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COMMENTS ON THE CRIMINALIZATION OF "SEPARATISM" AND RELATED CRIMINAL OFFENCES IN MOLDOVA

REPUBLIC OF MOLDOVA

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Based on an unofficial English translation of the amendments to the Criminal Code provided by the OSCE Mission in Moldova.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The adopted amendments of 2 February 2023 to the Criminal Code of Moldova criminalize "separatism" and the establishment of so-called "illegal intelligence structures" and introduce new legal concepts such as "anti-constitutional entity".

International law recognizes that states can take measures to protect territorial integrity and sovereignty, which are principles that are sometimes invoked when prohibiting "separatism". In this respect, the particular national and regional context at hand, where Moldova does not exercise effective control over parts of its territory, should also be noted. However, any such measures must also comply with international human rights standards and OSCE human dimension commitments. Legislation, and especially criminal law, used to curtail "separatism" is controversial. International law offers no definition for the term "separatism", nor a basis for its criminalization or prohibition, unless the means (or actions) advocating secession or autonomy or directed against territorial integrity are violent, undemocratic or illegal from the international law point of view. In the past, ODIHR has warned against considering "separatism" to fall within the scope of criminal law.

Due to the inherently vague nature of the term, broad range of conduct that may be captured by it and the potential impact on human rights and fundamental freedoms (including freedom of opinion and expression, association, peaceful assembly, political participation, rights of persons belonging to national minorities and self-determination), criminalization of so-called "separatism" raises fundamental human rights issues.

The legitimacy of criminal law, *inter alia*, depends on it being used sparingly as "ultimo ratio". The criminal offence of "separatism", as contemplated in the adopted amendments, risks criminalizing the mere expression of opinion or ideas and may also be used as a pretext to suppress peaceful advocacy or views for different territorial arrangements, autonomy or even independence.

If "separatism" is nevertheless criminalized, it is important that a number of key principles of criminal law, rule of law and human rights are upheld. The criminal offences must satisfy the principles of legal certainty, foreseeability and specificity. The principle of specificity of criminal law is particularly important because the definition of "separatism" can be highly subjective and may depend on factors such as political ideology or cultural identity. Any vaguely or broadly framed criminal provisions open the possibility for misinterpretation and arbitrary application by public authorities, and as a consequence, potentially having a chilling effect on the exercise of fundamental rights. Similarly, any restriction on the rights to freedom of expression or peaceful assembly or association should be strictly justified and respect the principles of legality, necessity and proportionality, and non-discrimination in accordance with international human rights standards.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations:

A. to review the adequacy and appropriateness of criminalizing "separatism" and related offences in view of the lack of an internationally agreed definition of "separatism" and the apparent friction between its inherent broad and vague

nature with the requirements of the rule of law, in particular the principles of *ultima ratio* and specificity of criminal law; [paras. 40-41]

B. if the criminal offence of "separatism" is retained at all, to ensure that Article 340[1] (1) of the Criminal Code defines "separatism" and related actions as narrowly and precisely as possible, to meet the principles of legal certainty, foreseeability and specificity of criminal law, including by:

   1. strictly circumscribing the material elements of the offence while requiring some elements of violence or other criminal means or incitement to violence defined in accordance with international human rights standards; and providing a clear and precise definition of the required criminal intent (*mens rea*) of the offence; [para. 51]

   2. confining Article 340[1] (2) to incitement to violent actions or actions that result in a real foreseeable risk of violent action, while also requiring the mental element of intent to incite imminent violence or commission of criminal acts; [paras. 52-54]

   3. including under Article 340[1] legal defences or principles leading to the exclusion of criminal liability in certain cases, for instance when the acts or statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics, arts or some other issue of public interest; [para. 54]

   4. more strictly circumscribing the criminal offence in Article 340[1] (5) on financing of "separatism" by more clearly defining the forms the assistance may take and limiting the mental element (*mens rea*) for support in the form of "financing" by requiring that the individual must have intended or actually known that they were supporting/financing criminal actions; [para. 55]

   5. tailoring Article 352[2] to allow a narrow exception to ensure that journalists are not penalized for failure to reveal their sources and that individuals who have received information obtained from privileged communications, such as those between the accused and his/her defence counsel, a priest (and related secret confession), his/her doctor/psychologist or psychiatrist also benefit from this exception; [para. 56]

C. With respect to the new notion of "illegal intelligence structure" defined in Article 134[23], clarify and more strictly circumscribe the definition of "illegal intelligence structure" and the criminal offence of establishing such structures, including by:

   1. removing the reference to "other information" or clarifying its meaning; [para. 62]

   2. more strictly circumscribing the definition of "illegal intelligence structures" to ensure that it does not encompass organizations protected by the right to freedom of association; [para. 63]

   3. including an express public interest exception/defence and exemption from criminal liability for *bona fide* communication of information of public interest; [para. 64]

D. To more clearly circumscribe the notion of "anti-constitutional entity" to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity

for violence or commission of serious criminal offences defined in accordance with international human rights standards, or otherwise operating in violation of the constitutional order and requirements of international law, avoiding unjustified restrictions on legitimate and innocuous activities of individuals or civil society groups. [para. 69]

These and additional Recommendations, are included throughout the text of these Comments, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 2 February 2023, the Law no. 9 amending the Criminal Code and Criminal Procedure Code of the Republic of Moldova[1] was adopted and the related amendments entered into force on 18 March 2023.[2] Following initial discussions and exchange of views between the OSCE Mission in Moldova and the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") in line with established methodology and ODIHR's mandate to support OSCE field operations, on 22 November 2023, the Head of the OSCE Mission in Moldova sent a request to ODIHR to prepare the legal analysis, from a human rights perspective, of the recent amendments to the Criminal Code relating to "separatism" and related offences (hereinafter "the Amendments") for publication.
2. On 1 December 2023, ODIHR responded to this request, confirming the Office's readiness to provide an assessment of the Amendments' compliance with international human rights standards and OSCE human dimension commitments and concrete recommendations to the legal drafters to enhance the said provisions. The Comments also provide a succinct comparative overview of legislative practices in other countries in relation to certain specific aspects of the criminalization of "separatism" and of the establishment of "illegal intelligence structures".
3. These Comments were prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States as established by the relevant OSCE human dimension commitments.[3]

II. SCOPE OF THE COMMENTS

4. The scope of these Comments focuses only on the excerpts of the amendments to the Criminal Code adopted on 2 February 2023 that introduce the criminal offices of "separatism" and of establishment of "illegal intelligence structure". The Comments primarily aim at providing an overview of relevant international human rights standards and recommendations, OSCE human dimension commitments and relevant legal practices in the OSCE region on these issues. Thus limited, it does not constitute a full review of the legal and institutional framework regulating "separatism" and related offences in Moldova, or a detailed review of all the amendments to the Criminal Code and Criminal Procedure Code adopted on 2 February 2023.
5. The Comments raise key issues and seek to provide general guiding principles and potential human rights implications of criminalization of "separatism" and of the establishment of "illegal intelligence structure". The Comments also highlight, practices from other OSCE participating States. When referring to national legislation, ODIHR does not advocate for any specific country model; any country example should be approached with caution since it cannot necessarily be replicated in another country.

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1 See <LP9/2023 (legis.md)>.

2 Except for Article I item 2 of the Law, which states: "*In Article 289[1], paragraph 1 shall be supplemented by the following point (h): 'h) illegal overflight of the airspace of the Republic of Moldova of objects used for military purposes'*", which entered into force on the date of publication of the Law in the Official Monitor of the Republic of Moldova, which occurred on 18 February 2023.

3 ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE commitments. See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]".*

Country examples should always be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[4] (CEDAW) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[5] and commitments to mainstream gender into OSCE activities, programmes and projects, the Comments integrate, as appropriate, a gender and diversity perspective.

7. The Comments are based on an unofficial English translation of the Amendments, which is attached to this document as an annex. Errors from translation may result. Should the Comments be translated in another language, in case of discrepancies, the English version shall prevail.

8. In view of the above, ODIHR would like to stress that the issuance of these Comments does not prevent ODIHR from formulating additional written or oral recommendations or comments on relevant legal acts or related legislation pertaining to the legal and institutional framework regulating "separatism" or similar offences in the future.

III. OVERVIEW OF RELEVANT INTERNATIONAL STANDARDS, OSCE HUMAN DIMENSION COMMITMENTS AND COMPARATIVE STATE PRACTICES

1. Relevant International Standards and OSCE Commitments

1.1. On "Separatism"

9. While measures targeting "separatism" are intrinsically linked to the principle of respect for territorial integrity and sovereignty of a state, the term "separatism", its criminalization or prohibition have no basis in international law. As previously noted by ODIHR, *"[t]he lack of internationally agreed definition and vague and overbroad definition could lead to potential abuse, for instance to target persons or organizations which may simply express opinions, however shocking and unacceptable certain views or words used may appear to the authorities and/or the population. Indeed, such a definition could potentially capture writings and speeches advocating 'separatism', or even political movements expressly critical of the incumbent government and constitutional order, even if there is no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles*."[6] It is only in the context of the Shanghai Cooperation Organization, which has a very limited number of member states[7] that a definition of "separatism" is provided in the Shanghai Convention on Combating Terrorism, Separatism, and Extremism (2001). It is defined as "*any act intended to violate territorial integrity of a State including by annexation of any part of its territory or to disintegrate a State, committed in a violent manner, as well as planning and preparing, and abetting such act, and subject to criminal prosecuting in*

[4] See *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Moldova acceded to this Convention on 1 July 1994.
[5] See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.
[6] See *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020), para. 48.
[7] See <Shanghai Cooperation Organization | SCO (sectsco.org)>.

accordance with the national laws of the Parties."[8] There is otherwise no specific mention of "separatism" in international instruments as such and OSCE commitments only marginally refer to "violent separatism" as one of the factors that may engender conditions in which terrorist organizations are able to recruit and win support.[9]

1.2. On the Protection of Territorial Integrity and Sovereignty of a State and Right of Peoples to Self-determination in International Law

10. International law recognizes that states can take measures to protect their territorial integrity and sovereignty. This is enshrined in numerous international treaties and declarations, including the UN Charter and the Helsinki Final Act of 1975.[10] The Helsinki Final Act includes ten key principles among which specifically feature the principles of sovereignty and territorial integrity (Principles I and IV) and the principle of equal rights and self-determination of peoples (Principle VIII). Sovereignty refers to a state's ability to exercise supreme authority over its territory and people, free from undue external interference. The respect for territorial integrity implies that nation-states should not attempt to promote secessionist movements or to promote border changes in other nation-states, nor impose a border change through the use of force. The International Court of Justice (ICJ) has emphasized the importance of respecting the territorial integrity of states and the principle of non-intervention in the internal affairs of other states,[11] though concluding that international law contains no general prohibition of declarations of independence.[12]

11. At the same time, as underlined by the ECtHR, "*the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes […] does not automatically amount to a threat to the country's territorial integrity and national security*".[13] OSCE commitments also underline that "*full respect for human rights, including the rights of persons belonging to national minorities, besides being an end in itself, may not undermine, but strengthen territorial integrity and sovereignty*".[14]

12. The principles of sovereignty and territorial integrity must be balanced against other aspects of international law, including the right of peoples to self-determination and the exercise of their human rights.[15] The ratification of the United Nations Charter in 1945 placed the right of self-determination into the framework of international law. This was further reinforced both by the ICCPR and ICESCR, which provide that the right to self-

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[8] See Article 1 (2) of the *Shanghai Convention on Combating Terrorism, Separatism, and Extremism*.

[9] See, *OSCE Bucharest Plan of Action for Combating Terrorism*, *Annex to OSCE Ministerial Council Decision MC(9).DEC/1*, Bucharest, 3-4 December 2001, para. 9.

[10] Article 2(4) of the UN Charter prohibits the use of force against the territorial integrity or political independence of any state, and Article 2(7) affirms the principle of non-interference in the internal affairs of states. See also CSCE/OSCE, Helsinki Final Act (1975), Article IV, which provides: "*The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force. The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal*." See also UN General Assembly *Resolution 1514 (XV)*, which states that *"[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"*; and *Resolution 2625 (XXV)* which provides that the right of peoples to self-determination cannot be construed "*as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*".

[11] See International Court of Justice (ICJ), *Advisory Opinion of 22 July 2010*, which concluded that *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.

[12] See International Court of Justice (ICJ), *Advisory Opinion of 22 July 2010*, which concluded that *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.

[13] See ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, judgment of 2 October 2001, para. 97.

[14] See e.g., OSCE Istanbul Document (1999), Charter for European Security: III. Our Common Response, para. 19.

