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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT AMENDMENTS TO THE CRIMINAL CODE

OF THE REPUBLIC OF ARMENIA

adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008)

On the basis of comments by

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I. Introduction

1. On 5 May 2008, the Armenian National Assembly requested the Council of Europe to assess the draft law on making amendments and addenda to the Criminal Code of Armenia (CDL(2008) 063.

2. Both the Venice Commission and the Directorate General on Human Rights and Legal Affairs accepted to carry out this assessment.

3. Mr James Hamilton was appointed to act as rapporteur. The present opinion, based on his contribution (CDL(2008)045), was adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008).

II. Background

4. The opinion of the Venice Commission has been sought concerning two proposed amendments to the Criminal Code of Armenia. The amendments concern Article 225 which creates several offences related to "*mass disorder*" and Article 301 which makes criminal public calls to commit crimes against the foundation of the constitutional order and against national security.

5. The background to these proposals is the demonstrations in Yerevan after the Presidential elections on 19 February 2008. What ensued was described by the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, in his report of 20 March 2008 as follows: *"After nine days of peaceful demonstrations on the Opera square, the national police and security forces tried to disperse the protesters on 1 March. Clashes occurred between the police and security forces and the demonstrators in front of Myasnikyan's monument and the French Embassy, which resulted in the death of eight persons. That same night, the President declared State of Emergency in the capital Yerevan."*

6. The Commissioner stated in his report that there were conflicting and contradictory versions of what happened and that it was difficult to get a clear picture of the developments on 1 March. However, insofar as he did come to conclusions he was highly critical of the Armenian authorities as well as of elements among the demonstrators. He found that some of the demonstrators committed violent acts against the police and security forces. He also found that excessive use of force was used by police and by security forces.

7. One police officer died. According to the police and the prosecutors he died while trying to prevent a hand grenade exploding. Seven civilians died, three from being struck by teargas cartridges and four from bullets.

8. The report emphasizes the need for an objective enquiry into what happened. The report also sets out a number of complaints made against the authorities. These include excessive force in carrying out arrests and beating in police custody as well as abuses during interrogation. It is alleged there were delays in registering arrests, failure to grant access to defence lawyers, failure to inform arrested persons of charges, failure to bring them before judges. The report sets out these allegations but makes no findings on them. It is fair to say that these allegations are strongly contested by the Armenian authorities, as set out in the appendix to the Commissioner's report.

9. With regard to the particular charges which are used against the demonstrators the report had the following to say:

“Procedural safeguards of the accused

The prosecutors have consistently brought the same charges irrespective of the persons actual doing and involvement. A few articles in the Criminal Code are regularly invoked:

· Article 225 point 3: inciting mass disorder and organizing mass disturbances which are accompanied by violence, possession or use of firearms or explosives and accompanied with murder;

· Article 316: Violence against a representative of authorities, and

· Article 300 which regulates actions aimed at challenging the integrity of country or to overthrow the constitutional order or to appropriate public power by force.

Some of the criminal provisions are not sufficiently clear nor do they specify which acts are criminalized. The current wording leaves a great degree of discretion to the prosecutor. The legal definition in the Criminal Code of the crime of usurpation of State power allows for a very broad interpretation and fails to give clear guidance on the dividing line between legitimate expressions of opinion and incitement to violence.

The Prosecutors have applied standardized language in the charges against the arrested. The judges seemed not to have entered into a serious test of the charges, the legality of the apprehension and the proportionality of deprivation of liberty vis-à-vis the gravity of the crime. The Courts seem to have routinely granted pre-trial detention (so called preventive judgment) of two months to allow the prosecutor to investigate further and prepare the charges and the criminal case. Members of the Bar association informed the Commissioner that they had decided to “boycott” proceedings before one judge, who just “rubberstamped” all requests by the Prosecutor.

Some of these arrested persons had not been informed of their right to a defence lawyer. In some cases the detained had chosen not to retain a lawyer, stating that he was innocent. In one instance, the detainee did not want a lawyer, because they are all corrupt. Some detainees stated reticence retaining a public defence lawyer as it was not clear to them whether they would be loyal to them or pursue the goals of the state authorities.

In one instance, the arrested persons had first been requested to give a witness testimony to the Prosecutor General’s Office and had, in this capacity, signed a paper that he did not want legal counsel. However, during the examination the person was charged and turned into a suspect. The Prosecutor had then denied him legal representation referring to his previous signed statement, that he did not want a lawyer. However, this was done in his capacity as witness, not as a suspect.”

III. The Law

A. Mass Disorder

10. Article 225 of the Criminal Code creates four offences connected with mass disorder. The current provision is as follows:

"Article 225 Mass Disorder

1. The organization of mass disorder, which was accompanied with violence, pogroms, arson, destruction or damage to property, use of fire-arms, explosives, or explosive devices, or by armed resistance to a representative of the authorities, is punished with imprisonment for the term of 5 to 10 years.

2. The acts envisaged in part 1 of this Article, which was accompanied with murder, is punished with imprisonment for the term of 6 to 12 years.

3. Immediate commission, during mass disorder, of any of the acts envisaged in part 1 of this Article is punished with imprisonment for the term of 4 to 8 years.

