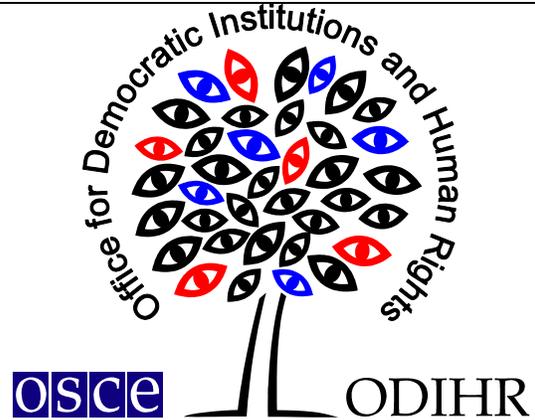


Warsaw, 16 January, 2006

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ARM/052/2006(MASz)*

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**Opinion on the Amendments to
Article 132 on Trafficking in Persons,
Article 132-1 on Engaging into Prostitution and other
forms of Sexual Exploitation etc.,
Article 261 on Engagement into Prostitution and,
Article 262 on Inciting into Prostitution
of the Criminal Code of the Republic of Armenia.**

**based on an unofficial English translation of the draft
provided by the OSCE Office in Yerevan.**

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Opinion on the Amendments to Article 132 on Trafficking in Persons, Article 132-1 on Engaging into Prostitution and other forms of Sexual Exploitation etc., Article 261 on Engagement into Prostitution and, Article 262 on Inciting into Prostitution of the Criminal Code of the Republic of Armenia.

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1. INTRODUCTION

1. *The opinion contained herein has been drafted in response to an official request of the Office of the Prosecutor General of the Republic of Armenia for review of the draft law of the Republic of Armenia on Making Amendments and Modifications to the Criminal Code of the Republic of Armenia (hereinafter also referred to as “draft Amendments” or “draft Articles”), made to the OSCE Office in Yerevan.*
2. *Further to the above, the OSCE Office in Yerevan requested assistance from the OSCE ODIHR in this regard. The opinion is a response to this request.*

2. SCOPE OF REVIEW

3. This opinion does not equate to a full and comprehensive review, but rather it has been drafted to serve as considerations which should be taken into account in light of international standards in the field of combating trafficking to which the Republic of Armenia has committed or may seek to commit.
4. In this regard, the OSCE ODIHR and the OSCE Office in Yerevan, would like to make mention that the opinion contained herein is without prejudice to any recommendations and comments to the Amendments to Articles 132, 132-1, 261 and 262 of the Criminal Code of the Republic of Armenia that both aforementioned institutions may wish to make in the future.

3. EXECUTIVE SUMMARY

5. The draft Amendments are drafted in the spirit of compliance with international standards which obligate criminalization of trafficking in human beings. For the purposes of further improvement of the draft, the OSCE ODIHR encourages the consideration of the below recommendations.
6. It is recommended that:
 - A. The amendments to Article 132 be retained; [par.7]
 - B. The definition of exploitation may be expanded to include a definition of the term “other forms of sexual exploitation”; [par.11]
 - C. The newly introduced Article 132-1 be retained; [par. 12]
 - D. The requirement of cross-border movement in the definition of slavery in Article 132-1 paragraph (4) be reconsidered; [par.13]
 - E. The requirement of cross-border movement in the definition of slavery in Article 132-1 paragraph (5) be reconsidered; [par.15]

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- F. The definition of “forced labour” is reconsidered to reflect the definition of ‘forced labour’ expressed in international standards; [par.18]
- G. Consideration to the operation of Article 261 and Article 262 vis-à-vis Article 132 and 132-1 [par. 18, 19, 20, 21, 22, 23]
- H. Consideration be given to introducing definition of “incitement” in Article 262 [par.21]
- I. Consideration be given to introducing provisions which would secure non-punishment of victims of trafficking in persons, in cases which are criminal or administrative offences or which create civil liability, of such acts result from their situation as a victim.
- J. Consideration be given, if not already the case, to introduce liability for trafficking for legal persons (in addition to natural persons), that is, corporate liability.

4. ANALYSIS AND RECOMMENDATIONS

4.1 Article 132 – Recruitment, Transportation, Transfer, Harboursing or Receipt of Persons with the Aim of Exploitation

7. The Amendments to Article 132 par (1) of the Criminal Code of the Republic of Armenia (hereinafter “Criminal Code” or “ACC”) are in compliance with the definition of trafficking in human beings as established in Article 3 of the of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000 (hereinafter “the Protocol” or “the Palermo Protocol”).

