"Supporting the criminal justice reform and harmonising the application of European standards in Armenia"

OPINION

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

ON THE REVISED DRAFT CRIMINAL CODE OF THE REPUBLIC OF ARMENIA

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Executive Summary

This Opinion examines the compliance of the revised 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 revised draft Code takes into account the requirements of European standards but finds that there continue to be certain matters that still require attention. These include ones relating to provisions that have remained unchanged from an earlier draft about which concern had previously been expressed. 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. Particular attention is needed in respect of provisions dealing with various forms of sexual assault since their modernising intention seem to have led to difficulties in complying with European standards. There are also some issues that need new provisions, notably as regards harassment and prostitution. In addition, sexual orientation and gender identity should be included in the list of characteristics covered by the offence of discrimination. Moreover, there is a need to treat as an aggravating circumstance for an offence the fact that its commission was motivated by the victim's sexual orientation should be an aggravating circumstance. The application of certain provisions has the potential to result in violations of European standards. However, this could sometimes be precluded through the provision of appropriate guidance to those tasked with implementing them. Overall, the issues requiring attention are not extensive and the steps that need to be taken to resolve the concerns identified are quite straightforward. A revision of the Revised Draft Code on the lines suggested would then lead to 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 revised draft Criminal Code of the Republic of Armenia ("the Revised Draft Code") prepared by a working group of the Ministry of Justice. The Revised Draft Code, while re-enacting some of the provisions in the existing

Criminal Code of the Republic of Armenia that was adopted on 1 August 2003 ("the 2003 Code"), is intended to replace many of them with entirely new ones.

2. The present Opinion reviews the compliance of all the provisions in the Revised 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'), as well as the Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention)[1] and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("the Lanzarote Convention")[2].

3. A particularly important consideration for the evaluation of the Revised 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.

4. Compliance with this requirement is essential not only for any restriction on a right or freedom under the European Convention to be admissible[3] 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[4]. 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.

5. Remarks will not be made with respect to those provisions in the Revised Draft Code that are considered appropriate or unproblematic unless this is relevant to an appreciation of their impact on other provisions. They will also not be made regarding the many provisions that embody positive changes made pursuant to comments made in an Opinion on an earlier draft Criminal Code prepared by the working group ("the earlier draft")[5]

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

[1] Article 36(1)(a). This convention has not been ratified by Armenia. However, the European Commission for Democracy through Law (the Venice Commission) is of the view that the obligations under the Istanbul Convention, therefore, do not go any further than those stemming from the European Convention and the case law of the European Court; Opinion on the constitutional implications of the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), CDL-AD(2019)018.

[2] Armenia has signed but not ratified this convention.

[3] See *Sunday Times v United Kingdom (No 1)* [GC], no. 6538/74, 26 April 1979, at para. 49.

[4] 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.

[5] 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, September 2017.

are italicised. These include ones in respect of a significant number of provisions that have not been changed following comments made on the earlier draft.

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

8. This Opinion has been based on an unofficial English translation of the Revised Draft Code.

9. The comments on which the Opinion has been based have been prepared by Jeremy McBride[6] and George Tugushi[7] under the auspices the Project "Supporting the criminal justice reform and harmonising the application of European standards in Armenia", co-funded within the European Union and Council of Europe Partnership for Good Governance for 2019-2021.

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.

11. However, the following ones might need to be improved if the points noted below do not stem from issues of translation or do not take account of established practice in applying the terms concerned:

- Violence" – the concept of "intentional physical influence" seems rather vague and is rather different from the notion of "harm" seen in the remainder of the definition, particularly as it requires intent to be established;
- "Theft" – the first sentence of the proposed definition seems to cover too many alternative concepts and it is not clear what value there is in including taking "without compensation" when there is already illegal taking and the second sentence also refers to illegal possession. The latter sentence also introduces a further concept, namely, of illegal use. Potentially the effect of the provision taken as a whole could be to treat as theft the mere taking of something, using it temporarily and then returning it or leaving it to be recovered by its owner. different concepts, which is not how "theft" is generally understood. A more straightforward definition might be something like: "the taking of another

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[7] Council of Europe consultant, former Public Defender (Ombudsman) of Georgia.

person's property or services without that person's permission or consent with the intent to permanently deprive him or her of it";

- "Blackmail" – the term "disgraceful information" seems rather vague. 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. It is also surprising that blackmail would not, in itself, be an offence under the Revised Draft Code but only an aggravating circumstance in the commission of other offences
- "On continuous basis" – this term seems inapt given the manner of its definition since that merely connotes a repetition of offences rather their non-stop commission. In this regard, it should be noted that the phrase "on continuous basis" is in essence the same as "ongoing offence" which is appropriately defined;
- "Vulnerable condition" – the stipulation "has no alternative but to be subject of abuse" could lead to arguments and rulings that the victim of an offence should have done something to avoid its commission when the real focus should be on the existence of factors such as age, dependence and physical or mental well-being as it is these which enable certain persons to be exploited by others.

12. *There is thus a need to address these concerns insofar as they are not already resolved by the formulation used in the Armenian text or through account being taken of well-established practice*.

Article 2. Criminal legislation of the Republic of Armenia

13. There is a certain circularity in the definition of "criminal legislation" in paragraph 1 in that it involves a reference to "criminal law a concept that is frequently found in the Revised Draft Code. It is not clear whether this is meant to be something distinct from the latter's provisions.

14. The need to use the term "criminal legislation" is also questionable since it is only used in this Article, the following one and in Chapter 2. The risk of confusion or uncertainty could be avoided if the term "Criminal law" were to replace "Criminal legislation" throughout the Revised Draft Code and the use of "criminal law" at the end of paragraph one was to be replaced by "those norms".

15. *There is thus a need for the paragraph 1 and the other relevant provisions to be amended accordingly*.

Article 8. Operation of the Criminal Law in Time

16. It is unclear whether the reference in paragraph 3 to "a continuing offence" is meant to be an "ongoing offence", which certainly does seem to be the case from the way the remainder of this provision is formulated.

17. *The terminology used in this provision should thus be clarified accordingly*.

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

18. The text in English of paragraphs 3 and 4 does not seem to be materially different and it may be that an element distinguishing them – such as the absence of "not" before "in effect" in paragraph 4 - has been lost in the course of translation.

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

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

20. The content of this provision is generally consistent with European standards.

21. However, the reference to "a person who has committed an offence" in the text of the heading – as opposed to the specific paragraphs – would 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]

22. *It would thus be more appropriate for the heading of 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

23. 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 (under Articles 168.1, 169.1, 170.1,171.1, 172.1, 173.1 174.1, 175.1, 179.1, 180.1) and involving psychological and physical pressure (under Articles 193.1 and 194.1) could result in inaction in pursuing a prosecution that is potentially inconsistent with the obligation not

[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).

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]

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

Article 17. The Notion of Crime

25. The definition of "crime" is very convoluted. Moreover, the use of the term "culpability" is not one found elsewhere in the Code. Moreover, it is incomplete as it requires the taking into account of the definition of "an Act" in Article 19.

26. It would be more straightforward to define a crime as "an action or inaction punishable under one of the provisions of this Code". This is, indeed, seen in the classification of crimes in Article 18.

27. *The definition would benefit from such simplification.*

Article 19. An Act

28. 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 previous conduct and yet Article 2 provides for criminal liability to arise only for norms included in the Criminal Code.

29. 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. In addition, 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. Furthermore, it does not make sense to put into paragraph 3 the essential basis of liability for inaction, namely, the ability to perform the obligation.

30. *Paragraphs 2 and 3 should thus be merged and revised accordingly*.

Article 21. Special Subject of the Crime

31. 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".

[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

32. However, the Special Part does not ever refer to the term "features" in relation to "the general subject" and only refers to the "special subject" in Articles 47 and 49 in the General Part. 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[10] but since the term "special subject" is only otherwise used in Article 49, the added value of this provision is not evident.