[15] See Article 1(2) of the *Charter of the United Nations* (1945); Article 1 of the ICCPR; Article 1 of the ICESCR; UNSC *Resolution 1513*, UN Doc. S/RES/1513 (2003), 28 October 2003; UNGA Resolution 2625 (XXV), *Friendly Relations Declaration*, 24 October 1970.

determination is a fundamental right, which includes the right of peoples to freely determine their political status and pursue their economic, social and cultural development.[16] Several OSCE commitments have reaffirmed the "*equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States*".[17]

13. The wording "all peoples" – instead of "everyone" – indicates that the right to self-determination is a collective right; that is, only a "people" and not an individual, can exercise the right. The right to self-determination entails that while States have a legitimate interest in maintaining their territorial integrity and sovereignty, they must also respect the right of peoples to determine their own political status and pursue their own economic, social and cultural development. Claims of self-determination generally imply demands for rights to be exercised within boundaries of existing states. The right to self-determination is particularly relevant to minority groups, which may seek to establish separate political entities based on ethnic, linguistic, or cultural differences.[18] Therefore, laws criminalizing "separatism" and banning related entities and structures must not thwart the legitimate exercise of the rights of minority groups. They must also ensure that they are not discriminatory in targeting or disproportionately impacting on particular minority groups. The right to self-determination must also be exercised in a manner that is consistent with other fundamental principles of international law and cannot be used to justify acts of violence or the *forcible* secession of a territory from a state.

2. Implications of the Criminalization of "Separatism" and Related Offences on the Exercise of Human Rights and Fundamental Freedoms

14. When measuring national legislation on "separatism" against the respect for human rights and fundamental freedoms, the international human rights obligations as embodied in the International Covenant on Civil and Political Rights (ICCPR),[19] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[20] the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[21] the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),[22] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[23] and as interpreted and elaborated by relevant treaty-based and other international human rights monitoring bodies, should be taken into account. At the Council of Europe level, the European Convention on Human Rights

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[16] See Article 1(2) of the Charter of the United Nations (1945); Article 1 of the ICCPR; and Article 1 of the ICESCR;, which state that *"[a]ll peoples have the right of self-determination"* and *"[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*"; see also UNSC Resolution 1513,*Resolution 1513*, UN Doc. S/RES/1513 (2003), 28 October 2003; UNGA Resolution 2625 (XXV), Friendly Relations Declaration, *Friendly Relations Declaration*, 24 October 1970.

[17] See e.g., OSCE Copenhagen Document (1990), para. 37; Charter of Paris for a New Europe (1990); OSCE Moscow Document (1991).

[18] See the *Press Release* of 21 February 2018 in which several UN special rapporteurs have also expressed concern over the ruling by a Chinese court to uphold charges of "incitement to separatism" brought against a human rights activist who appeared in a documentary calling for linguistic and cultural rights in Tibet. The statement also reminded the Chinese authorities of the right of persons belonging to minorities to use and promote their own culture and languages without restrictions, and without fear of reprisals or criminalization

[19] See the *UN International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. Moldova acceded to the ICCPR on 26 January 1993.

[20] See the *UN International Covenant on Economic, Social and Cultural Rights* (ICESCR), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. Moldova acceded to the ICESCR on 26 January 1993.

[21] See *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Moldova acceded to the CEDAW on 1 July 1994.

[22] See the *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the UN CAT), adopted by the UN General Assembly by Resolution 39/46 of 10 December 1984. Moldova acceded to the UN CAT on 28 November 1995.

[23] See the *UN International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. Moldova acceded to the CERD on 26 January 1993.

(hereinafter "ECHR") is also of particular relevance[24] along with the case-law of the European Court of Human Rights (hereinafter "ECtHR").

15. The criminalization of "separatism" could affect the exercise of a wide array of civil, political, economic and social rights. Particular issues may arise in relation to the rights to life (Articles 6 of the ICCPR and 2 of the ECHR), liberty and security of person (Articles 9 of the ICCPR and 5 of the ECHR), not to be subjected to arbitrary or unlawful interference with one's private life, family, home or correspondence, nor to unlawful attacks on one's honour and reputation (Articles 17 of the ICCPR and 8 of the ECHR), freedom of thought, conscience and religion or belief (Articles 18 of the ICCPR and 9 of the ECHR), the right to hold opinions and freedom of expression (Articles 19 of the ICCPR and 10 of the ECHR), freedoms of peaceful assembly and of association (Articles 21-22 of the ICCPR and 11 of the ECHR) and non-discrimination (Articles 2 and 26 of the ICCPR and Article 14 of the ECHR).[25] All of these rights are also part of the OSCE human dimension commitments, which OSCE participating States committed to uphold.[26]

16. While the above rights are not absolute,[27] any limitation must comply with the requirements provided in international human rights instruments. Notably, the limitations on the exercise of the rights to freedom of expression, peaceful assembly or association entailed in action against "separatism" must (i) be "prescribed by law" and be clear, accessible and foreseeable; (ii) pursue a "legitimate aim" provided by international human rights law for the right in question; (iii) be "necessary in a democratic society", and respond to a pressing social need and be proportionate to the aim pursued; and (iv) be non-discriminatory.

17. Furthermore, any criminal offence must satisfy the requirements of *nullum crimen sine lege* enshrined in international human rights standards,[28] meaning that no one may be convicted or punished for an act or omission that did not violate a penal law in existence at the time it was committed. It also requires that criminal offences comply with the principles of legal certainty, foreseeability and specificity of criminal law, i.e., criminal offences and related penalties must be defined clearly and precisely, so that an individual, either by themselves or with the assistance of legal counsel, should know from the wording of the relevant provision which acts and omissions will make them criminally liable and what penalty they will face as a consequence.[29] Any vaguely or broadly framed

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[24] See *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which entered into force on 3 September 1953. The Republic of Moldova became a State Party to the ECHR on 12 September 1997.

[25] The Republic of Moldova has signed on 4 November 2000, but not yet ratified, the Protocol no. 12 of the ECHR on the general prohibition of discrimination.

[26] See ODIHR, *Human Dimension Commitments (Volume 1, Thematic Compilation), 2023, 4th Edition*.

[27] There are rights that are absolute, i.e., rights that can never be suspended or restricted under any circumstances, which include: the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment (see Article 2 para. 2 of the *UN 1984 Convention against Torture and Cruel, Inhumane or Degrading Treatment and Punishment* (UNCAT) and OSCE Copenhagen Document (1990), para. 16.3)), from slavery and servitude, from imprisonment for inability to fulfil a contractual obligation; the prohibition of genocide, war crimes and crimes against humanity; the prohibition against the retrospective operation of criminal laws; the right to recognition before the law; the prohibition of *arbitrary* deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention (see UN Human Rights Committee (CCPR), *General Comment no. 35* on Article 9 of the *ICCPR* (2014), para. 67; and Working Group on Arbitrary Detention, Report to the UN Human Rights Council, A/HRC/22/44, 24 December 2012, paras. 42-51); the requirement of competence, independence and impartiality of a tribunal and the fundamental principles of fair trial, including the presumption of innocence (CCPR, *General Comment no. 32* on Article 14 of the ICCPR (2007), paras. 6 and 19); and the principle of non-refoulement (see Article 4 of the UNCAT; CCPR, *General Comment no. 20* on Article 7 of the *ICCPR*, 10 March 1992, para. 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Article 3 of the ECHR, see e.g., *Soering v. United Kingdom*, no. 14038/88, 7 July 1989, para. 88; and *Chahal v. United Kingdom*, no. 22414/93, 15 November 1996, paras .80-81).

[28] This principle is enshrined in Article 15 (1) of the ICCPR and Article 7 (1) of the ECHR, as well as in the UN General Assembly (1948) Universal Declaration of Human Rights, Resolution 217 A(III) (UDHR), Article 11 (1). See also *the Rome Statute of the International Criminal Court* (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), Articles 22 *(nullum crimen sine lege*) and 23 (*nulla poena sine lege*). See also, *EU Directive 2017/541 on Combating Terrorism*, para. 35 referring to "the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law".

[29] See ECtHR, *Rohlena v. the Czech Republic*, no. 59552, 27 January 2015, paras. 78-79; and CCPR, *General Comment No. 29 on States of Emergency* (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), para 7.

restrictive/criminal provisions open the possibility for misinterpretation and arbitrary application by public authorities, subsequently having a chilling effect on the exercise of fundamental rights, especially when used to target journalists, human rights defenders, representatives or members of civil society organizations or individuals expressing their views. A chilling effect may arise, in the words of the ECtHR, "*where a person engages in 'self-censorship', due to a fear of disproportionate sanctions or a fear of prosecution under overbroad laws. This chilling effect works to the detriment of society as a whole*."[30]

18. It is also important to consider whether women may be differently and disproportionately impacted by the criminalization of certain "separatism"-related offences in ways that may not have been envisaged by legislators. It has been acknowledged that the definition of the mental element (*mens rea*) for support or preparatory offences is particularly significant in terms of gender implications and the broader it is defined, the more likely it may affect women disproportionately. Indeed, women, in some contexts, may have far less access to information and may have no or very limited knowledge about the full scope of behaviour of their spouse or family members or may not be in a position to challenge that behaviour or to refuse to assist.[31] As a comparison, as noted in the context of counter-terrorism by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereinafter "Special Rapporteur on counter-terrorism and human rights"), women have been marginal to the conversations in which definitions of security are agreed and generally peripheral to the institutional settings in which security frameworks are implemented as policy and law.[32]

19. Hence, defining "separatism" in law requires a careful balance between the interest of the state to protect national unity or its territorial integrity and its obligation to respect fundamental human rights, including, but not limited to, the rights to hold opinions and freedom of expression, freedom of association and freedom of peaceful assembly, which will be addressed hereafter in detail. The significance and potential implications of the criminalization of "separatism" and related offences should also be considered in light of global trends, which show the emergence of this as a crime and of its use to stifle opposition and repress dissent.[33]

2.1. Specific Implications on Freedom of Expression

20. The criminalization of "separatism" or incitement to or instigating "separatism" and related offences should not lead to undue restrictions to the exercise of the right to freedom of expression, especially when the expression of political views or cultural identity is involved. In addition, as emphasized by the UN Human Rights Committee, "*it is incompatible with paragraph 1 [of Article 19 of the ICCPR] to criminalize the holding of an opinion*".[34] The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19 (1) of the ICCPR.[35]

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30 See as a comparison, the Council of Europe, *Study* on the Case on Freedom of Expression and Defamation, p. 24.

31 See e.g., *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020), para. 69. See also as a comparison, regarding counter-terrorism, UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019), pp. 41-42.

32 See the *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* - Note by the Secretary-Genera, 27 September 2017.

33 See *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020), para. 52. See also e.g., OSCE Representative on Freedom of the Media, *Press release*, 3 February 2020, regarding the suspended sentence of a journalist for "*public calls for actions violating the territorial integrity of the Russian Federation*", a criminal offence introduced in the Criminal Code (Article 280.1); and UN, *Press release - UN experts denounce the criminalization of linguistic and cultural rights advocacy* (charges of incitement to separatism in China), 21 February 2018; and *Press release of 26 December 2019*.

34 See UN Human Rights Committee, *Communication No. 550/93, Faurisson v. France*, 8 November 1996.

35 See UN Human Rights Committee, General comment No. 34, CCPR/C/GC/34, para. 9.

21. The right to freedom of expression protects all forms of ideas, information or opinions, including those that "*offend, shock or disturb*" the State or any part of the population,[36] and even "*deeply offensive*" speech,[37] even if those views or opinions relate to politically controversial and sensitive topics.[38] Another principle that has been consistently emphasised in the Court's case-law is that there is little scope under Article 10 (2) of the ECHR for restrictions on political expression or on debate on questions of public interest.[39]

22. The ECtHR has specifically recognized that advocating for the secession of part of the territory of a country via peaceful means is protected by the ECHR.[40] The Court also expressly held that "*where the views expressed do not comprise an incitement to violence […] Contracting States cannot rely on protecting territorial integrity and national security, maintaining public order and safety, or preventing crime, to restrict the right of the general public to be informed of them*".[41] Hence, the peaceful advocacy of "separatism" is a form of expression within the bounds of Article 10 of the ECHR. Moreover, it cannot be considered to be an "abuse of rights" as understood under Article 17 of the ECHR as it is not directed towards the "destruction of the rights and freedoms" established in the ECHR.[42]

23. However, the right to freedom of expression is not an absolute right and it may be subject to limitations under certain circumstances. Article 10 (2) of the ECHR allows for interferences with the right to freedom of expression for, amongst other grounds "*the interests of national security, territorial integrity or public safety*" while Article 19 (3) of the ICCPR does not specifically refer to "territorial integrity" but to national security and public order.

24. In particular, the prosecution of direct incitement to violence is permissible[43] provided the material and mental elements of the offence are clearly defined and limited in law,

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[36] See International Mandate-Holders on Freedom of Expression, *Joint declaration on freedom of expression and "fake news", disinformation and propaganda* (2017), seventh paragraph of the Preamble. See also Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *2015 Thematic Report*, A/HRC/31/65, 22 February 2016, para. 38. See also e.g., ECtHR, *Handyside v. United Kingdom*, no. 5493/72, 7 December 1976, para. 49; and *Bodrožić v. Serbia*, no. 32550/05, 23 June 2009, paras. 46 and 56.

[37] UN Human Rights Committee (CCPR), *General Comment no. 34 on Article 19: Freedoms of Opinion and Expression*, 12 September 2011, paras. 11 and 38.

[38] See e.g., ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 97, which states that "*the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security. […] In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means*."

