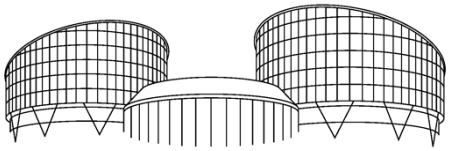

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

ADVISORY OPINION

concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law

Requested by

the Armenian Constitutional Court

(Request no. P16-2019-001)

STRASBOURG

29 May 2020

This opinion is final but it may be subject to editorial revision.

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Linos-Alexandre Sicilianos, President
Robert Spano
Jon Fridrik Kjølbro
Ksenija Turković
Paul Lemmens
Síofra O'Leary
Ganna Yudkivska
André Potocki
Egidijus Kūris
Iulia Antoanella Motoc
Georges Ravarani
Pauliine Koskelo
Marko Bošnjak
Jovan Ilievski
Jolien Schukking
Gilberto Felici, judges
Arman Sarvarian, ad hoc judge

and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 21 April, 7 May and 15 May 2020,

Delivers the following opinion, which was adopted on the last-mentioned date:

PROCEDURE

1. In a letter of 2 August 2019 sent to the Registrar of the European Court of Human Rights ("the Court"), the Armenian Constitutional Court requested the Court, under Article 1 of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Protocol No. 16"), to give an advisory opinion on the questions set out at paragraph 11 below. That request arose in the context of two cases currently pending before that court relating to protests which took place in Armenia between late February and early March 2008 and in which questions arose regarding the interpretation and application of the provision of the Armenian criminal code which penalised the overthrowing of the Armenian constitutional order (see paragraph 26 below for the relevant provision).

2. On 26 August and 2 September 2019 the Constitutional Court provided further materials and explanations as requested by the Court. The advisory opinion request was therefore considered by the Court to have been formally lodged on the latter date.

3. The judge elected in respect of Armenia, Mr Armen Harutyunyan, was unable to sit (Rule 28 of the Rules of Court). Accordingly, the President

decided to appoint Dr Arman Sarvarian to sit as *ad hoc* judge (Article 2 § 3 of Protocol No. 16 and Rules 29 § 1 and 93 § 1.1(d)).

4. On 2 October 2019 the panel of five judges of the Grand Chamber of the Court, composed in accordance with Article 2 § 3 of Protocol No. 16 and Rule 93 § 1 of the Rules of Court, decided to accept the request.

5. The composition of the Grand Chamber was determined on 7 October 2019 in accordance with Rules 24 § 2 (h) and 94 § 1.

6. By letters of 9 October 2019 the Registrar informed the parties to the domestic proceedings that the President was inviting them to submit to the Court written observations on the request for an advisory opinion, by 19 November 2019 (Article 3 of Protocol No. 16 and Rule 94 § 3). Within that time-limit, written observations were submitted by the Armenian National Assembly and by Mr Kocharyan.

7. The Armenian Government ("the Government") submitted written observations under Article 3 of Protocol No. 16. The Commissioner for Human Rights of the Council of Europe did not avail herself of that right.

8. Written observations were also received from the Helsinki Association for Human Rights, and by Mr Yegoryan on behalf of the family members of the victims of the events of 1-2 March 2008. Both had been granted leave by the President to intervene (Article 3 of Protocol No. 16). A further non-governmental organisation, "Path of Law", had also been granted leave to intervene by the President. It failed to submit its written observations within the time-limit fixed. The President refused its request for an extension of that time-limit.

9. Copies of the observations received were transmitted to the Constitutional Court, which did not submit any observations (Rule 94 § 5).

10. After the close of the written procedure, the President of the Grand Chamber decided that no oral hearing should be held (Rule 94 § 6).

THE QUESTIONS ASKED

11. The questions asked by the Constitutional Court in the request for an advisory opinion were worded as follows:

> "1) Does the concept of 'law' under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8-11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
>
> 2) If not, what are the standards of delineation?
>
> 3) Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?
>
> 4) In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?"

12. In parallel, by a letter sent on the same date as the advisory opinion request (see paragraph 1 above) the Armenian Constitutional Court asked the European Commission for Democracy through Law (Venice Commission) for an *amicus curiae* brief on questions of comparative constitutional law and of international law.