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

Article 23. Limited Sanity

34. The second paragraph is not problematic but might more properly be located in Chapter 11 Assignment of Punishment.

35. *Consideration should thus be given to relocating this paragraph accordingly.*

Article 24. Guilt

36. Paragraph 1 is really superfluous as it is effectively restating the definition of "crime" and the more important provisions are the second and third paragraphs clarifying what is understood by "guilt".

37. *Consideration should thus be given to deleting this paragraph.*

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).

38. 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.

39. Certainly, in some criminal justice 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.

40. This is particularly important given that intoxication can amount to circumstances aggravating the punishment for the purpose of sub-paragraphs 17 and 18 Article 72(1).

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

Article 29. Mistake (Error) in Factual Circumstances

[10] Such as a "pedagogue" in Article 290(3).

42. Paragraph 5 provides for the possibility of committing a crime through negligence. However, Article 27 has already dealt with committing the crime through negligence. The paragraphs in the latter provision also use the term "criminal negligence", which does not feature elsewhere in the Revised Draft Code.

43. It is not clear whether or not there is intended to be a difference between these two forms of negligence but, if there is no such difference, it would be clearer for them to be dealt with in the same article of the Revised Draft Code.

44. *There is thus a need to clarify the two concepts of negligence and, insofar as they do not differ, to deal with them in the same article*.

Article 33. Necessary Defence

45. The second sentence of paragraph 3 and the first sentence of paragraph 6 would envisage respectively an exemption from or diminution of criminal liability where certain factors are present. The former refers to an unspecific notion of "other circumstances" which are not necessarily linked to the objective factors of "fear", etc. and the latter both "objective" and "subjective" factors.

46. Both these formulations 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.[11]

47. *There is thus a need to recast the formulation of the two paragraphs so that only objective factors can justify or excuse the acts concerned*.

48. 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 would be excused liability where he or she did not realise that there are no other means of defence could in some instances fails to satisfy that test as there might be no need to establish that there was an honest and reasonable belief in that regard.[12]

49. *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*.

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

50. The stipulation in paragraph 4 that subjective factors could be used to excuse a person from realising that there was no illegal encroachment could result in the infliction of

[11] *Ribitsch v. Austria*, no. 18896/91, 4 December 1995.
[12] 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.

harm on someone entailing an unjustified interference with rights under Articles 2 and 3 of the European Convention since, as has been seen in the discussion of Article 33 above, a belief should be "reasonable" and not just "honest".

51. *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 35. Urgent Necessity

52. The exclusion of persons whose professional duty is to protect life, etc. from the application of the definition in paragraph 3 of exceeding the limits of urgent necessity would be inconsistent with Articles 2 and 3 of the European Convention as currently formulated. Those provisions would not require criminal liability to be imposed where the action of the persons concerned taken on objective and reasonable grounds nonetheless leads to greater harm than that which is being sought to be averted. However, the exclusion in paragraph 3 is not qualified in that way since this would be granted by reference only to the role or status of the persons concerned.

53. *This paragraph should thus be amended to limit the exclusion to action taken on objective and reasonable grounds.*

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

54. The meaning of paragraph 3 is not entirely clear in its stipulation that account would need to be taken of the provisions in Article 35 concerning urgent necessity when resolving the issue of criminal liability where damage has been inflicted to legally protected interests by means of physical or mental influence which did not deprive the person of the possibility to control his or her actions. Certainly, it would not really provide helpful guidance for the courts as to how to proceed in such cases and it would be better to state clearly when liability should be imposed in these cases.

55. *There is thus a need to provide an explicit basis for criminal liability in the situations addressed in paragraph 3*.

Article 39. Sport Risk

56. Paragraph 3 is a little unclear in that it would 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.

57. Moreover, this paragraph would not only envisage liability where the harm was inflicted "negligently" but also where this was done "wilfully" which would also be unnecessary given the existence of paragraph 2.2

58. *There is thus a need to clarify whether or not the breach of the rules in paragraph 3 is to be negligent and to reconsider whether or not there should be any reference to "wilfully" inflicting damage.*

Article 41. Execution of an Order or an Instruction

59. There is an inconsistency between paragraphs 1 and 2. The latter explicitly refers to the order or instruction having an "illegal nature" but the first sentence of the former refers to this being "issued in a due manner" while the second sentence deals with liability for the person giving "an illegal order or instruction".
60. The overall sense of both provisions is that they would be concerned with illegal orders and instructions and that the first sentence of paragraph 1 is trying to protect a person acting pursuant to them where they appear on objective and reasonable grounds to be legal.

61. *There is thus a need to revise the first sentence of paragraph 1 to make it clear that the order or instruction is illegal but appears on objective and reasonable grounds to be lawful*.

Article 42. Confidentially Cooperating with Operative Intelligence Bodies

62. This is an unduly complex provision which would be aimed at setting limits to the circumstances in which persons cooperating with operative-intelligence bodies might be protected from criminal liability.

63. Paragraph 1 of this provision might give the impression of allowing detection 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 established by law" and thus might be seen as an instance of the acts to which Article 40 refers.

64. It might be thought that, given the requirement of acting "in a manner established by law", paragraph 2 was not really necessary as grave and particularly grave crimes will not be authorised. However, it might be clearer if it stipulated that paragraph 1 cannot be regarded as authorising grave and particularly grave crimes. Nonetheless, this reading of the provision would seem to be contradicted by the exemption in respect of such crimes given in paragraph 3 to those persons who are part of a "criminal or terrorist organisation", etc. The formulation of this Article is likely to give rise to great problems of application in practice, even though the underlying objective seems legitimate.

65. *There is thus a need to simplify the manner in which this provision is formulated.*

Section 3. Punishment

Article 62. Public Works

66. The imposition of public works as a sanction is not, in itself, problematic. However, 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".[13]
67. As a result, the 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.

68. Both possibilities would seem to be envisaged in the present provision as paragraph 2 provides that they can be undertaken "with consent" and imprisonment can be imposed under paragraph 9 in "case of evasion from public works". The latter is not formally a case of conditional release from detention. However,, as imprisonment would be a consequence of not performing the public works, the European Court is likely to regard it as such in substantive terms.

69. It should, however, be noted that the English text of paragraph 2 refers to the consent being that of "the inmate" and there is nothing else in the provision suggesting that the person is actually subject to imprisonment or detention at the time of consenting to the public works.

70. *There is thus a need to check the formulation used in paragraph 2 and, if necessary, replace "inmate" by "offender" or "convicted person".*

Article 63. Depriving the Right to Hold Certain Positions or Engage in Certain Activity

71. The possibility of imposing the form of punishment that would be envisaged by this provision is not in itself problematic. However, it has been revised from an earlier draft so that what the position or activity to be affected would now 'depend' upon the nature of the crime rather than the previous formulation of "linked to the nature of the crime".

[13] 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 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 latter formulation would have given a better indication to the sentencing judge as to the appropriateness of the position or activity that should be affected than the revised formulation. The proposed change could, therefore, prove problematic in practice as the looseness of "depending on" could lead to a greater restriction than is actually warranted.

72. *It would thus be desirable to revert to the use of "linked to the nature of the crime".*

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

73. The reference to the *non-refoulement* principle in paragraph 3(3) would benefit from a specific reference to the obligations under the European Convention not to remove persons where this would be inconsistent with its rights and freedoms as these obligations are much wider than under the Convention relating to the Status of Refugees, covering, e.g., exposure to the risks of a flagrant violation of the right to liberty and security under Article 5[14] or of a flagrant denial of the right to a fair trial[15].

74. *This provision should thus be revised to take account of this concern*.

Article 71. Circumstances Mitigating the Criminal Liability or the Punishment

75. The specified circumstances that might lead to a mitigation of the punishment in a particular case are not generally inappropriate.

76. However, the inclusion in paragraph 1(7) of "committal of crime by breaching the condition of lawfulness of the circumstance excluding criminal liability" would have 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 Revised Draft Code[16] - led to a significantly reduced penalty as that would not then be regarded by the European Court as an adequate response to conduct incompatible with the prohibition on inhuman and degrading treatment.[17]

77. *There is thus a need for suitable, clear guidance to be prepared for courts and prosecutors regarding the application of this provision so that this does not lead to violations of Article 3 of the European Convention*.