[39] See *Guide on Article 10 of the European Convention on Human Rights*. See among many other authorities, ECtHR, *Wingrove v. the United Kingdom*, no. 17419/9025, 25 November 1996, para. 58, Reports 1996-V; *Ceylan v. Turkey* [GC], no. 23556/94, 8 July 1999, para. 34, ECHR 1999-IV; and *Animal Defenders International v. United Kingdom* [GC], no. 48876/08, 22 April 2013, para 102.

[40] See ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 97.

[41] See ECtHR, *Dmitriyevskiy v. Russia*, no. 42168/06, 3 October 2017, para. 100. See also, e.g., Venice Commission, Opinion on the Draft Law on the Review of the Constitution of Romania, CDL-AD(2014)010-e, para. 73, where it is stated that: "*In the absence of an element of "violence", the prohibition on expression favouring territorial separatism (which may be seen as a legitimate expression of a person's views), may be considered as going further than is permissible under the ECHR*."

[42] Article 17 of the ECHR states that: "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*."

[43] See e.g., ECtHR, *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998, para. 54, which states that "*it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks*"; ECtHR, *Sürek and Özdemir v. Turkey* (No. 2) nos. 23927/94 24277/94, 8 July 1999, para. 34, indicating that States enjoy a wider margin of appreciation for curtailing freedom of expression when remarks incite to violence; *Fatullayev v. Azerbaijan*, no. 40984/07, 22 April 2010, para. 116, finding that unless a publication incites violence on ethnic hatred, the government should not bring criminal law proceedings again the media; *Müdür Duman v. Turkey*, no. 15450/03, 6 October 2015, para. 33, finding an invalid interference as the relevant materials which the applicant was convicted for possessing did not advocate violence.

and any interference is necessary and proportionate.[44] More broadly, political speech, support or advocacy for the formation of a new state, whether pursuant to the right to self-determination or not, should not be criminalized unless it crosses the line of incitement to violence or to commit established crimes that themselves are compliant with international human rights standards. The UN Special Rapporteur on the right to freedom of opinion and expression noted the importance of making a distinction between acts of violence and "*charges of rebellion for acts that do not involve violence or incitement to violence [that] may interfere with rights of public protest and dissent*," as "*international human rights law cautions that, especially in situations involving political dissent, restrictions should only be imposed when they are strictly necessary and proportionate to protect the State's interests*".[45]

25. At the international level, to avoid undue limitations to freedom of expression, for forms of expression to constitute "*incitement*" to violence that is prohibited, the following three criteria should be met cumulatively: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[46] The severity threshold to amount to incitement is quite high, as emphasized in the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, which lists six factors to determine whether the expression is serious enough to warrant restrictive legal measures. These six factors are: context, speaker (including the individual's or organization's standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence).[47] Similarly, factors considered by the ECtHR when assessing whether an interference with the exercise of the freedom of expression in the form of criminal conviction is necessary in a democratic society include the following: whether the statements were made against a tense political or social background; whether such statements, being fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence; the manner in which the statements were made; their capacity – direct or

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[44] See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report on human rights impact of policies and practices aimed at preventing and countering violent extremism*, A/HRC/43/46, 21 February 2020, para. 27, where the UN Special Rapporteur noted that *"[s]uch offences must be strictly circumscribed in both their wording, to comply with the principle of legal certainty, and their application, to comply with the principles of proportionality and necessity, so as not to unduly restrict the rights to freedom of expression and religion*". See also ODIHR, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (2018), page 21, which puts emphasis on the need to *"[c]arefully define and limit the scope of activity covered by [foreign terrorist fighter]-related laws and policies and ensure that responses are framed around the conduct of individuals, and clearly identified in law*".

[45] <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22928&LangID=Eohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22928&LangID=E>.

[46] See UN Special Rapporteur on freedom of opinion and expression (hereafter "UN Special Rapporteur on freedom of expression"), the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information (hereafter "the International Special Rapporteurs/Representatives on Freedom of Expression"), *2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism*, 3 May 2016, par 2 (d); and Principle 6 of the *Johannesburg Principles on Freedom of Expression and National Security* (1995). See also UN Secretary General, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, A/63/337, 28 August 2008, par 62. See also UN Special Rapporteur on Counter-Terrorism and Human Rights, *Report on her visit to Kazakhstan*, UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 14, where the UN Special Rapporteur noted that there must be "*a direct and immediate connection between the action… and the actual (i.e. objective) risk of terrorist acts being committed*". See also the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, which provides that to prove inchoate crimes there should least be a causal link or actual risk of the proscribed result occurring.

[47] See the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred", United Nations General Assembly, 11 January 2013, Appendix, para. 29. This six-part threshold test has been endorsed by various independent experts and human rights monitoring bodies, e.g., in the *Report of the United Nations Special Rapporteur on Freedom of Religion or Belief (Tackling manifestations of collective religious hatred)*, United Nations General Assembly, UN Doc. A/HRC/25/58, 26 December 2013, para. 58; and in Committee on the Elimination of Racial Discrimination, *General Recommendation 35: Combating Racist Hate Speech*, UN Doc. CERD/C/GC/35, 12-30 August 2013, para. 15.

indirect – to lead to harmful consequences; and the proportionality of sanctions.[48] Building on the case-law of the ECtHR, the Council of Europe *Recommendation CM/Rec(2022)16 on combating hate speech* follow a similar approach to assess the severity of an expression and which type of liability should be incurred.[49]

26. Another relevant right in this context is the right to access to information. Article 10 of the ECHR guarantees the right for individuals to "*receive […] information and ideas without interference by public authorities and regardless of frontiers*."[50] Articles 19 and 25 of the ICCPR also entail the right of the media to access information regarding public affairs, as well as the right for individuals to receive media output.[51] Given the fundamental role of journalists and of the media, the widest possible scope of protection should be afforded to the press as also underlined in the case-law of the ECtHR.[52] To ensure that criminal provision of "separatism" or related offences are not used or abused to illegitimately obstruct the work of independent media and journalists, a public interest exception should be included in relevant legislation.[53] At the same time, the ECtHR has also stressed on numerous occasions that "*the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organizations, whose activities are an essential element of informed public debate*."[54] Consequently, a variety of other entities beyond journalists and the media carrying out "journalistic function" should deserve similar protection, including non-governmental organizations and human rights defenders. In addition, the ECtHR further noted that "*given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' insofar as the protection afforded by Article 10 is concerned*." A public interest exception and exemption from criminal liability should be applicable to them too.

2.2. Specific Implications on Freedom of Association and the Right to Participate in Public Affairs

27. The criminalization of "separatism" or the introduction in the Criminal Code of new notions including "anti-constitutional entity" and "illegal intelligence structure" can also have implications on the right to freedom of association, as provided by Article 22 of the ICCPR and Article 11 of the ECHR, as well as the right to political participation as enshrined in Article 25 of the ICCPR. OSCE participating States have committed to "*ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations*" (Copenhagen Document, 1990) and to "*enhance the ability of NGOs to make their full*

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48 See ECtHR, *Ibragim Ibragimov and Others v. Russia*, nos. 1413/08 and 28621/11, 28 August 2018, especially paras. 98-99 and 115-124; and ECtHR, *Stomakhin v. Russia*, no. 52273/07, 9 May 2018, para. 108, where criminal convictions were considered as justified under Article 10 (2) of the ECHR in the case of conviction for "*glorification of the Chechen separatists' insurgence and armed resistance as well as the violent methods used by them*".

49 See e.g., Council of Europe Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted by the Committee of Ministers on 20 May 2022, Appendix, para. 4, which refers to the following factors to be taken into account: the content of the expression; the political and social context at the time of the expression; the intent of the speaker; the speaker's role and status in society; how the expression is disseminated or amplified; the capacity of the expression to lead to harmful consequences, including the imminence of such consequences; the nature and size of the audience, and the characteristics of the targeted group; see also paragraph 11, which elaborates the types of expressions of hate speech that are subject to criminal liability.

50 See *ECHR*, Article 10(1).

51 See UN Human Rights Committee, *General Comment No. 34 on Article 19 of the ICCPR*, CCPR/C/GC/34, 12 September 2011, para. 18.

52 ECtHR, *Thoma v. Luxembourg*, no. 38432/97, 29 March 2001, paras. 58-63.

53 See International Mandate-Holders on Freedom of Expression, *2023 Joint Declaration on Media Freedom and Democracy*, which states: "*Restrictions on freedom of expression, for example in the interest of protecting the right to privacy, should include a public interest exception. Criminal defamation and laws criminalising the criticism of State institutions and officials should be repealed. Overall, legal frameworks should not be abused to illegitimately obstruct the work of independent media.*"

54 See ECtHR, *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 8 November 2016, para. 166.

contribution to the further development of civil society and respect for human rights and fundamental freedoms" (Istanbul Document, 1999).

28. In this regard, freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities.[55] While recognizing that certain restrictions on the right to freedom of association may be permissible if these are prescribed by law and necessary in a democratic society, the ECtHR has stressed that "*inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. That an association asserts a minority consciousness cannot in itself justify interference with its rights under Article 11 [ECHR]*".[56] The Court also held that the ability to establish a legal entity to act collectively in a field of mutual interest was one of the most important aspects of freedom of association.[57] Authorities can legitimately establish legal regulations that "*serve the purpose of facilitating the establishment and existence of associations*".[58] As underlined in the Joint ODIHR-Venice Commission Guidelines on Freedom of Association, associations should be entitled to pursue objectives or conduct activities that are not always congruent with the opinions and beliefs of the majority or run precisely counter to them, including calling for regional autonomy, or even requesting secession of part of the country's territory.[59] Hence, a restriction on "separatist" associations *per se* would not be in line with this principle. In other words, criminalizing the establishment or work of so-called "*anti-constitutional entity*" or "*any organization created outside the constitutional and legal regulations of the State for the purpose of collecting and processing the information that constitutes state secrets or other information that can be used for committing actions that harms the sovereignty, independence, territorial inviolability, state security or defence capacity of the Republic of Moldova, or for the purpose of recruiting persons in order to support such actions*" should not be interpreted as criminalizing the peaceful enjoyment of the freedom of association, or the work of associations or human rights groups *de facto* operating on the territory of Moldova. It must be reiterated that unregistered associations also benefit from the protection conferred by Article 22 of the ICCPR and Article 11 of the ECHR.[60]

29. Due to the essential role of political parties in a democracy and the importance of ensuring a plurality of views, interferences with such forms of association are narrowly construed. As also provided by the Joint ODIHR-Venice Commission Guidelines on Political Party Regulation, *"[a]lthough there are limitations to the right to freedom of association, such limitations must be construed strictly, and only convincing and compelling reasons can justify limitations on freedom of association. Limits must be prescribed by law, necessary in a democratic society, and proportionate in measure*."[61] Ultimately, the ECtHR case law on the issue of proscribed political parties or political associations stress that such interferences must be in pursuit of ensuring pluralism and the proper functioning of democracy.[62] In a case concerning the pursuit of Catalonian independence from Spain, the ECtHR has held that political parties may advocate for changes in constitutional orders, so long as it is done in a lawful and democratic manner.[63]

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55 See *ODIHR Guidelines on the Protection of Human Rights Defenders (2014)*, para. 201.
56 See ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 89. See also *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, para. 44
57 See ECtHR *Özbek and Others v. Turkey*, no. 35570/02, 6 October 2009.
58 See ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 51.
59 See ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 182. See also ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 97.
60 See UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report to the UN Human Rights Council (Best practices that promote and protect the rights to freedom of peaceful assembly and of association)*, UN Doc. A/HRC/20/27, 21 May 2012, para. 96; see also ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 69.
61 See ODIHR-Venice Commission, *Guidelines on Political Party Regulation* (2nd ed., 2020), para. 37.
62 See ECtHR, *Guide on Article 11 of the European Convention on Human Rights* (last updated 31 August 2022).
63 See ECtHR, *Forcadell I LLuis et al. v. Spain*, no. 75147/17, 7 May 2019, para. 37.

This ruling was echoed in a number of other cases where the ECtHR has recognized a right to freedom of association for political parties that advocate peaceful and democratic solutions to political problems, including when they advocate for secession of part of a territory,[64] and even when the political proposals would alter the existing structure of a state.[65] The ECtHR, however, opined that the protections of Article 11 of the ECHR do not extend to political parties or groups whose leaders incite violence or put forward policies aimed at the destruction of democracy or human rights.[66] The Court has held that political participation can be impeded where the party advocates a political goal that is contrary to democracy or where it intends to achieve its goals *through the use of force*.[67] Respectively, the emphasis on violence or the repudiation of democracy and human rights is a fundamental factor to consider when justifying interferences with Article 11 of the ECHR. If a country criminalizes so-called "separatism", the criminal offence should be tightly defined to focus exclusively on violent acts of "separatism" rather than "separatism", as such (see section IV.3).