THE BACKGROUND AND THE DOMESTIC PROCEEDINGS GIVING RISE TO THE REQUEST FOR AN OPINION

13. Mr Robert Kocharyan was the President of Armenia between 1998 and 2008. A presidential election was held in Armenia on 19 February 2008. The main contenders were the then Prime Minister, Mr Serzh Sargsyan, belonging to the same party as President Kocharyan, and the main opposition candidate, Mr Levon Ter-Petrosyan, who had also served as President of Armenia between 1991 and 1998. On 24 February the Central Election Commission announced that Prime Minister Serzh Sargsyan had won the election with around 52% of all votes cast, while Mr Levon Ter-Petrosyan had received around 21% of votes.

14. From 20 February 2008 onwards daily nationwide protests were held in Armenia by Mr Ter-Petrosyan's supporters and thousands of other concerned citizens who believed that the presidential election had not been free and fair. Their main meeting point in Yerevan was Freedom Square, where some of the protesters even stayed around the clock, having set up a camp. In the early morning of 1 March 2008, around 6.30 a.m., a major police operation involving at least 800 police officers and special forces was carried out at Freedom Square, resulting in the violent dispersal of protesters camping or otherwise present in the square. This led later in the day to a major escalation and standoff between, on the one hand, the protesters and thousands of other disgruntled citizens who had poured into the streets of Yerevan in response to the morning's events and, on the other hand, the law-enforcement authorities. It appears that numerous clashes took place and at some point even the army was brought in to quell the protest. The standoff continued until the early morning of 2 March 2008 and resulted in ten deaths (eight civilians and two law-enforcement officers) and a declaration of a state of emergency by Mr Kocharyan, which put a restriction on the enjoyment of a number of rights for a period of twenty days, including the right to freedom of assembly.

15. In April 2018 events known as the "Velvet Revolution" led to the resignation of Mr Serzh Sargsyan, who was at that time again Prime Minister, after two terms as President of Armenia. Subsequently, the leader of the protest movement, Nikol Pashinyan, was elected Prime Minister.

16. On 27 July 2018 Mr Kocharyan, and later a number of other individuals, were charged with overthrowing the constitutional order of Armenia under Article 300.1 § 1 of the 2009 Criminal Code ("the 2009 CC") in connection with the above-mentioned events and placed in pre-trial detention. Mr Kocharyan was in substance accused of:

> (a) unlawfully involving the Armed Forces, as well as unlawfully armed civilians, in the post-election political situation and thereby *de facto* eliminating the relevant provisions of the constitutional order by usurping power;
>
> (b) as Commander-in-Chief, instructing the use of the armed forces in political matters against civilians participating in peaceful protests, which had led to an unconstitutional engagement of army units by creating a new unlawful structure of military command and by withdrawing those units, during the night of 24 February 2008, from the locations of their deployment, including the national frontier, and moving them to military bases located in Yerevan and nearby;
>
> (c) having full knowledge of the police operation of 1 March 2008 forcing hundreds of peaceful protesters present in the Freedom Square to disperse with the unlawful use of force and then continuing using such force against protesters in central parts of Yerevan in order to prevent possible demonstrations; and
>
> (d) in the absence of a direct threat to the constitutional order, declaring a state of emergency on 1 March 2008 for a period of twenty days in violation of the Constitution and in the absence of a law regulating the legal framework of a state of emergency, and enabling measures and temporary restrictions as envisaged by the Martial Law Act. The restrictions under the state of emergency included prohibitions on freedom of assembly and demonstration, freedom of association, freedom of movement, freedom to disseminate information on public affairs via non-public media outlets, dissemination of leaflets and other forms of political propaganda, suspension of the activities of political parties and non-governmental organisations obstructing the elimination of the circumstances giving rise to the state of emergency, and expulsion of non-residents violating the state of emergency.

According to the indictment, the acts in question were aimed at overthrowing the constitutional order of Armenia prescribed by Articles 1, 2, 3 and 5 and Article 6 § 1 of the 2005 Constitution.