Article 72. Circumstances Aggravating the Criminal Liability or the Punishment

78. The circumstances specified in this provision are generally appropriate but there is no indication as to how the courts are to apply them in concrete cases.

[14] See *El-Masri v. "the former Yugoslav Republic of Macedonia* [GC], no.39630/09, 13 December 2012.
[15] See *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99, 4 February 2005.
[16] See paras. 45-51 above.
[17] See, e.g., *Gäfgen v. Germany* [GC], no. no. 22978/05, 1 June 2010 and *Austrianu v. Romania*, no. 16117/02, 12 February 2013.

79. *There is thus a need to develop separate guidelines as to how the circumstances are actually to be applied.*

80. The aggravating circumstance specified in sub-paragraph 1(7) also need attention.

81. This provides that "committing the crime by motives of ideological, national, ethnic, racial, social or religious hatred, intolerance, or hatred, intolerance or religious fanaticism". This list is certainly compatible with the requirement of the European Commission against Racism and Intolerance's General Policy Recommendation No. 7, which requires a motivation that is racist to be an aggravating factor in an offence.

82. However, the list in sub-paragraph 1(7) is not in keeping with the wider approach seen in many member States of the Council of Europe and does not take account the view of the European Court that a motivation based on the sexual motivation of the victim should be treated as an aggravating factor in sentencing. [18] This motivation is not expressly mentioned in any of the characteristics listed and it is unlikely that "social" hatred, etc. could be interpreted so as to cover it. Furthermore, in the light of evolving standards in this area, it would be preferable if the list were open so that a motivation on any grounds of discrimination was also covered.

83. *There is thus a need to expand the list to cover motivation by reference to sexual orientation, as well as any other grounds of discrimination.*

Article 74. Assignment of a Milder Punishment than Envisaged by Law; Article 79. The Assignment of Punishment in Case of Reconciliation or Cooperation Proceedings

84. The possibility envisaged in paragraph 2 of both provisions of imposing milder punishment pursuant to cooperating would run 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.[19] This would be all the more likely given that Article 89 would allow a person against whom a milder punishment was imposed, or a reconciliation or cooperation proceeding was applied, to be released on grounds of conditionally not applying the punishment.

[18] Thus, it observed that "Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention"; *Identoba and Others v. Georgia* [GC], no. 73235/12, 12 May 2015, at para. 67. In this case, the domestic criminal legislation directly provided that discrimination on the grounds of sexual orientation and gender identity should be treated as a bias motive and an aggravating circumstance in the commission of an offence but there was a failure to conduct a proper investigation into the alleged ill-treatment.

[19] 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).

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

Section 4. Exemption from Criminal Liability and Punishment

Article 86. Exemption from Criminal Liability on the Grounds When the Victim Withdraws him/her Complaint; Article 87. Exemption from Criminal Liability on the Grounds of Reconciliation of the Victim and the Offender

86. 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 – and would always need to be applied with care since it could sometimes result in a breach of the obligation not to tolerate conduct amounting to a violation of the prohibitions on torture and inhuman and degrading treatment and on interferences with moral, physical and psychological integrity under Articles 3 and 8 of the European Convention.[20]

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

Article 97. Pardon

88. The failure to include the offence of Torture in Article 425 within the offences for which a Pardon may not be granted would be likely to be considered incompatible with Article 3 of the European Convention as the granting of one would undermine the seriousness of the penal sanctions required for such conduct in the same way that limitation periods should be inapplicable to it[21].

89. *There is thus a need to extend the scope of paragraph 2 to include "a person having committed a crime established by Article 425 of this Code".*

Section 5. Peculiarities of criminal liability of minors

Article 109, Exempting from Liability through Imposing of Compulsory Educational Measures

90. This provision would exempt a minor or person under the age of twenty-one who is a first-time offender of a "non grave"[22] or medium gravity crime from criminal liability where the court imposes a compulsory educational measure.

[20] 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. 23-24 above.
[21] See *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.
[22] Is this a poor translation for "not very grave" or something else?

91. Such a measure would not entail a deprivation of liberty for the purpose of Article 5 of the European Convention but could involve an element of forced labour given the potential requirement to remedy damage inflicted by the offence and to proceed to work under paragraph 2.2 and 4.

92. Insofar as this is likely, this could result in a violation of Article 4(3)(a) of the European Convention unless the exemption was adopted with the consent of the offender concerned.

93. *There is thus a need for this provision to include the consent of an offender to the adoption of a decision exempting him or her from criminal liability.*

Article 113. Exempting from Punishment by Placing in a Special Educational and Disciplinary Institution

94. Unlike the preceding provision, the proposed exemption from punishment under this provision would entail a deprivation of liberty as it authorises the placing of the minor concerned in a special educational and disciplinary institution for a maximum of three years.

95. Such a measure is potentially compatible with the European Convention as Article 5(1)(d) does authorise deprivation of liberty of minors for the purpose of educational supervision. However, educational supervision must actually be provided, albeit that that does not have to be equated rigidly with the notions of classroom teaching. Furthermore, it is essential that schooling in line with the normal school curriculum be provided.[23]

96. *There is thus a need to ensure that appropriate arrangements are actually in place where resort to the power in this provision is exercised.*

Section 6. Security Measures and Confiscation of Property

Article 119. Grounds for Assigning Compulsory Medical Measures

97. This provision would allow 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."

98. However, there would 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.[24]

[23] For findings of violations of Article 5(1)(d) where these requirements were not fulfilled, see *Bouamar v. Belgium*, no. 9106/80, 29 February 1988, *D.G. v. Ireland*, no. 39474/98, 16 May 2002 and *Blokhin v. Russia* [GC], no. 47152/06, 23 March 2016,

[24] *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, at para. 69.

Although this provision does include such a test, it would only be applied as an alternative to preventing further prohibited acts and achieving the aims of the punishment and so is insufficient to prevent a possible violation of Article 3 of the European Convention.

99. *This provision should thus be revised to require that compulsory psychiatric treatment cannot be imposed unless the foregoing conditions are not alternatives but are all prerequisites for the imposition of such treatment.*

Article 121. Assigning, Changing and Terminating Compulsory Medical Measure

100. Although the medical-professional commission would have a duty under paragraph 2 to review the medical measure every six months, it is not clear how that then leads to any action by the courts on the opinion reached by the commission.

101. Certainly, the need for continued detention for this reason must be regularly reviewed and on each review the authorities would have to prove that the person needed to remain in the compulsory detention and that this was required as a result of his or her state of health.

102. The European Court has referred to the fact that preliminary and continued detention of mental patients would 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 should be 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).[25]

103. In the present provision, the fact that the onus is on the medical authorities to prove this to the court has not been clearly set out.

104. It is not clear, therefore, why paragraphs 3 and 4 in the equivalent provision of the previous draft have not been retained[26].

105. *There is thus a need to reinstate those two paragraphs in this provision.*

Article 123. A Ban on Visit to Certain Places

[25] See *Hutchison Reid v. United Kingdom,* no. 50272/99, 20 February 2003.

[26] These provided respectively that "In case of change in the nature or course of the person's illness, the court, based on the opinion of the medical institution, shall make a decision on terminating or not terminating the application of the enforced medical measure" and " In case of such a change in the nature or course of the person's illness, when there is no further need to apply the enforced medical measure, the court shall decide on the basis of the opinion of the psychiatric commission to terminate the application of that measure".

106. The formulation of this provision would not require the court to observe the principle of proportionality when imposing a ban and does not provide for a system of review by the courts for long term bans. As a result, there would be a risk that the imposition of a ban in some cases would unjustifiably interfere with rights and freedoms under the European Convention.

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

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

108. It appears implicit in this provision that any order for confiscation should be made by the criminal court and only once a person had been convicted of an offence. However, the scope of this provision would not be restricted to confiscation that would affect convicted persons. Moreover, it does not set out any procedure to be followed to ascertain what property should be confiscated and what the criteria should be used to determine such questions as what are "proceeds obtained through crime".

