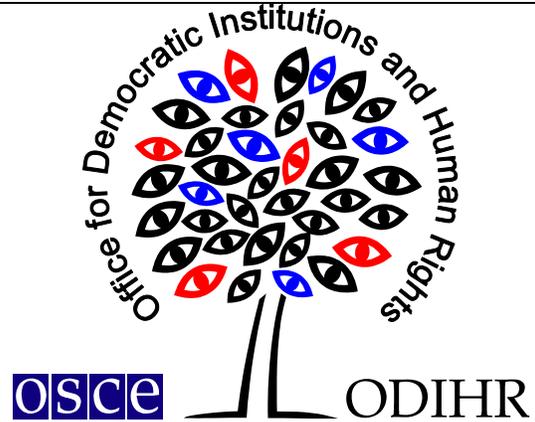


Warsaw, 24 August, 2006

Opinion-Nr: TRAFF –  
ARM/070/2006(MASz)

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**Comment on the Adopted 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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## **1. INTRODUCTION**

1. *The comment contained herein has been drafted as a follow-up to OSCE ODIHR Opinion-Nr:TRAFF-ARM/051/2006 (hereinafter referred to as the “Opinion”) which was drafted in response to an official request made by letter dated 19 December, 2005 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”), to the OSCE Office in Yerevan, which further requested the assistance of the OSCE ODIHR in this regard.*

2. *On 1 June 2006 the Parliament of the Republic of Armenia adopted the Draft Amendments in question (hereinafter referred to as the “Adopted Amendments”). Further, the Adopted Amendments were signed into law on 21 June, 2006 and entered into force on 16 July 2006.*

3. *Further to the above, the OSCE Office in Yerevan requested the OSCE ODIHR to draft the follow-up comment contained herein. The comment is a response to this request.*

## **2. SCOPE OF REVIEW**

4. This comment 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.

5. 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.

6. Furthermore, the opinions and views contained herein are strictly those of the OSCE ODIHR. The OSCE ODIHR in expressing its views on the compliance or non-compliance with the conventions and standards of the Council of Europe, United Nations or any other organization, is acting on the mandate provided in the OSCE commitments. The interpretations of the international conventions and standards of other international organizations, shall not be understood as the official interpretation given by the said organizations, or any monitoring mechanisms and bodies thereof.

### **3. EXECUTIVE SUMMARY**

7. The Adopted Amendments appear to have been adopted in the spirit of compliance with international standards which obligate criminalization of trafficking in human beings.
8. Although some recommendations of improvement may be found in the text of the analysis below, the main recommendations which can be made herein refer to further legislative work which may be undertaken by the authorities of the Republic of Armenia, to take on board new commitments and trends in international law on combating trafficking in human beings. It is therefore recommended as follows:
  - A. Consideration should be given to introducing provisions which would secure non-punishment of victims of trafficking in persons, if such acts result from their situation as a victim of trafficking.
  - B. Consideration should be given, if not already the case, to introduce provisions ensuring that legal persons are held liable for trafficking in human beings (in addition to natural persons), that is, corporate liability.
  - C. Consideration is given to reviewing and amending where necessary the provisions on victim witness protection of victims of trafficking in human beings.<sup>1</sup>

### **4. ANALYSIS AND RECOMMENDATIONS**

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

9. The Adopted 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 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 Palermo Protocol”).

10. 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 Palermo Protocol, which states that the recruitment,

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<sup>1</sup> Please see: OSCE ODIHR Opinion-Nr: TRAFF-ARM/016/2005 (IU/MASz) of 31 January, 2005 and OSCE ODIHR Opinion-Nr: TRAFF-ARM/030/2005 (IU/MASz) 1 June 2005.

***Comment on the Adopted Amendments to Article 132 on Trafficking in Persons, Article 132-1 on Engagement into Prostitution of 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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transportation, transfer, harbouring of 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 Adopted Amendment is therefore welcomed.

11. 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, 2005<sup>2</sup> and are welcomed.

12. Although neither the Palermo Protocol nor the Transnational Organised Crime Convention<sup>3</sup> 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 offence<sup>4</sup>. However, the interpretative notes to the TOC do however indicate that a crime such as trafficking in human beings is considered a “serious” crime and therefore should be punishable deprivation of liberty of four years of a more serious penalty.<sup>5</sup> Although the level of sanctions has been reduced to some degree in the Adopted Amendments, as compared with the Draft Amendments, the sanctions imposed by Article 132 are nevertheless considered as reflecting the severity of the crime of trafficking and are welcomed.

13. It is welcomed that Article 132 paragraph (5) defines “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 Palermo Protocol, to the discretion of the domestic jurisdiction of each State. Given that such definition has not been included in the Adopted Amendments, it may be considered to include a definition of this term, in a glossary or interpretative notes to the Criminal Code.