17. Following an investigation, on 29 April 2019 the criminal case was referred for trial to the First-Instance Court of General Jurisdiction of Yerevan. On 9 May 2019 the First-Instance Court declared the case admissible and on 20 May 2019, without entering into the judicial examination stage (see paragraph 20 below), it decided to suspend the criminal proceedings and to apply to the Constitutional Court – under Article 169 § 4 of the Constitution – with a request to determine, *inter alia*, the compatibility of Article 300.1 of the 2009 CC with Articles 72, 73 and 79 of the Constitution of 2015. The First-Instance Court expressed doubts as to whether Article 300.1 of the 2009 CC, which was to be applied in the case before it, met the requirement of legal certainty and whether, having entered into force on 24 March 2009, it had worsened the legal situation of a person in comparison to Article 300 of the CC, which had been in force at the time when the alleged offence had been committed.

18. On 30 May and 4 June 2019 Mr Kocharyan also lodged two applications with the Constitutional Court – under Article 169 § 1 (8) of the Constitution – seeking to determine the compatibility of Article 300.1 of the 2009 CC with Articles 72, 73, 78 and 79 of the Constitution of 2015. Referring to the judicial decisions ordering his detention, he argued that (a) Article 300.1 of the 2009 CC, which had been applied in his case, had not existed at the material time; (b) former Article 300 of the CC and new Article 300.1 of the CC essentially differed from each other and consequently the application of Article 300.1 of the CC in his case violated his rights guaranteed by Articles 72 and 73 of the Constitution of 2015; and (c) Article 300.1 of the 2009 CC failed to meet the requirement of legal certainty guaranteed by Article 79 of the Constitution of 2015, in particular because the wording "terminating the validity of [a constitutional] norm in the legal system" was not specific and foreseeable in its application. Relying on, *inter alia*, Articles 5 and 7 of the Convention, he argued that, since he had been charged and detained on the basis of Article 300.1 of the 2009 CC, his applications contesting the constitutionality of that provision met the admissibility requirements set out in Article 169 § 1 (8) of the Constitution. He also argued that no case-law had been developed since 2009 clarifying the meaning of Article 300.1 of the CC.

19. On 21 June 2019 the Constitutional Court, by two rulings, decided to declare admissible and examine jointly the two applications submitted by Mr Kocharyan. No reasons were provided for these rulings. A similar ruling declaring admissible the request submitted by the First-Instance Court was given on 8 July 2019.

20. In the meantime, on 25 June 2019, upon an appeal by the prosecutor, the Criminal Court of Appeal (hereinafter "the Court of Appeal") quashed the First-Instance Court's decision of 20 May 2019 and remitted the criminal case to the latter for it to resume the criminal proceedings. It found that the First-Instance Court had not yet entered into the stage of judicial examination and had not carried out a sufficient examination of the factual background related to the disputed questions. It could not therefore, at this stage of the proceedings, reach a conclusion as to the existence or absence of well-founded doubts regarding the constitutionality of the legal provision to be applied in the case.

21. It appears that the decision of the Court of Appeal was contested before the Court of Cassation and that those proceedings are currently pending. No information or documents have been provided concerning the proceedings before the Court of Cassation. Nor has information been provided regarding the continuation of the proceedings before the First-Instance Court following the remittal.

22. According to the information available to the Court, Mr Kocharyan is still in pre-trial detention.

RELEVANT DOMESTIC LAW

23. The relevant provisions of the Armenian Criminal Code and the Armenian Constitution read as follows.

I. THE CRIMINAL CODE

A. Version of the Criminal Code in force at the time of the alleged commission of the offences

24. Articles 12 and 13 of the Criminal Code, dealing with the operation of the criminal law in time and the retroactive effect of criminal law, read as follows. They were not changed by the 2009 amendment of the Criminal Code.

Article 12 – Operation of the criminal law in time

"1. The criminality and punishability of an act shall be determined by the criminal law in force at the time of the commission of the offence.

2. The time of the commission of an offence is the time when a socially dangerous act (or omission) was committed, regardless of when the consequences started to take effect."

Article 13 – Retroactive effect of criminal law

"1. A law eliminating the criminality of an act, mitigating the punishment or improving the status of the offender in any way shall have retroactive effect, that is, it shall apply to the persons who committed the act in question before the law had taken effect, including those persons who are serving the punishment, or have served the punishment but still have a criminal record.

2. A law establishing the criminality of an act, making the punishment more severe or worsening the status of the offender in any other way shall have no retroactive effect.