109. Such wide powers of confiscation without proper procedural safeguards are unlikely to be regarded by the European Court as sufficiently prescribed by law for the purposes of the right to peaceful possession of property under Article 1 of Protocol No. 1.[27]

110. The need for such safeguards would be significant in the case of the present provision 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 be established.

111. The right to a fair trial under Article 6(1) is certainly applicable to the resolution of such disputes[28] but, although paragraph 10 provides for resolution of disputes between a third bona fide person and a victim, it does not provide a dispute resolution process for any other person (including the convicted person), including one who is treated as not being a third bona fide person. In any event, this provision would require the person affected to take civil proceedings against the victim rather than provide a fair procedure before any taking of the property occurs.

[27] See, e.g., *Hentrich v. France*, no. 13616/88, 22 September 1994.See also its statement in *NKM v. Hungary*, no. 66529/11, 4 November 2013 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" (para. 45).

[28] *Phillips v. United Kingdom*, no. 41087/98, 5 July 2001.

112. 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.[29]

113. *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. It might be simpler to restrict the provision only to the property in the possession of the offender and make separate – non-criminal – provision for confiscation in respect of persons receiving the proceeds of a crime.*

C. The Special Part

Section 8. Crimes against Peace and Humanity

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

114. These provisions would seem to be directed to implementing Article 15(1) of the Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954[30] – 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".

115. 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. Such a risk could be avoided by using the formulation found in Article 15 of the Second Protocol.

116. *These provisions should thus be revised into one provision using the formulation of Article 15(1) of the Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict*.

Section 9. Crimes Against the Person

Article 156. Murder

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

[30] This provides as follows:"1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention".

117. The list of factors in paragraph 2.13 to be treated as aggravating circumstances is the same as that in Article 72(1)(7)[31] and is thus equally incomplete.

118. *There is thus a need to expand the list to cover motivation by reference to sexual orientation, as well as any other grounds of discrimination.*

119. It should be noted that Article 46 of the Istanbul Convention requires that it be an aggravating circumstance that the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority.

120. *It would thus be appropriate to add the circumstances referred to in Article 46 to the list of aggravating circumstances for this offence.*

Article 158. Murder in the State of Strong Mental Confusion (fit of insanity)

121. The reference to the mental confusion being caused by the victim's "immoral behaviour" not only introduces a concept which is very imprecise – unlike "illegal behaviour" - 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.

122. Moreover, this reference is incompatible with the stipulation in Article 42 of the Istanbul Convention that violent offences should not be justified by claims that the victim has transgressed cultural, religious, social or traditional norms or customs.

123. *The reference to "immoral behaviour" should thus be deleted.*

Article 161. Murder by Exceeding the Necessary Defence; Article 162. Murder by Exceeding the Measures Necessary to Catch a Person who has made an Illegal Encroachment

124. The proposed application of a reduced sentence for a killing that occurs in the course of defending oneself or in the course of law enforcement would not always be incompatible with the obligation to protect life under Article 2 of the European Convention.

125. However, the present provisions do not require the examination of the specific circumstances in which more than justified force was used before applying the discounted sentence for what would otherwise be murder under Article 156. A discount might be admissible where it is established that the excess was not intentional or reckless or the killing had not been the first time that the defendant had been attacked by the victim (such as in cases of domestic violence).

[31] See paras. 82-83 above.

126. *It would thus be necessary to specify in these offences that the excessive use of force was not intentional or reckless or the killing had not been the first time that the defendant had been attacked by the victim*.

Article 164. Causing to Commit a Suicide

127. The treatment of causing someone to commit suicide on account of negligence does not seem to be particularly precise as a concept as compared with the use of threat, cruel treatment or humiliation on a regular basis. A prosecution or conviction on this basis could thus result in a violation of Article 7 of the European Convention.

128. *This proposed ground of liability should thus be deleted*.

129. *Moreover, in view of the requirement in Article 46 of the Istanbul Convention already noted*[32]*, it would thus be appropriate to add the circumstances referred to in it to the list of aggravating circumstances.*

Article Inflicting Heavy Injury to Health; Article 169. Causing Moderate Damage to Health

130. The list of factors in paragraph 2.12 of the first provision and in paragraph 2.13 of the second one to be treated as aggravating circumstances is the same as that in Article 72(1)(7)[33] and is thus equally incomplete.

131. *There is thus a need to expand the list to cover motivation by reference to sexual orientation, as well as any other grounds of discrimination.*

132. *Moreover, in view of the requirement in Article 46 of the Istanbul Convention already noted*[34]*, it t would thus be appropriate to add the circumstances referred to in it to the list of aggravating circumstances for both provisions.*

Article 170. Causing Heavy or Moderate Damage to Health in a State of Strong Mental Confusion

133. As with Article 158, the reference to the mental confusion being caused by the victim's "immoral behaviour" not only introduces a concept which is very imprecise – unlike "illegal behaviour" - 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.

134. Moreover, this reference to "immoral behaviour" would, as already noted[35], be incompatible with Article 42 of the Istanbul s.

135. *The reference to "immoral behaviour" should thus be deleted*

[32] See para.119 above.
[33] See paras. 82-83 above.
[34] See para.119 above.
[35] See para. 122 above.

Article 171. Causing Heavy or Moderate Damage to Health by Exceeding the Measures Necessary to Catch the Person who has Committed an Illegal Encroachment; Article 172. Causing Heavy or Moderate Damage to Health by Exceeding the Necessary Defence

136. The proposed application of a reduced sentence for causing heavy or moderate damage to health that occurs in the course of defending oneself or in the course of law enforcement would not always be incompatible with the obligation to protect life under Article 3 of the European Convention.

137. However, the present provisions do not require the examination of the specific circumstances in which more than justified force was used before applying the discounted sentence for what would otherwise be the offences under Articles 168 or 169. A discount might be admissible where it is established that the excess was not intentional or reckless.

138. *It would thus be necessary to specify in these offences that the excessive use of force was not intentional or reckless or the killing had not been the first time that the defendant had used force in response to an attack by the victim.*

Article173. Causing a Light Damage to Health

139. The requirement in Article 46 of the Istanbul Convention already noted[36] would also be applicable to this provision.

140. *It would thus be appropriate to add the circumstances referred to in Article 46 to the list of aggravating circumstances for this offence.*

Chapter 25. Crimes endangering life and health

141. There is no provision in this chapter or elsewhere in the Revised Draft Code that criminalises female genital mutilation, i.e., the complete or partial cutting, infibulation or otherwise mutilating female genitals, whether by the influence of a religious, ritual, ethnic or other tradition, or without such influence. This is a serious omission given the increasing incidence of such conduct in European countries.

142. *There is thus a need to make such mutilation, as well as forcing or persuading someone to undergo it, an offence*.

Article 178. Infecting with AIDS Virus

143. This provision does not specify any necessity for intent in infecting someone and yet would result in a higher penalty than where this occurs negligently.

144. *This provision should thus be amended to require that the infection must be intentional*.

[36] See para. 119 above.

Article 191. Illegal Deprivation from Freedom; Article 193. Psychological Pressure; Article 194. Physical Pressure

145. The requirement in Article 46 of the Istanbul Convention already noted[37] would also be applicable to these provisions.

146. *It would thus be appropriate to add the circumstances referred to in Article 46 to the list of aggravating circumstances for these offences.*

147. The concepts in the second offence of "a real danger to perform the threat" and "social isolation" are not entirely clear. Certainly, the former must be something less than an actual attempt as that is already an offence but, in the absence of that, it could be difficult to say that the danger is real. Similarly, the factors that constitute social isolation are potentially problematic, especially given the freedom that individuals have to associate with each other.

148. *There is thus a need to give these elements some greater precision in order to satisfy the foreseeability test.*

Article 195. Pursuing

149. The reference to "pursuing in an obscene manner" is also rather vague and it is hard to see the link between obscene behaviour and any of the concerns listed apart from "sexual immunity".

