."*

193. A conviction of someone for exercising his or her freedom of speech will violate Article 10 of the ECHR.[83] As the European Court has stated:

> there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.[84]

194. The creation of a criminal offence for merely making statements must specifically comply with Article 10 of the ECHR and the strict jurisprudence of the ECtHR in order to avoid the European Court finding violations against the Republic of Armenia if this provision results in criminal sanctions. Article 10(2) does provide a special protection for judges from criticism: "…for maintaining the authority and impartiality of the judiciary." However any restriction on freedom of speech that results in a criminal sanction is likely to be very strictly scrutinized by the European Court. It would be more sensible to remove this completely from the Draft Code and provide for civil, rather than criminal, remedies.

195. Judges and prosecutors are entitled to protection and, for the purposes of Article 10 of the European Convention, the level of justified criticism of them is lower than it might be other officials or politicians because of their role in guaranteeing justice and because of their inability to reply to criticism.[85] However, judges (and prosecutors) should not be immune from criticism and journalists are entitled to criticise them without being sanctioned if the statements are in the public interest.[86] In addition, any criminal sanction, even if justified, must be proportionate.[87]

196. The special protection for judges and prosecutors is included in Article 10(2) of the European Convention:

> The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge. What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large.[88]

197. This special protection does not, however, extend to all of those officials listed in this provision of the Draft Code and it is essential that it is amended to remove them.

---

[83] See the cases cited at n. 76.
[84] *Ceylan v. Turkey*, no. 23556/94, 8 July 1999, at para. 34.
[85] *Prager and Obserschlick v. Austria*, no. 15974/90, 26 April 1995.
[86] *De Haes and Gijsels v Belgium*, no. 19983/92, 24 February 1997 and *Amihalachioaie v Moldova*, no. 60115/00, 20 April 2004.
[87] *Skalka v. Poland*, no. 43425/98, 27 May 2003.
[88] *Kyprianou v Cyprus*, no. 73797/01, 15 December 2005, at para. 172.

Furthermore, a statement that exposes malpractice, corruption or other illegal activity by an official, including a prosecutor or judge, must not be punished (whistle-blowers).[89] A statement that contains true facts about such activities but also makes some untrue statements which were the honestly believed to be true by the author should also not be a criminal offence. Finally any sentence following a conviction needs to be a proportionate response to the criticism.

198. It is assumed that the inclusion of the word "slandering" in this provision means that a person who has made a statement about an official which is, in fact, true would not be committing an offence. It would be useful if this was made explicit in the Article itself.

199. *It is strongly recommended that these Articles are removed completely from the Draft Code and that civil rather than criminal remedies are provided instead. Secondly, if the provisions are retained it is essential that these Articles should be limited only to those person who are judges or prosecutors or who have a very similar role in the system of justice in Armenia. Thirdly it is suggested that, if retained, there be added a defence for a person to demonstrate that any statement that was made, even if partially untrue, was believed to be correct and, was made in the public interest.*

Article 453. Disrespect towards the Prosecutor, Head of Investigation Department, the Ombudsman, the Lawyer, a Person Performing Representative Functions in the Case, the Person Exercising Prosecution, the Expert, the Interpreter (translator), the Court Bailiff

200. Articles 451 and 452 of the Draft Code more than adequately protect the court and its officials even with the amendments suggested above. Any unjustified attack on those officials can be dealt with by these other provisions and Article 453 should be removed from the Draft Code.

201. *This provision is unnecessary and should thus be deleted.*

Article 457. Refusal or Evasion to Undergo Investigation, Examination, Medical Testing or Provision of Samples

202. This article raises a number of complex issues. The first issue concerns the possible threat of criminal sanctions against a suspect or defendant for failing to be examined or to produce documents etc. Whilst clear recognition is provided against compulsory self-crimination for suspects and defendants in the Draft Criminal Procedure Code[90], it is also necessary to ensure that defendants and suspects are exempted from the requirements of this provision to avoid violating the principle of freedom from self-incrimination under Article 6(1) of the European Convention. In this connection, it should be recalled that the European Court has significant concerns about any process

[89] *Guja v Moldova*, no. 14277/04, 12 February 2008.
[90] Articles 43, 110, 221, 224, 309 and 416.

which involves the compulsion of the suspect or defendant to produce material for the prosecution.[91]

203. Secondly, the imposition of a criminal sanction for failing to cooperate without allowing the person concerned to make representations about whether the requirement is lawful or justified and secondly for the offence only to apply after a court has made an order requiring the specific action in question, is problematic.