3. A law partially mitigating the punishment and, at the same time, partially making the punishment more severe shall have retroactive effect only in so far as it mitigates the punishment."

25. In the Criminal Code in force at the material time, overthrowing the constitutional order was punishable under Article 300, entitled "Usurpation of power". That Article read as follows:

Article 300 – Usurpation of power

"1. Usurpation of State power, that is, actions aimed at the violent seizure of State power or its violent retention in violation of the Constitution, as well as the violent overthrow of the constitutional order of Armenia or a violent breach of the territorial integrity of Armenia, shall be punishable by imprisonment for a period of between ten and fifteen years."

B. Version of the Criminal Code in force since 24 March 2009 ("the 2009 CC")

26. The 2009 CC modified the definition of the offences of "usurpation of power" (Article 300) and "overthrowing the constitutional order" (Article 300.1). The amended Articles, in so far as relevant, read as follows:

Article 300 – Usurpation of State power

"1. Seizure of power through violence or the threat of violence, or seizure of the powers of the President, the National Assembly, the Government or the Constitutional Court through other means not prescribed by the Constitution, shall be punishable by imprisonment for a period of between ten and fifteen years.

2. Retention of power, that is, continuing to perform the powers of the President, a member of parliament, the Prime Minister or a minister after the end of the corresponding term of office, shall be punishable by imprisonment for a period of between ten and fifteen years."

Article 300.1 Overthrowing the constitutional order

"1. Overthrowing the constitutional order, that is, the *de facto* elimination of any of the norms prescribed by Articles 1 to 5 and paragraph 1 of Article 6 of the Constitution, by terminating the validity of that norm in the legal system, shall be punishable by imprisonment for a period of between ten and fifteen years."

II. THE CONSTITUTION

A. The Constitution as in force at the material time

27. At the time of the events, that is, in February and March 2008, the 2005 Constitution was in force. The Articles of the Constitution of relevance in the context of the present advisory opinion request read as follows:

Article 1

"The Republic of Armenia is a sovereign, democratic and social State governed by the rule of law."

Article 2

"In the Republic of Armenia, the power belongs to the people. The people shall exercise their power through free elections and referenda, as well as through State and local self-government authorities and officials as provided for by the Constitution. Usurpation of power by any organisation or individual shall be a crime."

Article 3

"The human being, his or her dignity and fundamental rights and freedoms are the highest values. The State shall ensure the protection of fundamental human and citizen's rights and freedoms, in conformity with the principles and norms of

international law. The State shall be bound by fundamental human and citizen's rights and freedoms as directly applicable law."

Article 4

"Elections of the President, the National Assembly and local self-government authorities, as well as referenda, shall be held on the basis of universal, equal and direct suffrage, by secret ballot."

Article 5

"State power shall be exercised in conformity with the Constitution and laws on the basis of the separation and balance of the legislative, executive and judicial powers. State and local self-government authorities and officials shall be entitled to perform only such actions for which they are authorised under the Constitution or laws."

Article 6

"1. The Constitution has supreme legal force and shall be directly applicable."

B. The 2015 Constitution

28. In 2015 a new Constitution entered into force, the relevant Articles of which provide as follows:

Article 1

"The Republic of Armenia is a sovereign, democratic and social State governed by the rule of law."

Article 2

"In the Republic of Armenia, the power belongs to the people. The people shall exercise their power through free elections and referenda, as well as through State and local self-government bodies and officials as provided for by the Constitution.

Usurpation of power by any organisation or individual shall be a crime."

Article 3

"The human being, his or her dignity, fundamental rights and freedoms

1. The human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms.

2. The respect for and protection of fundamental human and citizen's rights and freedoms shall be the duty of the public authorities.

3. The public authorities shall be bound by fundamental human and citizen's rights and freedoms as directly applicable law."

Article 4

"The principle of separation and balance of powers

State power shall be exercised in conformity with the Constitution and the laws, on the basis of separation and balance of the legislative, executive and judicial powers."

Article 5

"The hierarchy of legal norms

1. The Constitution shall have supreme legal force.

2. Laws must comply with constitutional law, whereas secondary regulatory instruments must comply with constitutional and statute law.

3. In the event of conflict between the norms of international treaties ratified by the Republic of Armenia and of laws, the norms of international treaties shall apply."