150. The proposed offence is really a very poor substitute for the offence of harassment or of sexual harassment. The former is widely understood to comprise a knowing and wilful course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorises the person and serves no legitimate purpose. The latter is defined in Article 40 of the Istanbul Convention as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

151. *It would thus be more appropriate to replace the present provision by offences of harassment and of sexual harassment as defined in the preceding paragraph.*

Article 196. Forcing to Commit an Act or to Refrain from Acting

152. The proposed offence is not problematic as such but it risks criminalising legitimate law-enforcement activity if the terms "violence" and "threats" are not characterised as "unlawful since policing can require people to do or refrain from acting in order to maintain or secure public order.

153. *There is thus a need for this provision to be revised accordingly.*

[37] See para. 119 above.

Article 197. Violent Actions of Sexual Nature; Article 198. Forcing to Sexual Acts

154. The offences proposed in these two Articles would be concerned with all sexual acts which occur against the will of the person concerned. They are problematic in several respects.

155. First, the offence in Article 197 would merge into a single offence rape (i.e., enforced sexual intercourse, which is presumed to be what the term "sexual relationship" in the English text is intended to be) and other sexual acts not amounting to intercourse that are committed through the exercise or threat of violence or the abuse of the helpless situation of the victim.

156. Although sexual acts not involving intercourse are serious wrongs, they are undoubtedly less serious incursions on the moral, physical and psychological integrity of the victim. By lumping the different kinds of offences together, there would be a risk that the more serious wrong – enforced sexual intercourse – will not receive an appropriate response, which could lead to a breach of the obligation under Article 3 of the European Convention to enact criminal law provisions that effectively punish rape and to apply them in practice through effective investigation and prosecution.[38] The possibility of this occurring would be reinforced by the relatively low level of the penalty envisaged in paragraph 1, with more substantial ones being applicable only on account of the nature of the victim or the form of the violence used. Furthermore, the present approach is inconsistent with the Istanbul Convention.[39]

157. Secondly, the distinction made in Article 197 between "sexual relationship" and other forms of sexual action, including those of a "homosexual nature", would effectively treat certain forms of serious sexual assault as not as serious as rape. This would be inconsistent with the approach being adopted in Europe - and endorsed in the Istanbul Convention – that would treat rape as being concerned with penetration – whether anal, oral or vaginal - of a sexual nature of the body of another person with any bodily part or object. Moreover, it should be noted that the European Court has recognised that non-consensual anal penetration amounts to a violation of Article 3 of the European Convention.[40]

158. Thirdly, the use in paragraph 1 of Article 198 of the expression "natural sexual relationship" and in paragraph 1 of both Articles of either actions of a sexual nature including those of a "homosexual nature" or "homosexualism" would not only seem to treat homosexual sexual actions as less significant than heterosexual ones but more generally could be taken as giving heterosexual sex a different (and higher) status than homosexual sex. As a result, there would be a risk that the victims or perpetrators of

[38] See, e.g., *I.C. v. Romania*, no. 36934/08, 24 May 2016.
[39] Article 36(1)(a).
[40] See, e.g., *Selmouni v. France* [GC], no. 25803/94, 28 July 1999.

sexual assaults 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.[41]

159. Fourthly, the offence proposed in Article 198 would impose liability for sexual actions by reference to them being procured by forms of compulsion not involving violence.

160. Although ostensibly consistent with the view of the European Court that Article 3 of the European Convention requires the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim[42], the proposed offence would again merge sexual intercourse with other sexual actions and would also provide very modest penalties for what should be regarded as rape since, as the definition of rape in Article 36 of the Istanbul Convention makes clear, the commission of this offence should turn solely upon the absence of consent - to be assessed in the context of the surrounding circumstances - and not be concerned with the means of overcoming the absence of such consent.[43]

161. Fifthly, although there is no exception made for rape or sexual assaults committed by one spouse against another, it would be desirable to make it clear that this is equally covered by these offences so that there is no risk of such conduct being treated as acceptable.

162. Sixthly, the extensive list of aggravating circumstances in the second and third paragraphs of both Articles would be likely to reinforce the sense that the base offence is not such a serious matter, which would be quite inconsistent with the obligation to protect a person's moral, physical and psychological integrity.

163. Seventhly, the enhanced level of the penalties proposed in those paragraphs would seem to be more in line with the sort of penalty appropriate for the basic offence, at least where sexual intercourse without consent was involved.

164. Eighthly, some of the proposed aggravating circumstances are likely to be very difficult to prove – notably "negligently caused death" and having "led to the suicide of the victim or the victim's close relative" and can be expected to lead to extensive argumentation by the defence to a prosecution, which will act as a distraction from the gravity of the essential lack of consent for a sexual action and may even be to the prejudice of a successful prosecution. It might be better to use the much simpler formulations found in Article 46 of the Istanbul Convention.[44]

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[41] 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.
[42] *Ibid.*
[43] This approach has also been endorsed in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 1998 and in CEDAW's General Recommendation No. 35 on gender-based violence against women (CEDAW/C/GC/5).
[44] These are as follows: "a the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or

165. Finally, the definition of a person in the helpless situation in the fourth paragraph of Article 197 would be the same as that for a "helpless person" in Article 1(1). Its repetition in this provision would seem unnecessary.

166. *There is thus a need to ensure to revise these two provisions so that there is a distinct offence of rape that (a) covers penetration – whether anal, oral or vaginal - of a sexual nature of the body of another person with any bodily part or object, (b) is based solely upon a lack of consent which requires only proof that the perpetrator did not reasonably believe that the victim consented and is not concerned with any means used to overcome his or her refusal of consent or the situation of the person concerned and (c) sets penalties at an appropriate level for this serious interference with moral, physical and psychological integrity. Furthermore, in the offence of sexual actions without consent not amounting to rape, no distinction should be made in the formulation used between hetero- and homosexual actions, the approach regarding the absence of consent should be the same as that for rape and the level of penalties prescribed should also be enhanced. It should also be made clear that a spousal relationship between the perpetrator of rape or other forms of sexual action without consent cannot be a defence to either of the offences.*

Article 199. Acts of a Sexual Nature Towards a Person Under Sixteen

167. The proposed offence suffers from the same defects regarding those considered in the preceding paragraphs as regards the failure to distinguish between rape and other sexual actions, and the distinction between hetero- and homosexual sex.

168. In addition, the proposed penalties, particularly those in paragraphs 2 and 3 seem unduly lenient given the circumstances involved.

169. It would also be appropriate to add to the aggravating circumstances in paragraph 3 the fact that the perpetrator had previous convictions of the same nature and that the offence was committed repeatedly or the offence was committed by a family members or cohabitee (and not just someone with obligations regarding care and upbringing).

170. *There is thus a need to revise this provision to take account of these concerns*.

Article200. Committing a Lecherous Act

171. There is a risk that this offence will fail the test of foreseeability and thus result in its application giving rise to a violation of Articles 7, 10 and 11 of the European

his authority; b the offence, or related offences, were committed repeatedly; c the offence was committed against a person made vulnerable by particular circumstances; d the offence was committed against or in the presence of a child; e the offence was committed by two or more people acting together; f the offence was preceded or accompanied by extreme levels of violence; g the offence was committed with the use or threat of a weapon; h the offence resulted in severe physical or psychological harm for the victim; I the perpetrator had previously been convicted of offences of a similar nature".

Convention. This is because it is unclear whether liability could ensue from the unintentional making of pornography accessible to general public so that persons below age of 16 could access it and not just when such access is specifically provided to such persons. Furthermore, the inclusion of the element "other activities inspiring sexual desire among persons under sixteen" leaves huge room for interpretation as that could be the effect of numerous materials and sources, as well as various forms of artistic performance and even protest.

172. *There is thus a need to revise the scope of this offence so that its reach is clearer and more foreseeable and does not give risk to a risk of encroaching upon the rights to freedom of expression and peaceful assembly*.

173. The present offence also does not meet the requirement of Article 22 of the Lanzarote Convention to criminalise the intentional causing, for sexual purposes, of a child to witness sexual abuse or sexual activities, even without having to participate.