30. It is also important that the introduction of new criminal offences does not interfere with the activities of human rights defenders and their ability to operate independently and effectively, including when protecting and promoting the rights of persons belonging to national minorities.[68] The 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter "UN Declaration on Human Rights Defenders") also highlights that "*everyone has the right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means* […]".[69]

2.3. Specific Implications on Freedom of Peaceful Assembly

31. In the context of "separatism", the right to freedom of peaceful assembly is also particularly relevant because "separatist" movements often involve the peaceful gathering and expression of political views or cultural identity. The right to freedom of peaceful assembly is key in a democratic society, and any restrictions on this right must be carefully balanced against the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others, while respecting the principles of legality, necessity and proportionality, and non-discrimination. As also provided by the UN Human Rights Committee's General Comment No. 37 (2020), the right to peaceful assembly "*constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism. Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and to establish the extent of support for or opposition to those ideas and goals*."[70]

32. ODIHR and the Venice Commission have cautioned, e.g., against the use of legislation to tackle so-called "extremism" to justify arbitrary action that curtails the right to freedom

[64] See ECtHR, *Socialist Party et al. v. Turkey*, no. 21237/93, 25 May 1998, para. 47. See also ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 97.

[65] See ECtHR, *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, 12 November 2003, para. 43.

[66] See ECtHR *Yasar and Others v. Turkey*, no. 44763/98, 9 April 2002.

[67] See ECtHR *Linkov v. Czech Republic*, no. 10504/03, 7 December 2006; *Refah Partisi (The Welfare Party) et al. v. Turkey [GC]*, no. 41340/98 & 3 others, 13 February 2003.

[68] See *ODIHR Guidelines on the Protection of Human Rights Defenders* (2014), paras. 205 and 206.

[69] See Article 13 of the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (UN Declaration on Human Rights Defenders), adopted by UN General Assembly resolution A/RES/53/144 of 9 December 1998. See also Articles 5 and 8.

[70] See UN Human Rights Committee, *General Comment No. 37 (2020) on the right of peaceful assembly (article 21)**, para.1.

of peaceful assembly.[71] They further underlined that "*A penalty should not be imposed or enhanced based on the content of the message communicated by an assembly or the viewpoints expressed by its participants, unless this message constitutes incitement to violence, hatred or discrimination*". The UN Human Rights Committee has opined that *"[w]hile acts of terrorism must be criminalized in conformity with international law, the definition of such crimes must not be overbroad or discriminatory and must not be applied so as to curtail or discourage the exercise of the right of peaceful assembly*.[72] *The mere act of organizing or participating in a peaceful assembly cannot be criminalized under counter terrorism laws*."[73] The same safeguards should be extended to the context in which "separatism" and related offences are criminalized.

33. The ECtHR has also assessed whether voicing of "separatist" ideas and statements at public meetings to commemorate historic events would justify a refusal by the authorities to allow such events to be organized. As noted above, the Court has underlined that calling for autonomy or even secession of part of a country's territory – in speeches or through demonstrations – cannot automatically be considered to amount to a threat to a country's territorial integrity or national security, if advocated using peaceful means.[74]

3. Protection of Territorial Integrity and Criminalization of "Separatism" in National Legislation of OSCE Participating States

34. Several countries have a long history of engagement and confrontation with separatist or independence movements. As an essential element of state sovereignty, territorial integrity, unity or indivisibility of the state is specifically mentioned in most constitutions.[75] Some of the constitutions also refer to the right to self-determination or have been interpreted as such.[76]

35. In most OSCE participating States, criminal codes or legislation include criminal offences addressing actions against the territorial integrity of the state or aiming to separate part of the territory of the state, generally along with other attacks against the constitutional order or seizure of power, with reference to the use of force, threat thereof, or other illegal means.[77] Some of them address acts accompanied by the use of force or

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71 See ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, Third Edition (2020), para. 151.

72 See e.g., *Concluding observations on Swaziland in the absence of a report* CCPR/C/SWZ/CO/1, para. 36; *Concluding observations on the initial report of Bahrain*, CCPR/C/BHR/CO/1, para. 29. See also A/HRC/40/52.

73 See UN Human Rights Committee, *General Comment No. 37 (2020) on the right of peaceful assembly (article 21)**, para. 68.

74 See ECtHR, *Stankov and the United Macedonian Organisation Ilinden*, nos. 29221/95 and 29225/95, para. 97.

75 See e.g., the Preamble of the *Turkish Constitution* of 1982, which refers to the "indivisible nature of the state"; the Preamble of the *Serbian Constitution* of 2006, which declares Kosovo to be an integral part of the territory of Serbia; Article 2 of the *Georgian Constitution* of 1995, as amended in 2020, which confirms "*the territorial integrity of Georgia and the inviolability of the state border*"; Article 2 of the *Spanish Constitution*, which states that the Spanish Constitution "*is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all*"; Article 2 of the *Constitution of Kazakhstan*, which states*: "The state shall ensure the integrity, inviolability, and inalienability of its territory*"; Article 5 of the *Constitution of France* (1958, amended 2008) refers to the "territorial integrity".

76 See e.g., the Preamble to the Basic Law for the Federal Republic of **Germany**, which refers to "free self-determination"; the Preamble of the Constitution of **France** (1958, amended 2008), provides "*By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development*" and includes a specific section regarding the self-determination of New Caledonia; the Supreme Court of **Canada**, which has held that "*the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states*" (see the Advisory Opinion of the Supreme Court of Canada that addresses the constitutionality of a hypothetical unilateral declaration of independence by the province of Quebec (2 S.C.R. 217).

77 See e.g., Article 421 of the Criminal Code of **Armenia (2022)**: "*Actions targeted at violation of territorial integrity, i.e. separation a part of territory of the Republic of Armenia, or surrender of the Republic of Armenia territory or its part to another state through violence or under the threat of violence— shall be punished by imprisonment for a term of ten to fifteen years*" (see also Article 422 on Public Calls to Seizure of Power, Breach of Territorial Integrity or Violent Overthrow of the Constitutional Order); Article 280 of the Criminal Code of **Azerbaijan**, which provides: "*Organization of armed rebellion or active participation in it with a view of violent change of constitutional power of the Azerbaijan Republic or infringement of territorial integrity of the Azerbaijan Republic – is punished by imprisonment for the term from ten up to fifteen years or life imprisonment*" (see also Article 281 on Public appeals directed against the state); Article 340 of the Criminal Code of **Croatia** on High Treason: "*Whoever by the use of force or by threat of use of force or in any*

other illegal means with the intent of separating or detaching part of the territory as stand-alone criminal offences.[78] Some of these criminal offences do not explicitly refer to violence or use of force but generally mention the deliberate or wilful commission of acts and/or the intent to separate part of the territory,[79] though they may have been interpreted

other illegal manner jeopardises the territorial integrity or constitutional structure of the Republic of Croatia, shall be punished by imprisonment for not less than five years"; Section 310 of the Criminal Code of the **Czech Republic**: "*Whoever participates in violent actions against the Czech Republic or its authorities with the intention to subvert the constitutional system, territorial integrity or defence capability of the Czech Republic or to destroy its sovereignty, shall be sentenced to imprisonment for eight to twelve years, eventually in parallel to this sentence also to confiscation of property*"; Article 231 of the Criminal Code of **Estonia**, which states: "*Violent activities against the Republic of Estonia (1) Activities aimed at violent disruption of the independence, sovereignty or territorial integrity of the Republic of Estonia, violent seizure of power or violent changing of the constitutional order of the Republic of Estonia in any other manner is punishable by six to twenty years' imprisonment or life imprisonment*", but see Article 233 on Non-violent acts committed by alien against the Republic of Estonia, which provides: *"(1) Engagement by an alien in non-violent activities directed against the independence and sovereignty or territorial integrity of the Republic of Estonia and such activities do not contain the necessary elements of an offence provided for in § 231 or 234 of this Code, is punishable by two to fifteen years' imprisonment*"; the Penal Code of **France**, which contains several criminal offences involving violence that aim at undermining the territorial integrity of the state (see e.g., Articles 412-1 ("*committing one or more acts of violence likely to endanger the institutions of the Republic or to undermine the integrity of the national territory*" subject to thirty years of imprisonment and a fine of 450,000 euros) and 412-3 referring to insurrectional movement i.e., "*any collective violence likely to endanger the institutions of the Republic or to undermine the integrity of the national territory*"; Article 411-2, which states "*Handing over troops belonging to the French armed forces, or all or part of the national territory, to a foreign power, to a foreign organisation or to an organisation under foreign control, or to their agents, is punished by life criminal detention and a fine of €750,000*"); Criminal Code of **Germany**, Section 82 on High Treason against Land, which states that "*Whoever undertakes, by force or threat of force, 1. to incorporate the territory of one of the Länder in whole or in part into another Land or to separate a part of one of the Länder from it or 2. to change the constitutional order based on the constitution of a Land incurs a penalty of imprisonment for a term of between one year and 10 years"*; Criminal Code of the Principality of **Liechtenstein**, which provision 242 states: "*High treason 1) Any person who, by force or the threat of force, undertakes to change the Constitution of the Principality of Liechtenstein or to separate territory belonging to the Principality of Liechtenstein shall be punished with imprisonment of ten to twenty years. 2) An undertaking within the meaning of paragraph 1 shall also include a mere attempt*"; Article 279 of the Criminal Code of the **Russian Federation** states "*Organization of an armed rebellion or active participation in it for the purpose of overthrowing or forcibly changing the constitutional system of the Russian Federation, or of breaching the territorial integrity of the Russian Federation, shall be punishable by deprivation of liberty for a term of 12 to 20 years*" (but see also Article 280.1. Public calls for actions aimed at violating the territorial integrity of the Russian Federation); **Swiss** Criminal Code (1937, as amended 1 September 2023), Article 265 on High Treason, which states: "*Any person who carries out an act with the aim, through the use of violence, of changing the constitution of the Confederation or of a canton, of deposing the constitutionally appointed state authorities or rendering them unable to exercise their powers, or of severing an area of Swiss territory from the Confederation or a part of cantonal territory from a canton, shall be liable to a custodial sentence of not less than one year*"; Article 306 of the Criminal Code of **Tajikistan**, which states: "*1) Actions aimed at violent seizure of power or forcible retention of power contrary to the Constitution of the Republic of Tajikistan, as well as aimed at violent change of the constitutional order of the Republic of Tajikistan or violent violation of the territorial integrity of the Republic of Tajikistan, - are punished with imprisonment for a term of twelve to twenty years*" (see also Article 307 of the Criminal Code, which criminalizes "*Public calls for the forcible seizure of state power or its forcible retention or forcible change in the constitutional order, or forcible violation of the territorial integrity of the Republic of Tajikistan, as well as assistance in committing these acts*" and Article 313 on Armed Rebellion, which refers to territorial integrity).

78 See e.g., Article 150 of the Criminal Code of **Bosnia and Herzegovina** states "*Whosoever attempts to detach a part of the territory of the Federation of Bosnia and Herzegovina by use of force or threat of force, or to annex any part of the territory thereof to the other entity, shall be punished by imprisonment for a minimum term of five years*"; Section 98 of Chapter 12 of the Criminal Code of **Denmark** on Offences against the Independence and Safety of the State": *"(1) Any person who, by foreign assistance, by the use of force, or by the threat of such, commits an act aimed at bringing the Danish state or any part of it under foreign rule or at detaching any part of the state shall be liable to imprisonment for any term up to life imprisonment*"; Article 241 of the **Italian** Penal Code provides "*Unless the fact constitutes a more serious crime, whoever commits violent acts directed and suitable for subjecting the territory of the State or a part thereof to the sovereignty of a foreign State, or a impair the independence or the unity of the State, is punished with the not less than twelve years' imprisonment*"; Article 122 of the Criminal Code of **Lithuania** on Public Incitement to Infringe upon the Sovereignty of the Republic of Lithuania by Using Violence; Article 359 of the Criminal Code of **Montenegro** on Endangering Territorial Integrity provides "*Whoever exerts force or other unconstitutional means to attempt to secede part of the territory of Montenegro or to annex that part of the territory to another state shall be punished by a prison sentence for a term from three to fifteen years*"; Article 307 of the Criminal Code of **North Macedonia** states: *"(1) Whosoever, by use of force or serious threat to use force, attempts to occupy, to separate a part of the territory of the Republic of Macedonia, or to annex a part of this territory to some other country, shall be sentenced to imprisonment of at least five years. (2) Whosoever, by use of force or serious threat to use force, attempts to change the borders of the Republic of Macedonia, shall be sentenced to imprisonment of at least four years*"; Chapter 17, Section 111 of the Penal Code of **Norway**, provides "*A penalty of imprisonment for a term not exceeding 15 years shall be applied to any person who through use of force, threats or other illegal means creates a risk of Norway or a part of Norway a) being incorporated into another state, b) being brought under the rule of a foreign state, c) or a state that is politically or militarily allied with Norway, suffering war or hostilities, d) suffering material restrictions on its right of self-determination, or e) becoming detached*"; Article 349 of the Criminal Code of **Slovenia** provides "*Whoever attempts to separate any part of the territory of the Republic of Slovenia or to join the same to a foreign country by means or threat of force shall be sentenced to imprisonment for between one and ten years*"; Chapter 19, Section 1, of the Criminal Code of the Kingdom of **Sweden**, states "*A person who, with intent that the country or a part of it will, by violent or otherwise illegal means or with foreign assistance, be subjugated by a foreign power or made dependent on such a power, or that, in this way, a part of the country will be detached, undertakes an action that involves danger of this intent being realised is guilty of high treason and is sentenced to imprisonment for a fixed term of at least ten and at most eighteen years, or for life or, if the danger was minor, to imprisonment for at least four and at most ten years*".