Article 6

"The principle of lawfulness

1. State and local self-government bodies and officials shall be entitled to perform only such actions for which they are authorised under the Constitution or laws.

..."

Article 72

"No one may be convicted for any act or omission which did not constitute an offence at the time when it was committed. Nor may a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. A law decriminalising an act or mitigating a penalty shall have retroactive force."

Article 73

"Laws and other legal instruments worsening the legal situation of a person shall have no retroactive force. Laws and other legal instruments improving the legal situation of a person shall have retroactive force if so provided by such instruments."

Article 78

"Any means chosen for restricting fundamental rights and freedoms must be suitable and necessary for the achievement of the objective prescribed by the Constitution. The means chosen for such restriction must be proportionate to the significance of the fundamental right or freedom being restricted."

Article 79

"When restricting fundamental rights and freedoms, laws must define the grounds and scope of such restrictions, and be sufficiently certain to enable persons exercising such rights and freedoms and being affected by them to regulate their conduct appropriately."

COMPARATIVE-LAW MATERIAL

29. The Court undertook a comparative-law survey covering forty-one States Parties to the Convention not including Armenia: Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus,

the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and the United Kingdom.

30. The survey addressed two issues. The first issue concerns the use of the "blanket reference" or "legislation by reference" technique for setting out the constituent elements of criminal offences in general and offences against the constitutional order of a country in particular. The second issue concerns the principle of non-retroactivity of (less favourable) criminal law and the principle of retrospective application of more favourable criminal law.

I. THE USE OF THE "BLANKET REFERENCE" OR "LEGISLATION BY REFERENCE" TECHNIQUE

31. Regarding the first issue the Court will use the terminology "blanket reference" or "legislation by reference" technique to denote the legislative technique where substantive provisions of criminal law, when setting out the constituent elements of criminal offences, refer to legal provisions outside criminal law. Moreover, the term "referencing provision" will be used to denote the (criminal-law) provision referring to a legal provision outside criminal law. The latter will be termed the "referenced provision" or "provision referred to".

32. The survey shows that a large majority of the forty-one member States covered by the survey, namely all except two (Malta and the Netherlands), make use of the "blanket reference" or "legislation by reference technique" in their criminal law in general. Twenty-one member States (Andorra, Azerbaijan, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Finland, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, North Macedonia, Norway, Poland, Romania, Russia, Serbia, Spain, Switzerland, Turkey and Ukraine) also have recourse to this technique in respect of criminal offences against the constitutional order of their country.

33. Among those member States making use of the "blanket reference" or "legislation by reference" technique in the definition of offences against the constitutional order, eleven member States (Azerbaijan, Bulgaria, the Czech Republic, Finland, Iceland, Italy, Norway, Poland, Russia, Switzerland and Ukraine) do so by referring either to general principles or to notions of constitutional law and three (Ireland, Latvia and Spain) by making reference to specific rules of constitutional law. The combined use of both is to be found in one member State (Turkey). References to other provisions, outside constitutional law, can be found in ten member States

(Andorra, Bosnia and Herzegovina, Bulgaria, Hungary, Latvia, Lithuania, North Macedonia, Romania, Russia and Serbia).

34. In twenty-six out of the forty-one legal systems surveyed (Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Montenegro, North Macedonia, Romania, Russia, Slovakia, Slovenia, Switzerland, Turkey and the United Kingdom), when use is being made of the "blanket reference" or "legislation by reference" technique, the relevant requirements concerning the principle of legality – including the level of precision of the criminal-law provisions in general (accessibility, clarity, certainty, foreseeability) – apply to the level of precision of the criminal-law provisions containing references to legal provisions outside criminal law, which accordingly extends the requisite level of precision to the legal provisions referred to.

35. In some legal systems, when use is made of the "blanket reference" or "legislation by reference technique", the domestic law (including domestic case-law and legislative practices) imposes some further requirements in this regard. These requirements relate to the precision and foreseeability of the law and pertain either to the referencing provision or to the referenced provision or to both provisions taken together. For instance, some legal systems require that references be explicit, or require that it must be foreseeable to which norm(s) the referencing provision refers. In some legal systems the referencing provision must set out the penalty and the essential elements of the offence. The referenced provision has only interpretative relevance in the sense that it may not extend the scope of criminalisation as set out in the referencing provision and, most importantly, both provisions taken together must enable the individual concerned to understand the constituent elements of the offence and to foresee what acts or omissions will make him or her criminally liable (various examples can be found in the case-law of the Austrian, Portuguese, Slovenian and Spanish Constitutional Courts). There seems to be no consensus among member States regarding the question whether the referenced norms must be or may be of a certain nature or hierarchical level.