174. *There is thus a need to give serious consideration to amending the Revised Draft Code in order to fulfil these requirement*

Chapter 28. Crimes Against Constitutional Rights and Freedoms

175. The level of the proposed penalties provided for the offences included in this chapter do not generally seem commensurate with the constitutional rights that would be violated.

176. *There is thus a need for the level of the penalties to be reviewed and made commensurate with the gravity of the offences concerned.*

Article 201. Discrimination

177. The list of attributes protected by this provision does not include sexual orientation. Discrimination on this ground has been condemned by the European Court.[45] 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 this one very important characteristics leaves the issue of its protection uncertain. 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.[46]

178. Furthermore, the Revised Draft Code ought to be guided by the recommendation provided to the Republic of Armenia by the European Commission against Racisms and Intolerance ("ECRI") in the report from the 5th monitoring cycle, adopted on 28 June 2016[47]. The recommendation of ECRI related to the revision of the Criminal Code

[45] See, e.g., *Salgueiro da Silva Mouta v Portugal*, no. 33290/96, 21 December 1999 and *EB v France* [GC], no. 43546/02, 22 January 2008.

[46] 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

[47] https://rm.coe.int/fourth-report-on-armenia/16808b5539

remains partly valid; in particular, it noted that the list of prohibited grounds does not include does not refer to sexual orientation and gender identity.

179. In addition, the definition of discrimination by reference to differential treatment degrading someone or by getting advantages does not reflect the generally understood nature of the concept, namely, that it is something that covers every different treatment including every exclusion, limitation or preference, based on real or assumed personal characteristics or status, towards any person or group of persons and those who are in family relationship or other type of relation.

180. Also, it would be desirable to make it clear that the form of discrimination covered is only that which is direct as indirect discrimination occurs unintentionally and may only be provable through the use of statistical evidence.

181. *There is thus a need to revise the definition of discrimination to include in the list of personal or social circumstances sexual orientation and gender identity and to make it clear that indirect discrimination is not covered*.

Article 202. Breach of Confidentiality of Personal or Family Life

182. The formulation of the offences in this provision does not take into account either the significance of the information covered by it or the effect of its use or disclosure. As a result, it would cover any information so long as its dissemination had not been authorised by the person concerned. Furthermore, it does not provide any defence of disclosure in the public interest. As a result, the scope of the offence is likely to result in its application entailing violations of the right to freedom of expression.

183. *There is thus a need both for a sense of proportionality as regards the nature of the information covered and an express defence for any acquisition or disclosure of information where this would be in the public interest*.

Article 203. Publicizing a Medical Confidentiality; Article 204 Violation of the Secrecy of Correspondence, Telephone, Postal, Telegraph or other Communication; Article 205. Breach of Inviolability of the Residence

184. The proposed offences would be predicated upon the informing someone of the relevant information "illegally" without any indication as to what the basis is for determining that the conduct in question is illegal. It may be that this is covered by other legislation but this ought to be specified. Furthermore, it does not provide any defence of disclosure in the public interest. As a result, the scope of the offence is likely to result in its application entailing violations of the right to freedom of expression.

185. *There is thus a need in these offences to clarify and, if necessary, specify what makes respectively the informing illegal, the violation of secrecy and the trespass illegal, as well as to establish a public interest defence*.

Article 207. Hindering the Right to Exercise Freedom of Conscience or Religion

186. Although there is some clarity in the proposed offence as concerns "hindrance of the implementation of religious ceremonies", there is still a failure to recognise that there could be justifiable reasons for doing so, such as in connection with planning restrictions, health and safety considerations or traffic management. However, the scope of the remainder of the offence, "interference with the legitimate right to freedom of conscience, including religious organizations" is far too imprecise and could lead to criminal liability being based on entirely subjective considerations.

187. *There is thus a need to restrict the scope of this offence to hindrance of religious ceremonies to doing so without some legal basis*.

Article 208. 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

188. The right to vote and participate in elections is an important fundamental right under Article 3 of Protocol No. 1 to the European Convention and its protection by this provision is appropriate. However, the application of the proposed offence should not lead to unjustified restrictions other rights under the European Convention, such as those relating to peaceful protests, demonstrations and counter-demonstrations.

189. *There is thus a need to restrict the scope of this offence to hindrances caused by acts or omissions for which there is no legal basis.*

Article 210. Forgery of Elections or Voting Results

190. The substance of the proposed offence is not quite the same as its title, which certainly connotes deliberate falsification. The use of the notions of "obviously incorrect" and "obviously wrong" are certainly capable of covering mistakes which are evident only with the benefit of hindsight and for which criminal liability might therefore not be appropriate.

191. *It would thus be desirable to add the requirement that the action that is incorrect or wrong be "deliberate" or "intentional" and not just "obvious".*

Article 225. Hindering the Right to Establish Associations (Public or Trade Unions) or Parties or Their Activities

192. Although there is some clarity in the proposed offence as concerns hindering the establishment of associations or their activities, there is still a failure to recognise that there could be justifiable reasons for doing so, such as in connection with compliance with formal requirements, health and safety considerations or traffic management.

193. *There is thus a need to restrict the scope of this offence to hindrance of establishing associations and their activities to doing so without some legal basis*.

Article 226. Hindering or Forcing to Hold Meetings or Participate in them

194. Although there is some clarity in the proposed offence as concerns hindering the holding of meetings or participating in them, there is still a failure to recognise that there could be justifiable reasons for doing so, such as in connection with compliance with formal requirements, health and safety considerations or traffic management. Moreover, the concepts of "legitimate meeting" in paragraph 1 and "illegal meeting" in paragraph 2 could give rise to much argument as to its scope that could lead to the right to peaceful assembly not being respected. Moreover, the use of force should be enough to criminalise participation in a meeting without the need to characterise the latter as "illegal".

195. *There is thus a need to restrict the scope of this offence to hindrance of holding meetings and participating in them to doing so without some legal basis and delete the use of "legitimate" and "illegal".*

Article 227. Hindering the Legal Professional Activities of a Journalist

196. The scope of this offence would benefit from it specifically referring to force being used in the obtaining and editing of information as much as in disseminating it.

197. *This provision should thus be amended accordingly*.

Section 10. Crimes against Property, Economy and Economic Activity

Article 247. Inflicting Damage to Property by Deception, Abuse of Confidence or Other Illegal Means.

198. The formulation of the proposed offence is potentially problematic insofar as it concerns the inflicting of damage through the dissemination of false information. This is because it could result in criminal liability being imposed for defamation contrary to Article 10 of the European Convention where it is the person defamed whose property suffers damage. This is probably not the intention of the proposed offence. However, its formulation would benefit from making it clearer that it is the use of false information, deception etc in order to cause the large-scale property damage concerned.

199. *There is thus a need to amend the provision accordingly*.

Article 281. Smuggling of Cultural Values

200. It is unclear how the definition of "a large amount of strategically raw items" in paragraph 4 relates to paragraph 1 as the latter does not make any reference to that phrase or concept.

201. *There is thus a need to clarify the purpose of paragraph 4 and possibly either amend or delete it.*

Section 11. Crimes against public order and morality

Article 286. Hooliganism

202. The proposed formulation of this offence is insufficiently clear as to the conduct being covered by it and this is exacerbated by the reference to "morals", in respect of which there can be wide disagreement as to what is or is not acceptable. It also mentions acts of sexual nature, which should not necessarily qualify as hooliganism and which is in any event covered by the offence that would be established by Article 387. A better formulation might be to define hooliganism as any act that grossly violates public order and demonstrates clear disrespect towards the public, using violence or threat of violence.

203. *This provision should thus be amended accordingly.*

Article 288. Pimping; Article 289. Abetting to Prostitution

204. The proposed offences do not fully meet the requirements of Article 19 of the Lanzarote Convention which requires the criminalisation of recruiting a child into prostitution or causing a child to participate in prostitution; coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes; and having recourse to child prostitution.

205. They also do not meet the requirement of Article 23 of that Convention to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child for the purpose of committing any of the offences established in accordance with Article 18(1)(a) (engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities) or Article 20(1)(a) (producing child pornography) against him or her, where this proposal has been followed by material acts leading to such a meeting.