79 For example, Article 274 of the Criminal Code of **Azerbaijan** states: "*High treason, that is deliberate action committed by a citizen of the Republic of Azerbaijan to the detriment of the sovereignty, territorial integrity, state security or defensibility of the Republic of Azerbaijan: changeover to enemy side, espionage, distribution of the state secret to foreign state, rendering assistance to a foreign state, foreign organization or their representatives in realization of hostile activity against the Republic of Azerbaijan— is punishable by imprisonment for the term of from twelve up to twenty five years or life imprisonment with confiscation of property or without it*"; Article

by courts as requiring a certain level of severity. Most of these criminal offences constitute a felony or high treason. Only a handful number of countries do not seem to criminalize such behaviours[80] or even specifically protect political speech advocating, through peaceful and lawful means, for the independence of part of the territory of a country.[81]

36. A few participating States, those that are States Parties to the *Shanghai Convention on Combating Terrorism, Separatism, and Extremism* (2001), explicitly use the term "separatism" or "separatist activities" in their criminal codes to criminalize such behaviours as required under Article 1.1 of the said Convention. In Kazakhstan, Article 180 of the Criminal Code criminalizes "Separatist Activities" ranging from "*propaganda or public calls for violation of the unitarity and integrity of the Republic of Kazakhstan, inviolability and inalienability of its territory or disintegration of the state*" to actions committed with such an aim,[82] without reference to violence. This criminal offence is distinct from "*Propaganda or public calls for the seizure or retention of power,*

361 of the Criminal Code of **Belarus** refers to "*implementation of actions aimed at violating the territorial integrity of the Republic of Belarus*", which shall be punishable by restraint of liberty for a term of up to five years or imprisonment for a term of up to six years with or without a fine; Article 233 of the Criminal Code of Estonia on Non-violent acts committed by alien against the Republic of Estonia, which provides: *"(1) Engagement by an alien in non-violent activities directed against the independence and sovereignty or territorial integrity of the Republic of Estonia and such activities do not contain the necessary elements of an offence provided for in § 231 or 234 of this Code, is punishable by two to fifteen years' imprisonment*"; in **Georgia,** an act committed against Georgia that is "*intended to transfer the entire territory of Georgia or its part to a foreign country or to separate a certain part from the Georgian territory, and "same act that results in loss of the entire territory or its part*" is punishable with 10 to 15, and 15 to 20 years of imprisonment, respectively; Section 80 of the Criminal Code of **Latvia** states: "*(1) For an action that is directed against national independence, sovereignty, territorial integrity, State power or administrative order of the Republic of Latvia in a manner that is not provided for in the Constitution, the applicable punishment is the deprivation of liberty for a period of up to eight years, with probationary supervision for a period of up to three years. (2) For a person who commits the same acts, if they have been committed using violence or if they have been committed by an organised group, the applicable punishment is deprivation of liberty for a period of five years and up to fifteen years and with probationary supervision for a period up to three years*" (public call to undertake such actions is subject to the same penalties as per Section 81); Article 19.1 of the Criminal Code of **Mongolia** on High Treason provides: "*1. An action deliberately committed by a citizen of Mongolia which is detrimental to the national security, sovereignty, territorial integrity, defense capacity of Mongolia: giving help or collaborating with the enemy during a war, a war situation, an armed attack or conflict shall be punishable by imprisonment for a term of twelve up to twenty years, or life imprisonment*"; Article 280.2 of the Criminal Code of the **Russian Federation** on Violation of the territorial integrity of the Russian Federation states: "*Alienation of a part of the territory of the Russian Federation or other actions (except for delimitation, demarcation, redemarcation of the State Border of the Russian Federation with neighboring states) aimed at violating the territorial integrity of the Russian Federation, in the absence of signs of crimes provided for in Articles 278, 279 and 280.1 of this Code, - shall be punishable by imprisonment for a term of six to ten years*" (see also Article 280.1 of the Criminal Code on "*Public calls for actions aimed at violating the territorial integrity of the Russian Federation*"); Article 302 of the Criminal Code of **Türkiye** on "Breach to National Unity and Territorial Integrity" provides: "*Any person who causes partition of the country by allowing another country to rule part or whole of Territorial land, or breaches National Unity, or shows consent to separation of certain portion of the territory under the sovereignty and administration of the State and executes acts aimed to weaken the independence of the State, is punished with heavy life imprisonment*"; Article 110 of the Criminal Code of **Ukraine** criminalizes "Trespass against territorial integrity and inviolability of Ukraine": "*1. Willful actions committed to change the territorial boundaries or national borders of Ukraine in violation of the order provided for by the Constitution of Ukraine, and also public calls or distribution of materials with calls to commit any such actions - shall be punishable by imprisonment for a term of three to five years with or without forfeiture of property. 2. The same actions, if committed by an official of government authorities, or repeated, or committed by an organised group, or accompanied with exciting national or religious enmity - shall be punishable by imprisonment for a term of five to ten years with or without forfeiture of property. 3. Any such actions, as provided for by parts 1 and 2 of this Article, if they caused the death of people or resulted in any other grave consequences - shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment with or without forfeiture of property*" (see also Article 110[2] on Financing of actions taken with the aim of violently changing or overthrowing the constitutional order or seizing state power, changing the boundaries of the territory or the state border of Ukraine); Article 157 of the Criminal Code of **Uzbekistan** states: "*Treason to the state, that is, an act deliberately committed by a citizen of the Republic of Uzbekistan to the detriment of sovereignty, territorial integrity, security, defense capability, the economy of the Republic of Uzbekistan through espionage, issuance of state secrets or other assistance to a foreign state, foreign organization or their representatives in carrying out hostile activities against the Republic Uzbekistan*".

80 See e.g., **Andorra**, **Canada**, **Luxembourg**, **Malta**.

81 See e.g., Section 60 of the Criminal Code of **Canada**, which provides: **"***Notwithstanding subsection 59(4), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith, […]* ***(c)*** *to procure, by lawful means, the alteration of any matter of government in Canada*".

82 Article 180 of the Criminal Code of the Republic of **Kazakhstan** states: "*1. Propaganda or public calls for violation of the unitarity and integrity of the Republic of Kazakhstan, inviolability and inalienability of its territory or disintegration of the state, as well as production, storage for the purpose of distribution or distribution of materials of such content - shall be punishable by a fine in the amount of one thousand to five thousand monthly calculation indices, or restraint of liberty for a term of up to seven years, or imprisonment for the same term. 2. The same actions committed by a person with the use of his/her official position or by the leader of a public association, or with the use of mass media or telecommunications networks, or by a group of persons or a group of persons by prior conspiracy, including the use of funds received from foreign sources, - shall be punishable by imprisonment for a term of five to ten years. 3. Actions committed with the aim of violating the unitarity and integrity of the Republic of Kazakhstan, the inviolability and inalienability of its territory or the disintegration of the state, - shall be punishable by imprisonment for a term of ten to fifteen years with or without deprivation of citizenship of the Republic of Kazakhstan*."

as well as the seizure or retention of power or violent change of the constitutional order of the Republic of Kazakhstan" (Article 179), which is worded in a similar fashion without reference to territorial integrity but with mention of violence, and "*Armed Rebellion*" (Article 181), which refers to the violation of the territorial integrity. Article 328 of the new Criminal Code of the Kyrgyz Republic (2021, as amended)[83] also includes a specific criminal offence of "Separatist activities" defined as "*an act aimed at violating the territorial integrity of a State, including by separating part of the territory from it or disintegrating the state, committed by force*", which is punishable by imprisonment of ten to twelve years with confiscation of property. In Uzbekistan, apart from the criminal offence of "Treason" (Article 157), which refers to an act deliberately committed to the detriment of territorial integrity (among others),[84] several provisions make reference to "separatism" or "separatist" in relation to the "*production or storage for the purpose of distribution of materials containing ideas of […] separatism*" (Article 244[1]) and the "*creation, leadership, participation in religious extremist, separatist, fundamentalist or other prohibited organizations*" (Article 244[2]). The Criminal Codes of Tajikistan and of the Russian Federation do not explicitly refer to "separatism"/"separatist" but do include criminal offences for "*Public calls for actions aimed at violating territorial integrity*" (Article 280.1 of the Criminal Code of the Russian Federation and Article 307 of the Criminal Code of Tajikistan) and *other actions aim at violating territorial integrity* (Article 280.2 of the Criminal Code of the Russian Federation), though in the case of Tajikistan, there is an explicit reference to the *violent* or *forcible* violation of the territorial integrity in both cases,[85] the element of force or violence not being mentioned in the Criminal Code of the Russian Federation.

IV. GENERAL COMMENTS AND ANALYSIS OF SOME OF THE AMENDMENTS TO THE CRIMINAL CODE OF MOLDOVA

1. BACKGROUND

37. On 8 December 2022, a draft law no. 456, comprising a package of amendments to the Criminal Code of the Republic of Moldova, was submitted to the Parliament of Moldova. On 22 December 2022, the Parliament adopted these draft amendments in the first reading. On 2 February 2023, these amendments, as further amended during the second

[83] Russian version available at: <Code of the Kyrgyz Republic dated October 28, 2021 No. 127 "Criminal Code of the Kyrgyz Republic" (minjust.gov.kg)>.

[84] See footnote 86.

[85] Article 280.1 of the Criminal Code of the **Russian Federation** provides: "*1. Public calls for the implementation of actions aimed at violating the territorial integrity of the Russian Federation, committed by a person after he has been brought to administrative responsibility for a similar act within one year, - shall be punishable by a fine in the amount of two hundred thousand to four hundred thousand rubles or in the amount of the salary or other income of the convicted person for a period of one to two years, or forced labor for a term of up to three years, or arrest for a term of four to six months, or imprisonment for a term of up to four years with deprivation of the right to hold certain positions or engage in certain activities for the same period. 2. The same acts committed with the use of mass media or electronic or information and telecommunication networks (including the Internet), - shall be punishable by compulsory labor for a term of up to four hundred and eighty hours with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years, or imprisonment for a term of up to five years with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years*." Article 306 of the Criminal Code of **Tajikistan** states "*Forcible seizure of power or violent retention of power 1) Actions aimed at violent seizure of power or forcible retention of power contrary to the Constitution of the Republic of Tajikistan, as well as aimed at violent change of the constitutional order of the Republic of Tajikistan or violent violation of the territorial integrity of the Republic of Tajikistan, - are punished with imprisonment for a term of twelve to twenty years*" and Article 307 of the Criminal Code, states: "*Public calls for the forcible seizure of state power or its forcible retention or forcible change in the constitutional order, or forcible violation of the territorial integrity of the Republic of Tajikistan, as well as assistance in committing these acts*".

reading, including with new provisions amending the Criminal Procedure Code, were adopted. According to the legal drafters, the amendments had the purpose to adjust the normative framework on state security, and to address the real operational situation in combating risks and threats, generated by subversive informational actions of foreign special services in relation to the Republic of Moldova.

38. The adopted amendments introduce two new definitions of terms used in the Criminal Code, i.e., the definitions of an "anti-constitutional entity" (new Article 134^{23}) and of an "illegal intelligence structure" (new Article 134^{24}). It broadens the scope of two already existing criminal offences of treason and espionage to cover the disclosure, transmission, stealing or collection of state secrets not only for the benefit of "*foreign state, foreign organization or their representatives*" but also of so-called "*anti-constitutional entities*" as defined by the new Article 134^{23} of the Criminal Code. It also introduces an aggravating circumstance for the crime of treason when it is committed by a public official, an official holding a position of responsibility, or a person holding public office. The amendments also supplement the Criminal Code with five new criminal offences of "Creation of illegal intelligence structure" (Article 338^{1}), "Plotting against the Republic of Moldova" (Article 338^{2}), "Unauthorized collection of information" (Article 338^{3}), "Separatism" (Article 340^{1}) and "Failure to denounce to authorities offences against the State and national security" (Article 352^{2}).[86] As a consequence, Article 341(1) of the Criminal Code on "Calls for the Overthrow or for a Violent Change in the Constitutional Order of the Republic of Moldova" is also amended to remove the reference to the "*the purpose of violating the territorial integrity of the Republic of Moldova*", which is now covered by other provisions that aim to protect territorial integrity. The adopted amendments also supplement Article 289^{1} (1) of the Criminal Code on "Crimes against Aeronautic Security and against Airports Security" and amends three existing articles of the Criminal Procedure Code.

39. As per the request, the following sections will analyse some of the adopted amendments, primarily focusing on the new criminal offences of "separatism" and of establishment of "illegal intelligence structures" and the introduction of the new notion of "anti-constitutional entity".