II. THE PRINCIPLE OF NON-RETROACTIVITY OF (LESS FAVOURABLE) CRIMINAL LAW AND THE PRINCIPLE OF RETROSPECTIVE APPLICATION OF MORE FAVOURABLE CRIMINAL LAW

36. Almost all of the forty-one legal systems surveyed recognise the principle of non-retroactivity of (less favourable) criminal law and the principle of retrospective application of more favourable criminal law. In some legal systems (Cyprus, Iceland, Ireland, Malta, the Netherlands, Norway and the United Kingdom) the application of the principle of

non-retroactivity of criminal law has certain specific characteristics. In some of these systems (Iceland, the Netherlands and Norway) the principle of retrospective application of more favourable criminal law applies as regards the substantive criminal-law provisions only under certain conditions relating to the necessity to establish the intention of the legislature with regard to the decriminalisation of an act. In some others the principle is, or appears to be, limited to the retrospective application of more lenient penalties: in Cyprus the principle of retrospective application of the more lenient criminal law is limited only to penalties unless something contrary is specifically stated in the new law. In Malta the application of that principle appears to be limited only to the application of penalties. In Ireland and the United Kingdom the principle applies to penalties, but it is not clear whether it could also apply as regards the substantive provisions of criminal law.

37. In the legal systems surveyed there are different criteria for assessing whether or not – for the purpose of the principle of (non-)retroactivity of criminal law – a law passed after an offence has been committed is more or less favourable to the accused than the law that was in force at the time of the commission of the offence. Despite certain differences, there are two criteria that commonly apply: (1) the principle of "concretisation" and, (2) the principle of prohibition of the combination of multiple potentially applicable criminal laws.

38. According to the principle of "concretisation", which applies in twenty-two legal systems surveyed (Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Switzerland and Turkey), it is necessary to determine *in concreto* which law is more favourable to the accused and then to apply that law. In one of the legal systems covered by the survey (the Netherlands), the question of more favourable criminal law must be decided on the basis of an assessment *in abstracto* instead of the possibility of an assessment *in concreto* of a more lenient penalty. No information is available in respect of the other legal systems surveyed.

39. The principle of prohibition of the combination of multiple potentially applicable criminal laws applies in twelve legal systems surveyed (Belgium, Croatia, Finland, Greece, Hungary, Luxembourg, Poland, Romania, Serbia, Slovenia, Spain and Turkey). In respect of the other legal systems surveyed, no information is available. According to that principle, it is not possible to combine some provisions of one criminal law with some provisions of another, but it is necessary to determine which criminal law – all provisions taken together – is more favourable to the accused and then to apply only that law.

40. There are, however, some exceptions to that principle. For instance, in Croatia, if the new law reduces the minimum sentence but increases the maximum sentence, the new law is considered to be more lenient but the

sentence imposed cannot be higher than the maximum period imposed under the older law. In Finland, although generally it is not possible to pick and choose the most lenient elements among the old law and the new law, nevertheless if both the general principles of the criminal law and a particular provision on punishment have changed, it is possible for both laws to be applied. There are also specific considerations of relevance for the assessment of the more/less favourable criminal law as regards the applicable sanctions and/or the substantive provisions of criminal law.

THE COURT'S OPINION

I. PRELIMINARY CONSIDERATIONS

41. The present advisory opinion request presents two specific features. Firstly, the questions submitted by the Constitutional Court are, at least in part, broad and very general. Secondly, the Constitutional Court itself is seized in the context of proceedings for the review of the constitutionality of Article 300.1 of the 2009 CC, while the underlying criminal proceedings against Mr Kocharyan are pending at an early stage before the criminal court of first instance. The Court therefore deems it useful to have regard to a number of preliminary considerations.