204. Some principles on this subject can be derived from the jurisprudence of the European Court on Article 5(1)(b) which allows for detention only to "secure the fulfilment" of any obligation prescribed by law. For a criminal offence to follow the obligation must be of a specific and concrete nature.[92] In the case of *McVeigh and others v. the United Kingdom* the former European Commission of Human Rights found that an obligation, when entering the United Kingdom, to submit to an examination by an officer is a specific and concrete obligation and consequently, the detention to secure its fulfilment was in principle permitted under Article 5 (1) (b). In this case, the former European Commission framed the test to be applied to facts raising issues under this provision of the Convention:

> In considering whether such circumstances exist, account must be taken… of the nature of the obligation. It is necessary to consider whether its fulfilment is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfilment is reasonably practicable…[93]

205. Compelling a person to disclose documents, to have their home searched or to be subject to a search of their person also raises Article 8 issues, including the issue of the proportionality of the interference. In order to be justified, any interference by the state with a person's private life rights must fall within one of the exceptions detailed in Article 8(2) and must meet the general requirements of justification (it must be in accordance with law and necessary in a democratic society). It would appear the wide nature of this offence may not comply with the requirement that it must have the appropriate 'qualities' to make it compatible with the rule of law:

> Firstly, the law must be adequately accessible: the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.[94]

206. The European Court has found that the 'stop and search' powers under terrorism laws, which gave the police extremely broad discretion both to authorize searches and to decide to carry them out, were neither sufficiently circumscribed nor subject to

[91] See *Saunders v. United Kingdom* [GC] no. 19187/91, 17 December 1996, *Funke v. France*, no. 10828/84, 25 February 1993, and *Jalloh v. Germany* [GC] no. 54810/00, 11 July 2006. Also note that in *O'Halloran and Francis v. United Kingdom*, [GC] no. 15809/02, 29 June 2007, the European Court did not find a violation because the offence was regulatory in nature and designed to prevent grave injury.
[92] *Ciulla v. Italy* [GC], no. 11152/84, 22 February 1989, at para. 36.
[93] No. 8022/77, 18 March 1981, at para. 191.
[94] *Sunday Times v United Kingdom (No 1)* [GC], no. 6538/74, 26 April 1979, at para. 49.

adequate legal safeguards against abuse; they were therefore not 'in accordance with the law'.[95]

207. Proportionality also incorporates the concept of procedural fairness. An infringement of a qualified right is less likely to be a proportionate response to a legitimate aim if the person affected by the action was not consulted, or was not given the right to a hearing, than if he or she was given such opportunities. Thus, the European Court has stated that,

> whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.[96]

208. Obviously search and seizure will be necessary in many cases to obtain and secure evidence to assist in a trial. However wide powers without adequate safeguards will not be sufficient to comply with the European Convention. For instance, the search of a lawyer's office needs to be accompanied by special procedural safeguards, including the presence of an independent observer.[97]

209. For a search to be proportionate the following criteria will need to be considered:

> The relevant criteria are the circumstances in which the search order was issued, the content and scope of the warrant, the manner in which the search was carried out, including the presence of independent observers during the search, and the extent of possible repercussions on the work and reputation of the persons affected by the search.[98]

210. A search of the body itself or the requirement for "strip searches" will require a higher safeguards and protection. Such searches are likely to engage Article 3 in addition to Article 8 and will be much more difficult to justify. Such searches may be justified but will need to be conducted in an appropriate manner with respect for the individual's dignity.

211. Therefore there needs to be a procedure to test whether or not the examination is necessary for resolving the issues that need to be decided in the trial itself.

212. Finally, the provision itself does not provide the required legal precision required for the purposes of Article 8 and, because it creates a criminal offence, of Article 7 of the European Convention.

213. *This provision should be omitted from the Draft Code or amended by making it clear it does not apply to a suspect or defendant; ensuring that the offence can only be*

---

[95] *Gillan and Quinton v United Kingdom* no. 4158/05, 28 June 2010.
[96] *McMichael v United Kingdom*, no. 16424/90, 24 February 1995, at para. 87.
[97] *Niemietz v Germany*, no. 13710/88, 16 December 1992.
[98] *Law of the European Convention on Human Rights*, Harris, O'Boyle and Warbrick, 3rd edn. p. 557.

committed if the person concerned has failed to obey specific order of the court to comply and that they have had an opportunity to participate in those proceedings; and that those proceedings give reasons for the order, base any decision on the specific reasons found that justifies that decision and considers the issues that might be raised by Articles 3, 6, 8, and 10.

Section 15. Crimes against the Established Order of Military Service

Article 469. Failure to Carry out a Command (Order)

214. The term "heavy damage to human health" in this provision lacks precision.

215. *A definition should thus be introduced for this term so as to give a more specific indication of what is understood by it unless there already exists a well-established body of case law that serves this purpose.*

Article 470. Failure to Carry out a Command (Order) as a Result of Negligence or Bad Faith; Article 471. Resistance to Commander or Hindering His Lawful Functions; Article 473. Violence or a Threat of Violence Against the Subordinate; Article 474. Breach of Relations Prescribed by Code of Conducts (Field Manuals), between Not Subordinated Servicemen

216. The preceding comments are equally applicable to use of the terms "heavy or medium damage" in the first provision "significantly damaging" and "heavy or medium damage" in the second one and "heavy or medium damage" in the third and fourth ones.