2. General Comments

40. As noted above, there is no internationally accepted definition of "separatism", nor any requirement in international law to criminalize or prohibit such behaviour. "Separatism" by its nature conveys a political goal and, as such, is a questionable basis in and of itself for the imposition of criminal sanctions. ODIHR has previously questioned whether "separatism" "*should fall within the scope of criminal law, the legitimacy of which depends on it being used sparingly, ultimo ratio*" also given the risk of "*criminalizing the mere expression of opinion or ideas, thus potentially violating the rights to political debate and participation, freedom of opinion and expression, and potentially the right to self-determination*."[87] As underlined above, expression of views, that do not constitute incitement defined in accordance with international human rights standards or are not construed as liable to incite violence should be protected by freedom of expression, and should as such in principle not be prohibited or criminalized. It must be emphasized that the legitimacy of criminal law depends on it being used sparingly, *ultima ratio*, as reflected in international law and practice. This was expressed, for example, in the EU approach to Criminal Law which states: "*whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused*

[86] See <CP985/2002 (legis.md)>.
[87] See *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020), para. 31.

or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals…"[88]

41. In accordance with international human rights standards (see Section III.1), any criminal offence, including in relation to so-called "separatism" should such a criminal offence exist, must comply with the principles of legal certainty, foreseeability and specificity of criminal law. In particular, this means that the legislation in force at the time of the commission of the criminal offence shall clarify the scope and elements of the offence, including the particular act/conduct and intent (material and mental elements) and specify the penalties applicable to that offence. As noted below, prohibited conduct of the individual, and whether there must be any harm caused or danger arising from it (the material elements), and with what knowledge or intent (the mental element) should be clear.

42. Penalties must be commensurate with the gravity of the crime committed, be proportionate and effective. One significant dimension of the fair and proportionate application of criminal penalties is that courts must take into account all circumstances of the individuals and the crime committed by them, in assessing appropriate and proportionate penalties.[89] For example, in connection with the right of freedom of expression, the ECtHR has explicitly stated that "*the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern*".[90]

43. Finally, it is important to reiterate that criminal law cannot punish ideas,[91] however dangerous or unfavourable they may be perceived to be, nor prosecute the legitimate exercise of human rights. Yet as noted, prosecution of "separatism" *per se* risks violating the rights to political debate and participation, freedom of opinion and expression, and potentially the right to self-determination. Prosecutions of conduct on this basis, if ever justifiable, should be exceptional and limited to serious cases where use of the weighty tool of criminal law can meet the requirements of necessity and proportionality. In situations entailing acts of violence, this may be the case. The broad scope of crimes and serious nature of punishments suggest the adopted amendments are casting a net as wide as possible, and punishing as seriously as possible, which are at least in tension with this principle.

RECOMMENDATION A.

To review the adequacy and appropriateness of criminalizing "separatism" and related offences in view of the lack of an internationally agreed definition of "separatism" and the apparent friction between its inherent broad and vague nature with the requirements of the rule of law, in particular the principles of *ultima ratio* and specificity of criminal law.

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88 European Parliament, *Resolution of 22 May 2012 on an EU approach to criminal law* (2010/2310(INI)), European Parliament, P7_TA(2012)0208, Point I, cited in ODIHR, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (2018), p. 39.

89 See *Eurojust Annual Report* 2016, page 13.

90 See ECtHR, *Cumpana and Mazare v. Romania* (Application no. 33348/96, judgment of 17 December 2004).

91 In accordance with the Roman law principle *cogitationis poenam nemo patitur* ("nobody endures punishment for thought", Justinian's Digest (48.19.18)), punishment cannot encroach into the private sphere of the individual, until such time as the thoughts have been brought, through conduct, into the external world.

3. New Criminal Offence of "Separatism" and Related Offences in the Criminal Code of Moldova

44. The newly introduced Article 340[1] (1) of the Criminal Code on "Separatism" criminalizes "*actions committed for the purpose of separating a part of the territory of the Republic of Moldova*". Such actions are punishable by "*a term of 2 to 6 years, whereas a legal entity shall be punishable by a fine in the amount of 3,000 to 5,000 conventional units with the deprivation of the right to practice certain activities or by its liquidation*". Article 340[1] (2) further criminalizes "*Instigation to separatism, as well as the distribution of goods, production and/or distribution, in any form and by any means, of materials and/or information that incite separatism*". When committed by a public official, an official holding a position of responsibility, a person holding public office, a foreign public official or an international civil servant, this constitutes an aggravating circumstance (Article 340[1] (3)). In addition, Article 340[1] (4) provides a list of aggravating circumstances leading to imprisonment for a term of 7 to 12 years, with the deprivation of the right to hold certain positions or to practice certain activities for a term of 7 to 15 years for the actions as defined in (1) that involve: a) violence dangerous to the person's life or health; b) use of firearms or explosive substances; c) the causing of material damage in particularly large proportions, and are d) committed upon the instruction of a foreign state, anti-constitutional entity or their representatives. Article 340[1] (5) also criminalizes the "Financing of separatism".[92] The definition of "separatism" merely refers to "*actions committed to separate a part of the territory*" without further specifying whether they should be deliberate and/or with intent as well as accompanied by some forms of violence or use of other illegal means. Accordingly, the prohibited conduct of the individual, and whether there must be any harm caused or danger arising from it (the material elements), and with what knowledge or intent (the mental element) is generally unclear.

45. In particular, Article 340[1] (1) of the Criminal Code does not specifically refer to the use of violence or force or other criminal or illegal actions or means, which are only mentioned in Article 340[1] (4), which refers to "violence dangerous to the person's life or health" and to the "use of firearms or explosive substances", among others, as aggravating circumstances. Hence, when read together with Article 340[1] (4), it follows that the meaning of "actions" in Article 340[1] (1) covers nonviolent acts since violent actions entail separate higher penalties.

46. As noted above, when dealing with attacks against territorial integrity, generally qualified as a felony in the majority of states, the criminal offences generally involve the use of violence or force as an essential constitutive element. Only in a few countries, criminal offences pertaining to the undermining of territorial integrity or separation of part of the territory do not involve violence but at least qualify the mental element by requiring that the actions be wilful or deliberate and/or with the intent of causing the separation of part of the territory.

47. Overall, **the definition of the criminal offence of "separatism" as currently foreseen in the adopted amendments appears broad and vague, and therefore, raises concern in terms of compliance with the principle of legality, foreseeability and specificity of criminal law.**

48. The vague and overbroad definition of "separatism" in Article 340[1] (1) could potentially lead to arbitrary application, for instance targeting persons or organizations that simply,

[92] i.e., "*the intentional provision or collection, by any means, directly or indirectly, of good of any kind acquired by any means in order to use these goods, in whole or in part, for the organization, preparation or committing of separatist actions, or delivering financial services in order to use these goods or services or knowing that they will be used, in whole or in part, for the organization, preparation or committing of separatist actions*".

and peacefully, express opinions or political views regarding the need for autonomy or even secession of part of the territory or the journalists or media that report on such subjects. The interests of "territorial integrity" could be a legitimate aim that the proposed offence is seeking to pursue as stated in Article 10 (2) of the ECHR, though not expressly mentioned in Article 19 (3) of the ICCPR. Even though lawmakers may have a legitimate interest in ensuring national security or protecting territorial integrity**,** the scope of the amendments should be appropriately limited to protect political participation and debate.[93] As the Venice Commission has also noted, "*[e]ven speech that is at odds with mainstream (democratic) values must be permitted as it may contain a relevant political message. Political debate may concern matters of everyday politics or go further and call into question the very structure of the State and foundations of the constitutional order*."[94] In this respect, the ECtHR has interpreted the legitimate aim of protecting territorial integrity narrowly, emphasizing the importance of a connection between the expression and an act of violence in order for the provision to be considered to be pursuing a legitimate aim.[95] Therefore, if the views expressed do not constitute incitements to violence or hatred or likely to encourage violence, the right to express these views or for the public be informed of these views should not be restricted.[96]

49. The mere existence of a criminal offence of "separatism" and related criminal sanctions may have a "chilling effect" on political expression as individuals may self-censor, but also on journalistic freedom of expression, as recognized in the ECtHR case law.[97] The ECtHR has stated that "*the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern*".[98] As it is, the criminal offence of "separatism" also risks capturing legitimate journalistic activity detailing information and analysis pertaining to separatist movements. Such a scenario would be similar to the case of *Jersild v. Denmark*, where the ECtHR found that Denmark had violated Article 10 of the ECHR when prosecuting a journalist for "aiding and abetting" a group called the Greenjackets following the conduction of an interview with a member of the group, notwithstanding the fact that the applicant's conduct during the interviews clearly dissociated him from the persons interviewed.[99] Even if the legislation is not intended to apply to journalistic activity, in *Cumpana v. Romania*, the ECtHR recognized, as a matter of principle, that the fear of being sentenced to imprisonment for reporting on matters of public interest creates a chilling effect on journalistic freedom of expression.[100] Thus, the ECtHR has stated that

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93 For example, Article 302 of the Italian Criminal Code penalizes the incitement inter alia to commit any violent act (i) aiming at impairing the independence or unity of the Italian State, and (ii) capable of producing such a result. A mere political action seeking the independence of a part of the Italian territory is not criminally relevant, but an incitement to commit a violent act will be criminally punishable."

94 See Venice Commission, *Report on the criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights*, 8 October 2020, para. 19.

95 See ECtHR, *Guide on Article 10 of the European Convention on Human Rights* (last updated 31 August 2022). See in particular ECtHR, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, 8 July1999, which involved publication of the views of representatives of organizations which resort to violence against the State, where the Court held that when such views cannot be categorized as vehicle for the dissemination of hate speech and the promotion of violence, states "*cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media."*

96 *Ibid.* ECtHR, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, 8 July1999, para. 63.

97 See e.g., ECtHR, *Dammann v. Switzerland*, no. 77551/01, 25 April 2006, para. 57; and *Cumpănă and Mazăre v. Romania*, no. 33348/96, 17 December 2004, paras. 114 and 116, where the ECtHR recognized, as a matter of principle, that the fear of being sentenced to imprisonment for reporting on matters of public interest creates a "chilling effect" on journalistic freedom of expression. While, *Cumpana* referred to the "chilling effect" of a custodial sentence on journalistic activity, the ECtHR has acknowledged the chilling effect in relation to other sanctions too, for example the amount of fines or when assessing the proportionality of damages for defamation; see ECtHR, *Kasabova v. Bulgaria*, no. 22385/03, 19 April 2011, para. 71. See also e.g., *Eon v. France*, no. 26118/10, 14 March 2013, paras. 61-62, where the Court considered that even a suspended fine of merely 30 Euros imposed on a French citizen for insulting the President of France (a sum which the remitting court contended it had been imposed "as a matter of principle") was considered "likely to have a chilling effect" simply due to its criminal nature, and was held "disproportionate to the aim pursued and hence unnecessary in a democratic society". See also the UN Human Rights Committee *General comment No. 34* to Article 19 of the ICCPR, CCPR/C/GC/34, para. 47.

98 *Ibid.* para. 69 (2011 ECtHR *Kasabova v. Bulgaria*).

99 ECtHR, *Jersild v. Denmark*, *[GC]*, no. 15890/89, 23 September 1994.

100 See ECtHR, *Cumpana v. Romania*, no. 33348/96, 2005. See also *Rónán Ó Fathaigh, 'Article 10 and the Chilling Effect Principle*' [2013] European Human Rights Law Review 304, 305.

the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern. In another prominent case, the ECtHR held that the closure of a Kurdish newspaper "*violated the applicants' rights to freedom of expression and that the authorities had failed to show that the newspaper had incited violence or supported terrorism*."[101] Protection should also apply to whistle-blowers and human rights defenders who share information of public interest but also to anyone considered as carrying "journalistic functions", who deserves similar protection, including non-governmental organizations.[102]

50. Further concerns arise in relation to the right of freedom of association (Article 11 ECHR and Article 22 ICCPR). An association or a political party that pursues or promotes advocacy of secession or autonomy of a given region through democratic and peaceful means is not contrary to the ECHR or ICCPR and should enjoy protection under international law. Moreover, public figures and other officials convicted under Article 340[1] (1) can also be deprived of the right to hold certain positions or to exercise certain activities. This could potentially restrain debate on the issues of public importance or target public office holders or opposition leaders, who may be expressing views or whose views could be interpreted as favouring secession or autonomy of part of the territory. Although the ECtHR and the Venice Commission have noted that some government officials are expected to act with restraint when speaking in public, elected officials enjoy increased protection[103] and a high level of protection of their freedom of expression.[104] As underlined above, political opinion, support or activism towards the formation of a new state or secession of part of the territory via peaceful means, whether pursuant to the right to self-determination or not, should not be criminalized unless it crosses the line into incitement to violence, resorting to undemocratic means or to commit established crimes that are themselves compliant with international human rights standards.

51. In light of the foregoing, as the newly introduced Article 340[1] (1) of the Criminal Code refers only to "actions" without further defining or circumscribing the material and mental elements of the criminal offences, it is likely that its application could cover mere expression and non-violent actions, and therefore may lead to violations of fundamental human rights. **If retained at all, it is necessary that the Criminal Code defines "separatism" and related actions as narrowly and precisely as possible, and mutually consistent. The material elements of the offence should be more strictly circumscribed and require some elements of violence or other criminal means or incitement to violence defined in accordance with international human rights standards** (see para. 25 above). **The said provision of the Criminal Code should in addition include a clear and precise definition of the mental element or required criminal intent (*mens rea*) of the criminal offence of "separatism".** It must be noted that, even where the actions are non-violent, certain actions may be circumscribed where their very impact or goal would undermine democratic principles and the constitutional order. As mentioned above political speech, support or advocacy for the formation of a new state, whether pursuant to the right to self-determination or not, should not be criminalized unless it crosses the line of incitement to violence or to commit established crimes that themselves are compliant with international human rights standards or could otherwise fall outside the protection of the ECHR and other international human rights instruments.