8. Article 132 paragraph (2) indent (1) rightly treats the crime of trafficking in persons under the age of 18 years (children) as an aggravating circumstance. It also complies with Article 3(c) of the Protocol, which states that the recruitment, transportation, transfer, harboursing or receipt of a child (person under the age of 18 years) for the purpose of exploitation shall be considered ‘trafficking in persons’ even if no means, such as, threat or use of violence, deception etc., are applied. This is because, Article 132 paragraph (2) does not require the means to be proven in the case of children and in the case of mentally disabled persons. The Amendment is therefore welcomed.

9. The aggravating circumstances established by Article 132 paragraph (2), (3) and (4) are in compliance with Article 24 on Aggravating Circumstances, of the Council of Europe Convention on Action against Trafficking in Human Beings, 2005¹ and are welcomed.

¹ (not yet in force), signed by the Republic of Armenia on 16 May, 2005

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10. Although neither the Palermo Protocol nor the Transnational Organised Crime Convention² provides clear guidelines for the severity of sanctions and penalties that should be imposed for the criminal offence of trafficking, the Transnational Organised Crime Convention does indicate that sanctions should take into account the gravity of the offence³. Therefore, the sanctions imposed by Article 132 are considered as reflecting the severity of the crime of trafficking and are welcomed.

11. It is welcomed that Article 132 paragraph (5) seeks to define “exploitation”. It should be borne in mind, that the term “other forms of sexual exploitation” has not been defined in the Palermo Protocol. These terms have intentionally been left by the drafters of the Protocol, to the discretion of the domestic jurisdiction of each State. It may be considered to include a definition of this term, if that would assist the authorities in identifying acts which may amount to “other forms of sexual exploitation”.

4.2 Article 132-1 – Engagement of Other Persons in Prostitution or Other Forms of Sexual Exploitation, Forced Labour or Services, or Slavery or Practices Similar to Slavery.

12. The amendment introducing Article 132-1 is understood as criminalizing the act of exploitation itself, targeting therefore, the person who *de facto* exploits (as opposed to the person who recruits, transports, harbours etc), that is, the final part of the trafficking chain. Due to the fact that Article 3 of the Palermo Protocol, lays down the minimum which States must ensure in contained in their legislation – this Article is indeed welcomed, as it goes above this minimum, meanwhile retaining the gravity of the act of exploitation, by introducing the same sanctions and penalties as proscribed by Article 132. In practice the exploitation itself often provides the best evidence for prosecution cases. The Amendment is welcomed.

13. However, Article 132-1 paragraph (4) raises some concerns as regards limiting slavery to the situation where a person is moved to another country. Slavery may indeed involve cross-border movement, but not necessarily. Slavery may also take place within the territorial borders of the Republic of Armenia. This element of the definition of slavery is recommended to be reconsidered.

14. Further to the above, Article 132-1 paragraph (4) is recommended to define the state of slavery to be “the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised”⁴.

15. Regarding Article 132-1 paragraph (5), the same concern is raised as in recommendation 13 above, meaning that although slave like-practices may involve

² United Nations Convention Against Transnational Organised Crime, G.A. Res.55/25

³ Article 11(1) of the United Nations Convention Against Transnational Organised Crime, G.A. Res.55/25

⁴ Article 1(1) of the Slavery Convention , 1926

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movement across the borders of the Republic of Armenia, they may also take place within the borders of Armenia.

16. It is welcomed that “slave-like practices” includes debt bondage as stipulated in Article 132-1 paragraph (5) indent (1).

17. It is welcomed that “slave-like practices” includes servitude⁵ as stipulated in Article 132-1 paragraph (5) indent (2).

18. The definition of “forced labour” contained in Article 132-1 paragraph (6) is considered wide as it includes any kind of situation in which conditions of work are demeaning to a person’s dignity. Inclusion of the notion of dignity is welcomed, although it is a difficult notion to define in practice.

19. Further to the above, it should also be mentioned, that the definition of “forced labour” according to Article 2.1 of the International Labour Organisation Convention Concerning Forced Labour No.29 states that forced or compulsory labour means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him or herself voluntarily”. It is therefore recommended consider bringing the definition in line with the definition of the International Labour Organisation Convention Concerning Forced Labour No.29⁶.

20. Additionally, the current formulation refers rather to possible indicators for which the authorities should be looking for in identifying cases of forced labour. The indicators developed by the International Forced Labour Organisation are attached as Appendix 1 hereto.

4.3 Article 261 – Engaging in Prostitution of Other Persons for Profit Motives or Making Property Profit from Prostitution of Other Persons

21. Firstly, the OSCE ODIHR must state that it does not seek to encourage, promote or endorse any decision which OSCE participating State make on the issue of regulation of prostitution.