4. During mass disorder, calls to disobey the lawful demand of a representative of the authorities, to carry out mass disorder, or to commit violence against individuals are punished with a fine in the amount of 200-600 minimal salaries, or detention for a term of up to 2 months, or imprisonment for a term of up to 4 years."

11. The proposed amendment would amend paragraph 1 of Article 225 to read as follows:

"The organization of mass disorder, which was accompanied by violence, pogroms, arson, destruction or damage to property, use of fire-arms, explosives, or explosive devices, or by armed resistance to a representative of the authorities, or the dissemination of materials containing calls to participate in such events, is punished with imprisonment for the term of 5 to 10 years."

12. It is not clear whether the effect of this addition is simply to penalize calls to participate in acts of mass disorder which expressly advocate the use of violence, pogroms, arson, destruction or damage to property, the use of firearms, explosives, or armed resistance to the authorities. If this was its effect, it could scarcely be objected to in principle, since there can be no right in a democratic society to abuse freedom of expression to advocate such activities.

13. However, if the provision were to be interpreted as prohibiting calls to participate in an event which subsequently became a scene of mass disorder, what was a permitted exercise of freedom of expression would be criminalized *after the event*. This could not be accepted as would be at variance with the principle of legality. The Commission refers in this respect to paragraphs 88, 89 and 90 of the OSCE/ODIHR Guidelines on freedom of peaceful assembly[1], which have been endorsed by the Venice Commission, which read as follows:

88. All provisions that create criminal or administrative liability must comply with the principle of legality (…). Furthermore, organizers and participants should benefit from a "reasonable excuse" defence. For example, participants in unlawful assemblies should be exempted from liability for the offence of "participation in an unlawful assembly" when they had no prior knowledge that the assembly was unlawful. Similarly, a participant should not be held liable for anything done under the direction of a police officer.

89. Individual participants who do not themselves commit any violent act cannot be prosecuted solely on the ground of participation in a non-peaceful gathering. As stated in the case of Ezelin v. France (1991), "[i]t is not 'necessary' in a democratic society to restrict those freedoms in any way unless the person in question has committed a

[1] CDL(2008)062.

reprehensible act when exercising his rights." Anyone charged with an offence relating to an assembly should enjoy fair-trial rights.

90. Assembly organizers should not be held liable for failure to perform their duties if they make a reasonable effort to do so. Furthermore, organizers should not be held liable for the actions of participants or third parties, or for unlawful conduct that the organizer did not intend or directly participate in. Holding organizers of the event liable would be a manifestly disproportionate response since this would imply that organizers are imputed to have responsibility for acts by individuals (including agents provocateurs) that could not have been reasonably foreseen.

14. Having regard to the allegations which have been made concerning the use of the current legislation (quoted in paragraph 9 above), this is a matter which gives rise to concern. The legislation should make it clear that it is only the dissemination of materials concerning calls to participate in events of mass disorder where the material advocates acts of mass disorder or where the publisher knows that such acts are planned or will be carried out which should be prohibited.

B. Calls for disintegrating the state power

15. The current Article 301 was the subject of a previous opinion (CDL-AD (2007) 43) endorsed by the Venice Commission in its 73rd Plenary Session on 14-15 December 2007. The provision makes it a criminal offence to call in public to usurp state power or to change the constitutional order by force. (Incidentally, the text discussed in that opinion differs somewhat from the text now provided). The conclusion of the opinion was as follows:

"On its face the provision in question does not appear to be incompatible with the European Convention on Human Rights provided that it is properly interpreted and used. However, the fact that a legal provision itself is acceptable does not mean that it cannot be abused by wrongful decisions to detain or prosecute persons against whom sufficient evidence of a breach of the provision in question does not exist."

16. It is now proposed to add the following new provision as Article 301[1]:

"1. Public calls for the armed forces, the police, the national security service, the prosecution office, penitentiary institutions, or their officials not to perform their duties aimed at the protection of the constitutional order or national security, or the dissemination of materials containing such calls, is punished with imprisonment for a term of 2-5 years."

17. The Commission considers that such a provision could very easily be open to abuse. It all depends on what is meant by calls for the armed forces, the police, the security service or the prosecutor not to perform their duties. If a person were to advocate restraint in the use of teargas canisters by the police might that be regarded as a call on them not to do their duty? If someone were to publicly argue that the prosecutor should decline to prosecute in a particular case or in particular circumstances would that be an offence under the section? If there is to be a provision of this sort it should be very tightly drafted to make it clear that it is only advocacy of matters such as a refusal to obey a lawful order or advocacy of a strike or advocacy of criminal behaviour which should be covered. As the provision stands if it were interpreted in a broad sense it could be used to criminalize certain criticisms of the police, security forces or the prosecutor's office.

IV. Conclusion

18. These amendments are overbroad and at variance with the principle of legality. They are open to the same criticism made by the Commissioner in his report where he said:

> *"Some of the criminal provisions are not sufficiently clear nor do they specify which acts are criminalized. The current wording leaves a great degree of discretion to the prosecutor. The legal definition in the Criminal Code of the crime of usurpation of State power allows for a very broad interpretation and fails to give clear guidance on the dividing line between legitimate expressions of opinion and incitement to violence."*

19. The Commission is thus of the opinion that these amendments should not be adopted. It remains at the disposal of the Armenian authorities should they wish to proceed to amendents to the criminal code provisions under consideration.