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[101] See ECtHR, *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000.

[102] The ECtHR has stressed on numerous occasions that "*the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organizations, whose activities are an essential element of informed public debate*"; see e.g., ECtHR, *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 8 November 2016, para. 166.

[103] Venice Commission, *Report on the criminal liability for peaceful calls for radical constitutional change from the standpoint of the European Convention on Human Rights* (8 Oct. 2020), CDL-AD(2020)028-e, paras. 47–48.

Ibid. para. 48; see also ECtHR, *Incal v. Turkey*, [GC], no. 22678/93, 9 June 1998, para. 46.

52. Article 340[1] (2) extends criminal responsibility to "*instigation to separatism*". As noted above, to avoid undue limitations to freedom of expression, for forms of expression to constitute "*incitement*" that is prohibited, the following three criteria should be met cumulatively: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[105] In addition, while direct public incitement to violence may be legitimately subject to criminalization subject to these caveats, **Article 340[1] (2) also covers indirect incitement, raising concerns as to the principle of remoteness in criminal law.**[106] As a comparison, in relation to counter-terrorism and human rights, a key element recommended by the UN Secretary General reports is "direct and public" incitement.[107] The UN Special Rapporteur on counter-terrorism and human rights indicates, among other material and mental elements, that there should be a real danger arising from the impugned speech and the individual should act in this knowledge.[108]

53. As for Article 340[1] (1), without confining "instigation" and related actions to public calls for violence and incitement to violence capturing the above elements of intent to incite imminent violence and direct and immediate connection between the expression and likelihood or occurrence of violence, Article 340[1] (2) may lead to undue restrictions to freedom of expression, including political debate, journalist work as well as work of human rights defenders and non-governmental organizations (see section III.2). In particular, the said criminal offence could potentially capture writings and speeches peacefully advocating for different territorial arrangement, secession or autonomy, or other expressions and actions protected under Articles 10 and 11 of the ECHR, or political movements expressly critical of the incumbent government and constitutional order, even if there is no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles. Also, no guidance is given in the adopted amendments on the mental element related to e.g., individuals distributing information with the intent to act and to cause the harm, or at least, to create a serious risk of foreseeable harm by inciting imminent violence or commission of criminal acts.

54. In light of the above, if retained at all, **Article 340[1] (2) should be more strictly circumscribed to reflect the constitutive elements of incitement to violence as defined by international human rights standards, and especially require the mental element of intent to incite imminent violence or commission of criminal acts**. In addition, in order to more clearly delineate the said criminal offences under Article 340[1](1) and (2), and ensure that they do not lead to undue restrictions on the right to freedom of expression, especially as regards journalists, other considered to exercise "journalistic functions, and legitimate human rights work, **it will also be important to**

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[105] See UN Special Rapporteur on freedom of opinion and expression (hereafter "UN Special Rapporteur on freedom of expression"), the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information (hereafter "the International Special Rapporteurs/Representatives on Freedom of Expression"), *2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism*, 3 May 2016, par 2 (d); and Principle 6 of the *Johannesburg Principles on Freedom of Expression and National Security* (1995). See also UN Secretary General, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, A/63/337, 28 August 2008, par 62. See also UN Special Rapporteur on Counter-Terrorism and Human Rights, *Report on her visit to Kazakhstan*, UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 14, where the UN Special Rapporteur noted that there must be "*a direct and immediate connection between the action… and the actual (i.e. objective) risk of terrorist acts being committed*". See also the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, which provides that to prove inchoate crimes there should least be a causal link or actual risk of the proscribed result occurring.

[106] The principle of remoteness is a legal limit on the liability that can be imposed on a party for breach of contract. Even if a breach has caused a particular loss, the loss may be deemed too "remote", or unforeseeable, in relation to the breach for the breaching party to be responsible for that loss. See also *Inciting Terrorism? Crimes of Expression and the Limits of the Law*.

[107] UN General Assembly, *Report of the Secretary-General, The protection of human rights and fundamental freedoms while countering terrorism*, A/63/337, 28 August 2008, para. 62.

[108] See UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in countering terrorism, A/HRC/16/51, 22 December 2010, para. 31. A model offence of incitement to terrorism was also provided in paragraphs 29-32 of the report.

include legal defences or principles leading to the exclusion of criminal liability in certain cases, for instance when the acts or statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics, arts or some other issue of public interest.[109]

55. Article 340[1] (5) defines financing of "separatism" as "*the intentional provision or collection, using any methods, directly or indirectly, of any goods acquired by any means in order to use these goods, fully or partially, for the organization, preparation or committing of separatist actions, or delivering financial services in order to use these goods or services or being aware that these will be used, fully or partially, for the organization, preparation or committing of separatist actions*." This could apply to a host of daily activities. In particular, the reference to "any methods, directly or indirectly" and the provision of "*any goods acquired by any means*" is of an unspecified nature and goes beyond "*financing*" as such. These broader forms of engagement are uncertain as to their scope. **Hence, there is a significant lack of clarity about what forms such assistance may take, which raises concern in terms of compliance with the principle of legality, foreseeability and specificity of criminal law.** Regarding the mental element (*mens rea*) for support in the form of "financing", it is also important to circumscribe it in order to avoid overbroad application, which as noted above, may be significant in terms of gender implications (see section III.2 above). Hence, to circumscribe more strictly the said criminal offence, it is recommended **to specify that the individual must have intended or actually known that they were supporting/financing criminal actions defined in accordance with the above recommendations**.

56. Lastly, Article 352[2] of the Criminal Code makes it a felony for an "*individual who, being aware of the preparation, attempt or perpetration of one of the offenses set out in Articles 337-340[1], 343, fails to denounce to the state authorities*." Positively, this provision excludes family members, which should in principle prevent the potential discriminatory impact on women of support or preparatory offences that has been noted in other contexts[110] (see para. 18 above). The criminalization of omission, while permissible, should therefore be only used in exceptional cases and in accordance with the specific responsibilities of individuals. The way this provision is drafted may also be used to penalize journalists who receive information from insiders that relate to state secrets or other national security information. The UN Human Rights Council has opined that States should recognize the right of journalists not to reveal their sources as this is essential to their work and to ensuring the realization of the right to freedom of expression.[111] **This provision should be tailored to allow for the narrow exception to ensure that journalists are not penalized for failure to reveal their sources. Similarly, individuals who become aware of such facts through information obtained from privileged communications, such as those between the accused and his/her defence counsel, a priest (and related secret confession), his/her doctor/psychologist or psychiatrist, should also benefit from an exception**.[112]

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109 As a comparison, with respect to the criminal offence of "terrorism", see e.g., ODIHR, *Note on the Proposed Revision of the Definition of Terrorist Offences in Article 1 of the Council of Europe Convention on the Prevention of Terrorism* (28 September 2023), para. 24.

110 See e.g., *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020), para. 69. See also as a comparison, regarding counter-terrorism, UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019), pp. 41-42.

111 UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (12 September 2011), para. 45.

112 See e.g., ODIHR, *Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (2014), para. 115.

RECOMMENDATION B.1.

If the criminal offence of "separatism" is retained at all, to ensure that Article 340[1] (1) defines "separatism" and related actions as narrowly and precisely as possible, to meet the principles of legal certainty, foreseeability, and specificity of criminal law, including by:

- strictly circumscribing the material elements of the offence, while requiring some elements of violence or other criminal means or incitement to violence defined in accordance with international human rights standards; and
- providing a clear and precise definition of the required criminal intent (*mens rea*) of the offence.

RECOMMENDATION B.2.

To confine 340[1] (2) to incitement to violent actions or actions that result in a real foreseeable risk of violent action, while also requiring the mental element of intent to incite imminent violence or commission of criminal acts.

RECOMMENDATION B.3.

To more strictly circumscribe the criminal offence in Article 340[1] (5) on financing of "separatism" by more clearly defining the forms the assistance may take and limiting the mental element (*mens rea*) for support in the form of "financing" by requiring that the individual must have intended or actually known that they were supporting/financing criminal actions.

RECOMMENDATION B.4.

To include legal defences or principles leading to the exclusion of criminal liability in certain cases, for instance when the acts or statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics, arts or some other issue of public interest.

RECOMMENDATION B.5.

To tailor Article 352[2] to allow a narrow exception to ensure that journalists are not penalized for failure to reveal their sources and that individuals who have received information obtained from privileged communications, such as those between the accused and his/her defence counsel, a priest (and related secret confession), his/her doctor/psychologist or psychiatrist also benefit from this exception.

4. PROHIBITION OF "ILLEGAL INTELLIGENCE STRUCTURES"

57. New Article 134[24] of the Criminal Code defines an "illegal intelligence structure" as "*any organization created outside the constitutional and legal regulations of the State for the purpose of collecting and processing the information that constitutes state secrets or other information that can be used for committing actions that harms the sovereignty, independence, territorial inviolability, state security or defense capacity of the Republic of Moldova, or for the purpose of recruiting persons in order to support such actions.*" Newly introduced Article 338[1] criminalizes (with imprisonment for 7 to 10 years) the *"[i]nitiation of establishment, organization and setting up on the territory of the Republic*

of Moldova of an illegal intelligence structure or recruiting, instigation for recruiting of persons for the purpose of committing actions that harm the sovereignty, independence, territorial inviolability, state security or defense capacity of the Republic of Moldova."

58. The meaning and nature of a "structure" is unclear. One way to read it is to presume that the article refers here to any secret intelligence service controlled by another state or by non-state actors. However, it could also presumably apply to any informal associations or groupings, think tanks, civil society organizations, online communities, etc. It is also advisable to clarify whether "*outside constitutional and legal regulations of the State*" refers to the establishment or operation of an organization performing functions or activities that can only be performed by governmental bodies or otherwise violates requirements of the legislation or international law. It is important to ensure that the law does not violate the right to freedom of association, which protects both formal and informal associations, and hence also groups that are not registered as associations under applicable legal regulations of the state.[113] Hence it is recommended that instead of referring to organizations created "*outside constitutional and legal regulations of the State*", a reference is made to the objectives or activities of such organizations being contrary to the constitutional order or pursuing aims that are inconsistent with international human rights standards. It is noted that associations may only be prohibited in very limited cases and as a measure of last resort, and only where an association's objectives and activities promote propaganda for war, the incitement of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as well as the achievement of goals that are inconsistent with democracy.[114]

59. The Criminal Code of some states include provisions pertaining to "unlawful organizations" or "anti-constitutional organizations"[115] but generally such provisions specify what is meant by unlawful/anti-constitutional by reference to the criminal nature of the activities/objectives of such organizations, for instance terrorism, violence, or glorification of violence, or other serious criminal offences thus narrowing the definition and allowing individuals and groups to adapt their behaviour in accordance with the law.

60. **Consequently, the definition of "illegal intelligence structure" should be more clearly circumscribed to comply with the principle of legal clarity and certainty, particularly by focusing on the entity's capacity for violence or commission of**

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[113] See ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 182. See also Council of Europe, *Fundamental Principles on the Status of Non-Governmental Organizations in Europe*, 13 November 2002, Principle 5. See also Council of Europe, *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, 10 October 2007, para. 3, which states that "*NGOs can be either informal bodies or organisations or ones which have legal personality*".

[114] *Ibid.* ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 179. See also e.g., ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 98.

[115] See e.g., in **Ireland,** the *Criminal Justice (Terrorist Offences) Act 2005*, which was enacted to give effect to United Nations Security Council Regulation 1373, defines "unlawful organisations" as including international terrorist groups, namely that *"[a] terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976"* with the *Offences Against the State Act 1939* defining the activities of "unlawful organizations", which among others include engagement, promotion, encouragement and advocacy for the (1) commission of treason or any activity of a treasonable nature, (2) procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, (3) commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law (4) attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means; in **Spain**, Article 515 of the Criminal Code defines the unlawfulness of an association with reference to "*1º Those whose purpose is to commit a crime or, after being constituted, promote its commission. 2.º Those that, although having as their object a lawful purpose, use violent means or alteration or control of personality to achieve it. 3º Paramilitary organizations. 4º Those that encourage, promote or incite directly or indirectly hatred, hostility, discrimination or violence against persons, groups or associations because of their ideology, religion or beliefs, the membership of their members or any of them to an ethnic group, race or nation, their national origin, their sex, age, sexual or gender orientation or identity, reasons of gender, aporophobia or social exclusion, family situation, illness or disability."* In **Lithuania**, Article 121 of the Criminal Code criminalizes the "Creation of Anti-constitutional Groups or Organisations and Participation in Activities Thereof" as follows: "*A person who created organisations or armed groups with the aim of unlawfully altering the constitutional system of the State of Lithuania, making an attempt against its independence, infringing upon territorial integrity or who participated in the activities of such organisations or groups shall be punished by a custodial sentence for a term of three up to ten years*."

serious criminal offences defined in accordance with international human rights standards.