206. *There is thus a need to give serious consideration to amending the Revised Draft Code in order to fulfil these requirements.*

Article 290. Illegal Preparation or Dissemination of Pornographic Materials or Items

207. In view of the heading given to this offence, there is a need to clarify in what circumstances the preparation or dissemination of pornographic materials or items is lawful. In particular, is it simply where there the activity is aimed at minors or involves what is referred to as "child pornography".

208. In any event, the definitions of "pornography" as such and the form referred to as "child pornography" are in need of some definition as otherwise there is a great risk of interfering with the right to freedom of expression under Article 10 of the European Convention.

209. In this connection, it should be noted that Article 20(2) of the Lanzarote Convention defines child pornography as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes".

210. Furthermore, it ought to be made clear in respect of both the proposed offences that materials or items having medical, scientific, educational or artistic value are not to be considered pornography.

211. *There is thus a need to clarify the object of this offence and to provide a definition of "pornography" – which would be applicable to other references to the concept in the Revised Draft Code – and of "child pornography, as well as to provide that materials or items having medical, scientific, educational or artistic value are not to be considered pornography.*

212. The present offence does not meet the requirement of Article 21 of the Lanzarote Convention to criminalise recruiting a child into participating in pornographic performances or causing a child to participate in such performances; coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes; and knowingly attending pornographic performances involving the participation of children.

213. *There is thus a need to give serious consideration to amending the Revised Draft Code in order to fulfil this requirement.*

Article 292. Negligently Destroying or Damaging the Historical or Cultural Monuments

214. There is nothing problematic with this offence as such but it would not satisfy the test of foreseeability in the absence of established list of the objects and documents of particular historical or cultural value being protected.

215. *There is thus a need to clarify whether or not such a list exists and, if so, a specific reference to it should be included in this provision. In the absence of such a list, one would need to be developed before this offence could be invoked*.

Section 12. Crimes against Public Security and Computer Information Safety

Article 302. Justifying Terrorism or Calls to Terrorism

216. Although the promotion or justification of terrorism will not be protected by the right to freedom of expression under Article 10 of the European Convention, the use of such an offence with respect to statements which only promoted the causes of minority groups involved in fighting for their independence but not the use of force by them has been found to violate this right[48]

[48] See, e.g., *Erdogdu v. Turkey*, no. 25723/94, 15 June 2000, in which the European Court held that a restriction on expression, in the form of a refusal to allow a radio journalist to interview a terrorist in Germany suspect, was

217. On the other hand, this would not be the view taken of liability being imposed for an indirect incitement to commit violence where the offence is defined with sufficient precision to satisfy the requirements of legal certainty, and proportionality. [49]. 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. It would be desirable to qualify the phrase "publicly justifying terrorism or preaching for it" in a way that makes it clear that there must be some encouragement to commit acts of terrorism.

218. *This offence should thus be amended by inserting a phrase such as "which are likely to encourage further acts of terrorism" after "preaching for it".*

Article 303. Dissemination of False Information about Terrorism

219. The same considerations as those discussed in the preceding two paragraphs would be equally applicable to the formulation of this provision.

220. *This offence should also be offended by inserting a phrase such as "which are likely to encourage further acts of terrorism" after "information about terrorism".*

Article 314. Public Calls to Mass Disorder

221. Although direct calls to mass disorder. would not be protected by the right to freedom of expression under Article 10 of the European Convention, it is important that the proposed offence is not used to suppress the expression of calls for constitutional or legislative change and criticism of persons in authority. This risk could be averted by qualifying the phrase "public calls to mass disorder" in a way that makes it clear that there must be some encouragement to commit such action.

222. *This offence should thus be amended by inserting a phrase such as "which are likely to encourage mass disorder".*

Article 315. Instigation of National, Ethnic, Racial, Political, Ideological or Religious Hostility, Hatred or Intolerance

223. The proposed offence concerns what is generally termed and "hate speech" and criminal liability for its use will not be inconsistent with the right to freedom of expression where it is intended or can reasonably be expected to incite acts of violence,

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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.

[49] *Hogefeld v. Germany* (dec.), no. 35402/97, 20 January 2000; which concerned a member of the Red Army Faction.

intimidation, hostility or discrimination.[50] These elements – intent to incite or reckless in that regard – are absent from the proposed offence and its use is thus likely to result in violations of Article 10.

224. *There is thus a need for the offence to be amended by adding the requirement of intent or reasonable expectation that the act would incite acts of violence, intimidation, hostility or discrimination.*

Article 326. Illegal Circulation of Special Technical Means for Collection of Secret Information

225. The formulation of the proposed offence is insufficiently precise as to what would lead to its commission. It refers to "special technical means for the collection of secret information" but in practice many devices that are lawfully available – cameras, drones and mobile phones could be used for such collection. In these circumstances, it would only be appropriate to impose criminal liability if there was evidence of an intent to use such devices for gathering secret information. Alternatively, some very specific kinds of devices could be listed in the offence.

226. *There is thus a need to amend this offence by either specifying an intent regarding the use of the devices or to be more specific as to the nature of the devices giving rise to criminal liability.*

Section 14. Crimes against state power

Article 400. High Treason; Article 408. Publicizing Information Constituting a State secret by a Person Having Illegally Obtained it; Article 409. Disclosure of State Secret

227. 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 would then be a strong likelihood of a violation of Article 10 of the European Convention resulting when it can be established that such disclosure was in the public interest.[51]

228. *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.*

229. Furthermore, the use of the phrase "provision of other help" in paragraph 1 of Article 400 is insufficiently precise and does not satisfy the requirement of foreseeability since the action concerned may not have been intended to assist hostile activities or even

[50] See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, 8 July 1999.

[51] 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.

understood to be capable of doing so. This could result in prosecutions being found to be in violation of Articles 7 and 10 of the European Convention.

230. *There is thus a need for this phrase to be either deleted or for there to be a clearer link in the proposed offence between the reason for the help and the assistance of hostile activities.*

Article 404. Public Calls to Seizure of Power, Breach of Territorial Integrity or Violent Constitutional Coup

231. Although direct calls to seize power, etc. would not be protected by the right to freedom of expression under Article 10 of the European Convention, it is important that the proposed offence is not used to suppress the expression of calls for constitutional or legislative change and criticism of persons in authority. This risk could be averted by qualifying the phrase "public calls to seize power by force …" in a way that makes it clear that there must be some encouragement to commit such action.

232. *This offence should thus be amended by inserting a phrase such as "which are likely to encourage the seizure of power by force" and so on.*

Article 418. Abuse of Authority, Powers, or the Influence Conditioned thereof by an Official

233. 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.

234. 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.

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

Article 421. Provision of False Data in the Declaration by a Person Responsible to File a Declaration Established by the Legislation of the Republic of Armenia, or Failure by Him to File a Declaration

236. The formulation of this offence does not make it clear whether the presenting of the false data must be intentional or could be accidental. The former would only be appropriate in the case of such action, whereas if it occurred by error or through negligence the more appropriate response would be a disciplinary measure.

237. *There is thus a need for intent to be expressly required as an element of the offence*.

Article 423. Official Negligence

238. The proposed offence in paragraph 1 is very broadly drawn, does not distinguish negligence from bad faith, does not distinguish between mere violation of rights or

interests without consequences and the occasioning of large-scale property damage and does not indicate any criteria for applying the significantly different forms of penalties specified. As such, the offence cannot be regarded as satisfying the requirements of foreseeability or proportionality.

239. *There is thus a need for as substantial revision of the offence to meet these concerns*.

Article 425. Torture

240. The proposed offence does not entirely follow the formulation found in the definition of torture Article 1 of the UN Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment in that it uses "illegally" to describe the acts covered instead of excluding from its application "pain or suffering arising only from, inherent in or incidental to lawful sanctions"[52]..

241. *It would be preferable to follow the definition found in the Convention*.

242. Although States are not required to enact an offence of inhuman treatment, such an offence would ensure that all intentional violations of Article 3 of the European Convention are prohibited by the criminal law.