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<sup>2</sup> (not yet in force), signed by the Republic of Armenia on 16 May 2005.

<sup>3</sup> United Nations Convention Against Transnational Organised Crime, G.A. Res.55/25, 2000

<sup>4</sup> Article 11(1) of the United Nations Convention Against Transnational Organised Crime, G.A. Res.55/25 and Article 23 of the Council of Europe Convention on Action Against Trafficking in Human Beings. CETS No 197.

<sup>5</sup> Article 2 (b) of the United Nations Convention Against Transnational Organised Crime, G.A. Res.55/25, which defines ‘serious crime’ as “...conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years **or a more serious penalty**” applicable to the crime of trafficking through Article 2(b) of the Palermo Protocol.

**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.**

14. 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 often, the exploitation itself provides the best evidence for prosecution cases. Although the Adopted Amendment are welcomed, it is emphasized at this point, once more, that the article should be strictly interpreted to cover only the act of exploitation, otherwise there is risk that it may be confused with, for instance, recruitment, which is the subject of Article 132. The distinct operation of the two articles, and their correct application, is recommended to be found in the interpretative notes to the provision.

15. It is recommended that Article 132-1, just as in the case of Article 312 (2), where no means are required in order to recruit, transport, transfer, harbour or receive children for the purpose of exploitation, should ensure that no means are required to be proven to be liable for the act of exploitation of children.

16. The deletion of the former Article 132-1 paragraph (4) in the Draft Amendments, which required movement of a victim across the border of the Republic of Armenia, is welcomed.

17. Regarding Article 132-1 paragraph (5) of the Draft Amendments, the same comment as expressed in paragraph 16 above, of this comment is applicable and the deletion of this paragraph is welcomed. However, although the deletion of the said article removed the requirement of movement across a border, it has also effectively removed the definition of debt bondage, which was useful and which may be transplanted at this point into a glossary or interpretative notes to the Criminal Code.

18. Further to the above, the definition of “forced labour” according to Article 2.1 of the International Labour Organisation Convention Concerning Forced Labour No.29 stating 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”, should remain applicable to the interpretation of the provisions criminalizing trafficking, that is Article 132 and Article 132-1.<sup>6</sup>

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<sup>6</sup> 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 December 2004

*Comment on the Adopted Amendments to Article 132 on Trafficking in Persons, Article 132-1 on Engagement into Prostitution of 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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#### **4.3 Article 261 – Engaging in Prostitution of Other Persons for Profit Motives or Making Property Profit from Prostitution of Other Persons**

19. Firstly, the OSCE ODIHR must state that in the absence of OSCE commitment or other international standards on the subject, it does not seek to encourage, promote or endorse any decision which OSCE participating State make on the issue of regulation of prostitution. Such policy decisions are left to the discretion of the States, and any comment made herein may not be construed as any such endorsement or rejection of policy in this regard.

20. The OSCE ODIHR consider it of utmost importance that the distinction elaborated between Article 132 and 132-1 and this Article 261 should remain clear, in order to ensure that persons responsible for the crime of trafficking, are not held liable only under this provision, which foresees far lighter sanctions. The results of prosecutions in this regard however, are a question of proper identification of trafficking, skilful gathering of evidence and presentation of the cases in court, in practice.

21. The Adopted Article 261 makes clear that the act which is being criminalized is 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 Adopted Amendments, which are, threat or use of violence, coercion, abduction, deception, abuse of position of vulnerability etc. The adopted Article in its current wording is therefore welcomed. However, as regard the lack of the necessity of proving means under this Article 261 – it naturally resembles the requirements of Article 132(2), which state that no means are required in order to be liable for trafficking in children. It is highly recommended that this distinction be described in explanatory or interpretive notes to the Adopted Amendments, and that persons who are in fact responsible for trafficking in children are not punished under this Article, which carries lighter sentences and does not reflect the gravity of the crime of trafficking in children.

#### **4.4 Article 262 – Inciting into Prostitution**

22. The statement expressed in paragraph 19 and 20 above, equally applies to the Adopted Amendments to Article 262.

23. It is clear that the Adopted Article no longer seeks to address incitement, which in this case could be confused with “coercion”, as mentioned in the Opinion, and makes clear that it refers only to facilitating prostitution, by making premises and establishments available. For this reason, unless by error in translation, the word “inciting” is recommended to be removed from the title of the adopted Article and it may be replaced with “maintaining or managing”.

#### **4.5 Additional Comments and Recommendations**

24. It is highly recommended to consider introducing a provision within the appropriate legislative acts, which 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.<sup>7</sup>

25. 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 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 a legal entity on behalf of traffickers.<sup>8</sup> Furthermore, this recommendation is made on 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).

26. It is recommended that appropriate provisions are introduced and/or those existing amended to ensure adequate victim witness protection for victims of trafficking in human beings.

***[END OF TEXT]***

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<sup>7</sup> 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.

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