217. *A definition should thus be introduced for these terms so as to give a more specific indication of what is understood by them unless there already exists a well-established body of case law that serves this purpose.*

Article 475. Wilful Abandonment of the Military Unit or The Place of Service, or Failure to Report for Service on Time

218. The third part of this provision would establish an enhanced punishment for the commission by a group of people of "any of the crimes specified in the third or fourth or fifth parts", which clearly is a mistake since the third part obviously does not specify any crime.

219. *There is thus a need to correctly enumerate the parts being referred to in the third part.*

220. The use of the term "heavy circumstances" as a basis for exemption from liability in part 7 lacks clarity and is not defined elsewhere in the Draft Code.

221. *A definition should thus be introduced for this term so as to give a more specific indication of what is understood by it unless there already exists a well-established body of case law that serves this purpose.*

Article 476. Desertion

222. The use of the term "heavy circumstances" as a basis for exemption from liability in part 4 similarly lacks clarity.

223. *A definition should thus be introduced for this term so as to give a more specific indication of what is understood by it unless there already exists a well-established body of case law that serves this purpose*.

Article 478. Failure or Refusal to Fulfil Military Service Duties; Article 479. Organization of, or Participation in Gambling by Servicemen

224. As noted in respect of other provisions, the use of the terms in them of respectively "heavy consequence" and "heavy consequences" are ones lacking in precision.

225. *A definition should thus be introduced for these terms so as to give a more specific indication of what is understood by them unless there already exists a well-established body of case law that serves this purpose*.

Article 480. Breach of the Rules for Handling Weapons, Ammunition or Items Dangerous for the Surrounding; Article 481. Handing over Weapons, Ammunition, other Military Property, as well as Materials or Items Dangerous for the Surrounding; Article 482. Wilful Destruction of or Damage to Military Property; Article 483. Negligent Destruction of or Damage to Military Property; Article 485. Breach of Rules for Driving or Operating Vehicles; Article 486. Breach of Rules for Flights or their Preparation; Article 487. Violation of Combat Duty or Combat Service Rules; Article 488. Breach of Border-Guarding Regulations; Article 489. Breach of Guarding or Patrolling Regulations; Article 490. Breach of Internal Service Regulations; Article 491. Breach of Service Rules when Protecting Public Order or Public Security; Article 497. Misuse or Abuse of Power; Article 489. Military Official Negligence

226. As in other provisions, the use in them of the terms "heavy or medium damage to human health", "heavy consequence" and "significant damage" are ones lacking in precision.

227. *A definition should thus be introduced for these terms so as to give a more specific indication of what is understood by them unless there already exists a well-established body of case law that serves this purpose.*

Section 16. Final Provision

228. There is no provision indicating that the 2003 Code is to be repealed or regarding the extent of its applicability to acts or omissions prior to the entry into force of the Draft Code.

229. *These omissions clearly need to be remedied.*

D. Conclusion

230. The Draft Code reflects a considerable amount of work undertaken by the authorities of the Republic of Armenia and, in particular, by the members of the Working Group that prepared it. Much care has been taken to try and ensure that it takes account of European human rights standards - including the developing case law of the European Court - and builds on the reform previously effected by the 2003 Code. Notwithstanding this great effort, the Opinion has found that there continue to be certain matters that still require attention.

231. Many of the problems identified in the Opinion are concerned with provisions that seem to lack sufficient precision for the purpose of imposing criminal liability in respect of particular conduct. As a result, there is a serious risk that their application will result in the violation of a range of rights and freedoms under the European Convention and, in particular, of the prohibition on retrospective criminal liability in Article 7.

232. In some instances, the perceived lack of precision may stem from problems of translation or a lack of awareness of well-established case law that clarifies the effect of the provisions concerned. However, in other instances there is likely to be a need to supplement the relevant provisions by definitions that clarify their meaning, as is already the case with others found in the Draft Code.

233. There are elements of certain some provisions whose actual effect or role is unclear and, subject to any clarification provided, it may be that there is no need to retain them at all.

234. There are also certain provisions dealing with the implementation of certain international obligations or standards regarding criminal liability for which that goal would be more readily achieved if the formulation used in the Draft Code were to use or to follow much more closely that actually used in the international instruments concerned.

235. Furthermore, a number of provisions, while not problematic in themselves, when applied can potentially lead to a violation of rights and freedoms under the European Convention. Although there is no need for these provisions to be amended, there should be prepared appropriate guidance for judges and prosecutors to ensure that they

appreciate that such a possibility exists and can thus act in a way that precludes it from arising in practice.

236. However, the potential for rights and freedoms under the European Convention to be violated through the application of certain other provisions can only be best obviated through the addition or modification of their text to ensure that particular requirements are observed. This is particularly the case with provisions that have implications for rights under Articles 2, 3, 4, 10 and 11 of the European Convention.

237. Finally, there are just a few provisions where compliance with the requirements of the European Convention can only be assured through the deletion of a particular word or phrase.

238. The issues requiring attention are not extensive and resolving them should be quite straightforward. The result of doing so will be a Criminal Code that imposes criminal liability and penalties in a manner consistent with European human rights standards.