243. *There is thus a need to give serious considerations to adding to the Revised Draft Code a separate provision criminalizing inhuman or degrading treatment or punishment*.

Article 432. Sales or Use of a Forged Document, Stamp, Seal and Letterhead

244. It would be inappropriate for this offence to be applied to persons who committed the acts covered by it before acquiring the status of a victim of human trafficking due to his/her being a victim of human trafficking.

245. It would also be inappropriate (except for acts related to the sale of forged official documents, seals, stamps or blank forms) for it to apply to foreigners or stateless persons who entered Armenia directly from the areas where their life or freedom was endangered under Article 1 of the 1951 UN Convention on the Status of Refugees and who seek asylum there, provided that they immediately and voluntarily appear at the relevant public agency and provide appropriate explanation with regard to the reasons for committing the acts concerned and unless their act contains elements of any other offence.

[52] "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

246. *There is thus a need to limit the scope of the offence accordingly*.

Article 443. Illegally Crossing the State Border

247. The limitation in paragraph 5 of the proposed offence does not give proper effect to the obligation in Article 31(1) of the Convention on the Status of Refugees, which provides that penalties shall not be imposed "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" as this is not the same as cooperation with the authorities. A "refugee" for this purpose will include a person seeking asylum.

248. *There is thus a need to amend paragraph 5 accordingly insofar as it deals with "an asylum seeker and or a refugee".*

Article 447. Failure to Report the Crime

249. The proposed offence does not take account of the possibility that the reason for the failure to report was 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.

250. *There is thus a need to consider introducing a defence where the non-reporting was the result of those circumstances.*

Article 450. False Reporting

251. The scope of the proposed offence in paragraph 1 is unduly wide insofar as it concerns publication in the mass media since it takes no account of the reporting being based on sources that have been credible, there being objective reasons for a report at the time that it was made and there being no intent to mislead. This aspect of the proposed offence would inevitably lead to violations of Article 10 of the European Convention.

252. *There is thus a need to limit the applicability of the offence insofar as it concerns the mass media to situations where false report was knowingly and deliberately made*.

Article 452. Illegal Detention or Arrest

253. Although any illegal detention or arrest would be a violation of Article 5 of the European Convention, there are many instances where this would be the result of an error of judgment or a misapplication of a legal provision. It would be inappropriate – and is not required by Article 5 - for law enforcement officers and judges to be criminally liable in such cases.

254. *There is thus a need to limit the scope of the proposed offence to situations where the illegal detention or arrest was intentional*.

Article 457. Threat or Violence Against a Judge, Prosecutor, Head of the Investigation Department, Investigation Body, Defence Lawyer, Person Performing Representation or the Enforcement Body; Article 459. Threat or Violence against the Human Rights Defender

255. The proposed imposition of criminal liability in the second paragraphs of both provisions for publicizing defamatory information or information otherwise damaging the rights and legitimate interests" of the persons listed in the heading to these provisions has nothing to do with the use of threats or violence.

256. Moreover, in their present form the proposed liability that they would establish is incompatible with the right to freedom of expression under Article 10 of the European Convention as such persons should not be immune from criticism. In particular, journalists are entitled to criticise them without being sanctioned if the statements are in the public interest.[53]

257. 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).[54] 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.

258. In addition, any criminal sanction, even if justified, must be proportionate[55] and that is not the case with the proposed periods of imprisonment or limitation of freedom that could be imposed

259. *The proposed offences thus need to be significantly amended by (a) the addition of 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, (b) a requirement for it to be established that civil liability would be inadequate and (c) a restriction on the possibility of imposing imprisonment only where it was shown that the publication was made with a malicious intent.*

Article 463. Refusing to Give Testimony

260. The proposed exemption in paragraph 3 from liability for a refusal to give testimony is appropriate. However, it would be desirable for priests also to benefit from such an exemption in respect of information provided to them in that capacity.

261. *There is thus a need for this provision to be extended accordingly*.

262. Paragraph 3 should thus be amended accordingly.

Article 470. Failing to Perform Obligations Undertaken by the Guarantor

[53] *De Ha2es and Gijsels v Belgium*, no. 19983/92, 24 February 1997 and *Amihalachioaie v Moldova*, no. 60115/00, 20 April 2004.
[54] *Guja v Moldova*, no. 14277/04, 12 February 2008.
[55] *Skalka v. Poland*, no. 43425/98, 27 May 2003.

263. The nature of the proposed offence is unclear from the translation as neither the relationship between the obligations of the guarantor and those of the accused nor their respective content are indicated.

264. *There is thus a need to clarify what is being proposed in this provision*.

Article 471. Preparing, Acquiring or Selling an Article Dangerous for Life or Health by an Arrestee and Detainee or a Prisoner Kept in a Penitentiary Institution

265. The object of the proposed offence is clearly understandable given the violence that can be caused by persons in places of detention. However, the proposed liability for various activities relating to "other tools, substance or item for deprivation of life or damaging health" is insufficiently precise and could lead to the arbitrary punishment of detainees who have tools, substances or items that could be used to cause harm but which also have an entirely legitimate purpose It would not be possible to have a list of what is prohibited given the scope for adapting innocent items but there would be less likelihood of arbitrariness if it was required the tools, etc. – as opposed to weapons - were "for the purpose of deprivation of life or damaging health" and not just ones capable of such deprivation or damage.

266. *This provision should thus be amended accordingly*.

Section 15. Crimes against the Established Order of Military Service

Article 483. Wilfully Abandoning the Military Unit or The Place of Service, or Failing to Report for Service on Time

267. The third paragraph of this provision refers to "Committing the crime established in paragraphs 1 or 2 or 3 of this Article" which clearly is a mistake since the third paragraph cannot refer to itself as a basis for creating an offence.

268. *There is thus a need to correctly enumerate the paragraphs being referred to in the third paragraph.*

Article 482. Wilfully Abandoning the Military Unit or The Place of Service, or Failing to Report for Service on Time; 483. Desertion

269. The use of the term "heavy circumstances" as a basis for exemption from liability in paragraphs 6 and 4 respectively lacks clarity.

270. *A definition should thus be introduced for this term so that this provision gives 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*.

Section 16. Final Provision

271. 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.

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

D. Conclusion

273. The Revised 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. Furthermore, as already noted, the Revised Draft Code has addressed many concerns raised about provisions in the earlier draft prepared by the working group. Notwithstanding this great effort, the Opinion has found that there continue to be certain matters that still require attention, including ones for which recommendations had previously been made.

274. 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.

275. It is possible that, 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 certainly seems 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 Revised Draft Code.

276. 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.

277. Particular attention is needed in respect of the provisions dealing with various forms of sexual assault since, despite the modernising intention behind them, the formulation of these seem to give rise to difficulties in complying with the requirements of the European and Istanbul Conventions. There are also some instances where the requirements off the Istanbul and Lanzarote Conventions have not been addressed, notably as regards harassment, prostitution and aggravating circumstances.

278. There is also a need for sexual orientation and gender identity to be included in the list of characteristics covered by the offence of discrimination and for the commission of an

offence on account of the victim's sexual orientation to be added to the list of aggravating circumstances.

279. In addition, the goal of implementing international standards relating to cultural values would be more readily achieved if the formulation used in the relevant provisions of the Revised Draft Code was the same or followed much more closely that used in the international instrument concerned.

280. Also, there are several provisions which are not problematic in themselves but whose application has the potential to lead to a violation of rights and freedoms under the European Convention. Although there is no need for these provisions to be amended, appropriate guidance regarding their application should be prepared 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 occurring. Similarly, a few provisions require specific practical arrangements – with corresponding financial requirements - to be made and these should not be overlooked when adopting the Revised Draft Code.

281. 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 requirements arising from the provisions concerned are observed. This is particularly the case with provisions that have implications for rights under Articles 2 and 3 of the European Convention.

282. The issues requiring attention are not extensive. The steps required to resolve them should thus be quite straightforward. Moreover, a revision of the Revised Draft Code along the lines being suggested would ensure that the Republic of Armenia then has a Criminal Code that imposes criminal liability and penalties in a manner consistent with European human rights standards.