22. This article is understood as criminalizing the very act of engaging someone into prostitution, without having to prove the intention to exploit (but rather with the motive to obtain profit) nor the means used to engage a person into prostitution such as those required under Article 132 and Article 132-1 of the Amendments, which are, threat or use of violence, coercion, abduction, deception, abuse of position of vulnerability etc. It is recommended to be ensured that the distinction between this Article and Article 132, and 132-1 is clear, so that the operation of Article 261 addresses the act of engagement alone. For practical purposes, this may be described in an explanatory note to the Amendments.

⁵ NB: the translated text uses the word “thralldom” instead of “servitude”.

⁶ In particular in view of the ratification by the Republic of Armenia of the International Labour Organisation Convention Concerning Forced Labour No.29 on 17.12.2004

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23. As stated above, the distinction between the crimes elaborated in Article 132 and 132-1 and this Article 261 should be very clear, in order to ensure that persons responsible for the crime of trafficking, are not held liable only under this provision, where the sanctions are far lighter. The results of prosecutions in this regard however, are a question of proper identification of trafficking, skillful gathering of evidence and presentation of the cases in court, in practice.

4.4 Article 262 – Inciting into Prostitution

24. The statement expressed in paragraph 20 above, equally applies to the recommendations made to this article.

25. As in the case of Article 261 it is also very important to consider the operation of this article vis-à-vis Article 132, and Article 132-1 to make certain that those persons indeed guilty of trafficking in human beings are not prosecuted and punished by lesser sentence solely or primarily under this article.

26. Further to the above, it may be said that this danger exists by reason of the fact that in practice it may be difficult to distinguish between “engaging” and “inciting”. For instance, is recruitment a form of engagement? Also, is it likely that ‘incitement’ will constitute a form of coercion, or possible the use of someone’s vulnerable position? Such questions may arise in practice and perhaps the Amendments may include definitions of these key words, for the purposes of more precise application. For instance, the Amendments may state that “inciting” refers only to the act of encouraging someone – without the presence of any deceptive or coercive means involved, without threat or abuse of someone’s vulnerability etc. Such clarifications may also be included in an explanatory note to the Amendments.

4.5 Additional Comments and Recommendations

27. It is highly recommended to consider introducing a provision within the appropriate legislative acts that would secure non-punishment of victims for the illegal acts committed as a result of being victims of trafficking in human beings. Optimally, such a provision should include the possibility of not punishing victims for acts which are criminal, administrative offences or create civil liability, where they result from their situation as victims of trafficking in human beings.⁷

28. It is recommended also that in connection with liability for the crime of trafficking in human beings, the ACC should establish liability of both natural and legal

⁷ As recommended by: Point 1.8 Ch III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557 24 July, 2003. and; Guideline 4.5 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking, United Nations Economic and Social Council, New York, 2002 Document Reference No: E/2202/68/Add.1. and; Article 26 of the Council of Europe Convention on Action Against Trafficking in Human Beings, CETS No.197 See also: Article 165(4) of the Criminal Code of the Republic of Moldova, entry into force, June 12, 2003.

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persons (corporate liability), in accordance with Article 10 of the TOC. The TOC indicates that it is possible to impose administrative, civil and criminal sanctions on legal persons. This is especially important in the context of seizure of criminal assets, often held by traffickers under the penumbra of a legal entity.⁸ Furthermore, this recommendation is made in the understanding that in the case that legal persons cannot be held criminally liable under Armenian law, it should be ensured that civil and administrative liability is effective, proportionate and dissuasive (to compensate for the inability to hold legal persons criminally liable).

⁸ Point 1.3/Chapter III, OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July 2003.

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Annex 1 – Indicators of Forced Labour

Source: “Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005” , Report of the Director General, A global alliance against forced labour, International Labour Conference, 93rd Session 2005 page 6. (www.ilo.org/declaration)

Identifying forced labour in practice

***Lack of consent to (involuntary nature of) work
(the “route into” forced labour)***

- Birth/descent into “slave” or bonded status
- Physical abduction or kidnapping
- Sale of person into the ownership of another
- Physical confinement in the work location – in prison or in private detention
- Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance
- Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.)
- Deception or false promises about types and terms of work
- Withholding and non-payment of wages
- Retention of identity documents or other valuable personal possessions

Menace of a penalty (the means of keeping someone in forced labour)

Actual presence or credible threat of:

- Physical violence against worker or family or close associates
- Sexual violence
- (Threat of) supernatural retaliation
- Imprisonment or other physical confinement
- Financial penalties
- Denunciation to authorities (police, immigration, etc.) and deportation
- Dismissal from current employment
- Exclusion from future employment
- Exclusion from community and social life
- Removal of rights or privileges
- Deprivation of food, shelter or other necessities
- Shift to even worse working conditions
- Loss of social status