61. In addition, the amendments make it a criminal offence to create an "illegal intelligence structure" and to "plot against the Republic of Moldova". This latter offence entails the establishment and maintaining of relationships with a foreign state, foreign organization, "anti-constitutional entity" or their representatives for committing the acts as provided for by Article 337 (high treason), Article 338 (espionage), Article 338[1] (creation of illegal intelligence structure) and Article 340[1] (separatism) or the acceptance to engage in such activity. The new Article 338[3] also makes the collection and appropriation of information for storage or use to harm the sovereignty, independence, territorial inviolability, state security or defence capacity of the Republic of Moldova an offence, even if it does not constitute treason or espionage.

62. In these provisions, there is no clear definition of the "information" covered. It explicitly goes beyond "state secrets" to cover "other information" that could be used in a harmful manner. Article 121 of the Criminal Code defines "state secret" as the information defined as such by Law no. 245-XVI of 27 November 2008 on State Secrecy, which is not subject to the current legal analysis.[116] At the same time, there is no clarity as to what will be covered by "other information" beyond information that has already been classified in domestic law. The use of criminal law to counter espionage activity and the communication of "state secrets" is legitimate and generally falling within the scope of criminal provisions on "high treason" or "espionage" in other countries. **However, it is recommended to remove or clarify the term "other information" in Article 134[24].**

63. The ambiguity and possibility of arbitrary application of Articles 134[24] and 338[1] of the Criminal Code raise concerns as to their compatibility with rule of law principles, and international human rights law requiring that interference with rights be clearly prescribed by law. The provisions are particularly worrying as they risk to negatively impact the right to freedom of association or result in excessive oversight of their operations, and widespread curtailing of privacy in the name of national security. It is notable that the provision refers to the "collection and processing" of information, not only the sharing or publishing of certain information etc. There is a danger of journalists receiving information, even if they do not follow upon this information, being brought within the scope of the law in this way. It is broadened out by the purpose of "*recruiting people in order to provide support in such actions*." As noted, the role of civil society organizations and others engaged in monitoring state activities, receiving and, where necessary, sharing information in this respect could potentially fall within the scope of this criminal offence.

64. Lastly, there are no provisions that suggest that information of public concern, such as information relating to violations of human rights, or corruption, would be excluded. For example, it is unclear whether these provisions as currently worded may capture *bona fide* journalism, particularly one that is based on whistle-blower testimony. This possibility may be tempered to an extent by the clarification that it only refers to "*any organization created outside the constitutional and legal regulations of the State*". As most journalistic organizations are created within legal regulations, they may not be captured by this definition. However, it may, nevertheless, still apply to an *ad-hoc* group of freelance journalists who seek to publish their findings outside of traditional news outlets, including online, or also – as underlined above – to other entities, beyond

[116] It should be noted that the rules and regulations regarding the classification of information and "state secrets" is sometimes abused and may unduly impact the right to access to information guaranteed by Article 19 of the ICCPR and Article 10 of the ECHR. For instance, in the context of counter-terrorism, the UN Special Rapporteur on counter-terrorism and human rights has raised concerns about the adoption of policies of secrecy by States to shield serious violations of human rights; see *2009 Annual Report*, UN Doc. A/HRC/10/3, 4 February 2009, par 49.

journalists and the media, carrying out "journalistic function", including non-governmental organizations and human rights defenders, which should deserve similar protection. There is also a danger that public officials reporting corruption, civil society organizations denouncing violations and others with legitimate reasons to share information would nonetheless fall under this provision. **Consequently, enhancements to this provision should centre upon improving the definition of "illegal intelligence structures" to ensure that it does not encompass organizations protected by the right to freedom of association but rather refers to organizations performing functions that can only be performed by governmental bodies and/or pursues aims that go against the constitutional order and are inconsistent with international human rights standards. These provisions could also be further improved by the inclusion of an express public interest exception/defence and exemption from criminal liability for *bona fide* communication of information of public interest.**

65. The title of Article 338[1] "Establishment of an illegal intelligence structure", is a misnomer as the text seems to include activities that go beyond those intentionally "establishing an unlawful structure", and cover broad and ill-defined crimes of recruitment or instigating recruitment to commit acts to the detriment of sovereignty. The scope of those acts and of sovereignty, security, and defence capacity are undefined. For example, actions to the detriment of defence capacity could potentially cover organized activism opposing defence spending. Further, "instigating the recruitment" of others is not sufficiently certain and requires elaboration. This provision poses real threats to the enjoyment of the freedom of expression, especially with regard to political speech, and raises concern as to the standards of criminal law laid out above seeing the minimum penalties for 7 years, as well as liquidation of the "entity".

RECOMMENDATION C.

To clarify and more strictly circumscribe the definition of "illegal intelligence structure" and the criminal offence of establishing such structures, including by:

- removing the reference to "other information" or clarifying its meaning;
- more strictly circumscribing the definition of "illegal intelligence structures" to ensure that it does not encompass organizations protected by the right to freedom of association;
- including an express public interest exception/defence and exemption from criminal liability for *bona fide* communication of information of public interest.

5. On the New Concept of "Anti-Constitutional Entity"

66. The adopted amendments introduce a new concept of an "anti-constitutional entity", which new Article 134[23] of the Criminal Code defines as "*an alleged authority created on the territory of a State, outside the constitutional regulations of the State and which is not recognized according to the provisions of international treaties*." The purpose of introducing this new concept is to broaden the scope of two already existing criminal offences of treason (Article 337) and espionage (Article 338) to cover the disclosure, transmission, stealing or collection of state secrets not only for the benefit of "*foreign state, foreign organization or their representatives*" but also so-called "*anti-constitutional entities*".

67. Whilst a state may legitimately respond to a threat coming from areas outside of its effective control, it is important that relevant legislation is drafted in precise terms and in a manner avoiding unintended and problematic consequences. As mentioned above, a definition would raise rule of law concerns if it lacks clarity and certainty. The definition in Article 134^{23} focuses exclusively on the composition of the entity, rather than its purpose; namely, that it is an "alleged authority" "outside the regulations of the state" and "not recognized according to the provisions of international treaties". This narrows the definition to an extent, though it is unclear what an *alleged* authority entails. It is of particular importance that this definition is clarified as it is introduced in other criminal law provisions, including on high treason and espionage.

68. In order to avoid potential overbroad or erroneous application of the law, it is recommended to provide further guidance, avoiding potential unjustified restrictions over, for example, civil society groups, or groups of individuals who seek to form *ad hoc* organizations and falling outside of the effective control of the state authorities, without seeking legal recognition or registration by those state authorities. They may do so for a variety of reasons, many of which are innocent or innocuous. For instance, a group may see no need to make its existence "official" due to the informal nature of its structure, the minimal importance of their common purpose, or the lack of any need for shared resources. While the reference to *authority* seems to exclude civil society or groups of individuals, the provision on espionage for example gives some leeway to broadly apply the notion of 'alleged authority' of "an anti-constitutional entity". The scope of this provision on anti-constitutional entity, especially in light of the other provisions, could also unintentionally affect legitimate relations that, for example, international organizations keep with groups and entities active on territories outside the state authorities' effective control.

69. **As currently worded, the definition as to the type of activity an entity must engage in for it to constitute an "anti-constitutional entity" does not provide sufficient guidance, especially taking into account other provisions of the criminal law referencing this term. Consequently, it makes it difficult to foresee in advance the impact of the criminal legislation, actions that may be subject to criminal prosecution, as well as having potential to target legitimate activities of individuals or civil society groups; the said criminal provisions would thus benefit from further improvement, ensuring clarity and certainty which are fundamental tenets of the rule of law.**

70. **Consequently, the definition of "anti-constitutional entity" should be more clearly circumscribed to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity for violence or commission of serious criminal offences defined in accordance with international human rights standards. This provision should be revised to ensure the respect for the right to freedom of association and related principles.**

RECOMMENDATION D.

To more clearly circumscribe the notion of "anti-constitutional entity" to comply with the principle of legal clarity and certainty, particularly by focusing on the capacity for violence or commission of serious criminal offences defined in accordance with international human rights standards, or targeting other activities performed in violation of constitutional order and

requirements of international law, avoiding unjustified restrictions on legitimate and innocuous activities of individuals or civil society groups.

6. RECOMMENDATIONS RELATED TO THE REFORM PROCESS

71. OSCE participating States committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, paragraph 5.8).[117] Moreover, these commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, paragraph 18.1).[118] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[119]

72. Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[120] To guarantee effective participation, consultation mechanisms should allow for input at an early stage and throughout the process, meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament.

73. In the present context, the amendments were adopted in second reading on 2 February 2023 after a first reading on 22 December 2022. Given the wide range of human rights implications these amendments may have, it was essential to allocate sufficient time for the consideration of the then draft amendments and to allow a meaningful, inclusive and transparent consultation process. The timeline in which the amendments were adopted indicates that such a thorough assessment and inclusive engagement of various stakeholders may not have been feasible. Given the sensitivity of the adopted amendments to the Criminal Code, it is fundamental that their implementation be monitored and their effects/impact evaluated after some time.[121]

74. In light of the above, the authorities are encouraged to ensure that any future reform process is subject to a transparent and inclusive process that involves meaningful consultations throughout the legislative process, including with representatives of various political parties, academia, civil society organizations, including representing national minorities, which should also enable equal opportunities for women and men to participate.

[END OF TEXT]

[117] See *1990 OSCE Copenhagen Document*.
[118] See *1991 OSCE Moscow Document*.
[119] See Venice Commission, *Rule of Law Checklist*, Part II.A.5.
[120] See ODIHR, *Guiding Principles of Democratic Lawmaking and Better Laws* (9 October 2023), Principle 7. According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information.
[121] See ODIHR, *Guiding Principles of Democratic Lawmaking and Better Laws* (9 October 2023), Principle 5. See also e.g., OECD, Better Regulation Practices Across the European Union, Chapter 4: Ex Post Review of Laws and Regulations Across the European Union.

ANNEX – RELEVANT EXCERPTS FROM THE AMENDMENTS TO THE CRIMINAL CODE OF THE REPUBLIC OF MOLDOVA ADOPTED ON 2 FEBRUARY 2023

Art. 134[23]. Anti-constitutional entity

An anti-constitutional entity is defined as an alleged authority created on the territory of a State, outside the constitutional regulations of the State and which is not recognized according to the provisions of international treaties.

Art. 134[24]. Illegal intelligence structure

An illegal intelligence structure is defined as any organization created outside the constitutional and legal regulations of the State for the purpose of collecting and processing the information that constitutes state secrets or other information that can be used for committing actions that harms the sovereignty, independence, territorial inviolability, state security or defence capacity of the Republic of Moldova, or for the purpose of recruiting persons in order to support such actions.

Art. 338[1]. Creation of illegal intelligence structure

Initiation of establishment, organization and setting up on the territory of the Republic of Moldova of an illegal intelligence structure or recruiting, instigation for recruiting of persons for the purpose of committing actions that harm the sovereignty, independence, territorial inviolability, state security or defense capacity of the Republic of Moldova,

shall be punishable by imprisonment for a term of 7 to 10 years, in both cases with the deprivation of the right to hold certain positions or to practice certain activities for a term of 2 to 5 years, whereas a legal entity shall be punished by a fine in the amount of 4,000 to 8,000 conventional units with liquidation of legal entity.

Art. 340[1]. Separatism

(1) Separatism, meaning actions committed for the purpose of separating a part of the territory of the Republic of Moldova,

shall be punishable by imprisonment for a term of 2 to 6 years, whereas a legal entity shall be punishable by a fine in the amount of 3,000 to 5,000 conventional units with the deprivation of the right to practice certain activities or by its liquidation.

(2) Instigation to separatism, as well as the distribution of goods, production and/or distribution, in any form and by any means, of materials and/or information that incite separatism,

shall be punishable by a fine in the amount of 700 to 1500 conventional units or by imprisonment for up to 3 years, with the deprivation of the right to hold certain positions or to practice certain activities for a term of 2 to 5 years, whereas a legal person shall be punished by a fine in the amount of 2,000 to 3,000 conventional units with the deprivation of the right to practice certain activities or by its liquidation.

(3) The actions set forth in para. (1) or (2) committed by a public official, an official holding a position of responsibility, a person holding public office, a foreign public official or an international civil servant,

shall be punishable by imprisonment for a term of 3 to 7 years, with the deprivation of the right to hold certain positions or to practice certain activities for a term of 5 to 10 years.

(4) The actions set forth in para. (1) involving:

a) violence dangerous to the person's life or health;

b) use of firearms or explosive substances;

c) the causing material damage in particularly large proportions;

d) committed upon the instruction of a foreign state, anti-constitutional entity or their representatives,

shall be punishable by imprisonment for a term of 7 to 12 years, with the deprivation of the right to hold certain positions or to practice certain activities for a term of 7 to 15 years.

(5) Financing separatism, meaning the intentional provision or collection, by any means, directly or indirectly, of goods of any kind acquired by any means in order to use these goods, in whole or in part, for the organization, preparation or committing of separatist actions, or delivering financial services in order to use these goods or services or knowing that they will be used, in whole or in part, for the organization, preparation or committing of separatist actions

shall be punishable by imprisonment for a term of 5 to 10 years, with the deprivation of the right to hold certain positions or to practice certain activities for a term of 6 to 12 years, and legal person by a fine in the amount of 12,000 to 15,000 conventional units with its liquidation.