42. Under Article 1 § 1 of Protocol No. 16, designated highest courts or tribunals may request the Court to give advisory opinions on "questions of principle relating to the interpretation and application of the rights and freedoms defined in the Convention and the Protocol's thereto". Pursuant to Article 1 § 2 of Protocol No. 16, a highest court or tribunal may do so "only in the context of a case pending before it". Article 1 § 3 of Protocol No. 16 requires the requesting Court to give reasons for its request and to provide the relevant legal and factual background for the pending case.

43. The Court reiterates that, as stated in the Preamble to Protocol No. 16, the aim of the advisory opinion procedure is to further enhance the interaction between the Court and national authorities and thereby reinforce the implementation of the Convention, in accordance with the principle of subsidiarity. The aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court guidance on Convention issues when determining the case before it (see *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, P16-1018-001, § 25, 10 April 2019 ("Advisory opinion P16-2018-001")).

44. Turning to the first feature addressed above, namely the broad and general nature of at least some of the questions submitted, the Court reiterates that it has inferred from Article 1 §§ 1 and 2 of Protocol No. 16 that the opinions it delivers under this Protocol "must be confined to points

that are directly connected to the proceedings pending at domestic level" (ibid., § 26).

45. It follows from the latter consideration that the Court has the power to reformulate questions asked by the requesting Court having regard to the specific factual and legal circumstances at issue in the domestic proceedings Indeed it did so in the first advisory opinion (ibid., §§ 27-33). The Court considers that, similarly, it may also combine certain questions asked by the requesting court.

46. A related but separate issue is whether, once seized of a request for an advisory opinion, the Grand Chamber may decide not to answer one or more questions. Article 2 § 1 of Protocol No. 16 specifies that "[the] panel shall decide whether to accept a request for an advisory opinion, having regard to Article 1". Article 2 § 2 of Protocol No. 16 provides that "if the panel accepts the request, the Grand Chamber shall deliver the advisory opinion". However, while the Panel accepts the request for an advisory opinion as a whole if it considers at that stage, and without the benefit of written and oral observations, that the request appears to fulfil the requirements of Article 1 of Protocol No. 16, this does not mean that all the questions that make up the request will necessarily fulfil these requirements.

47. While the decision to accept the request for an advisory opinion lies with the panel, this cannot deprive the Grand Chamber of the possibility of employing the full range of powers conferred on the Court, including its power in relation to the Court's jurisdiction (Articles 19 and 32 of the Convention and, by analogy, Article 48). Nor can the panel's decision preclude the Grand Chamber from assessing whether each of the questions composing the request fulfils the requirements of Article 1 of Protocol No. 16, in particular whether each question concerns "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (paragraph 1); whether the opinion has been sought "in the context of a case pending before" the requesting court (paragraph 2) and whether the requesting court has "give[n] reasons for its request and" has "provid[ed] the relevant legal and factual background of the pending case" (paragraph 3). Also, as already stated above, it follows from paragraphs 1 and 2 of Article 1 of Protocol No. 16 that the Grand Chamber's opinion must be confined to the points that are directly connected to the proceedings pending at domestic level. It thus remains open to the Grand Chamber to verify whether the questions the subject of a request fulfil the requirements set out in Article 1 of Protocol No. 16 on the basis of the original request, the observations received and all other material before it (see, *mutatis mutandis*, in the context of the Grand Chamber's role in proceedings following a request for referral under Article 43 of the Convention, *Pisano v. Italy* (striking out) [GC], no. 36732/97, §§ 26-28, 24 October 2002). Should it come to the conclusion, taking due account of the factual and legal context of the case, that certain questions do

not fulfil these requirements, it shall not examine these questions and will make a statement to this effect in its advisory opinion.

48. Turning to the second feature, the Court observes that the Constitutional Court has availed itself of the advisory opinion procedure, which is by its nature preliminary, in the context of proceedings for the review of constitutionality of Article 300.1 of the 2009 CC. By their nature these proceedings are also preliminary, in that they are intended to determine a question of domestic law that is relevant for the main proceedings that gave rise to them, namely the criminal proceedings against Mr Kocharyan, pending before the First-Instance Court.

49. While this double referral does not constitute an obstacle to dealing with the present advisory opinion request, it nevertheless frames the Court's approach in giving its advisory opinion, in particular where, as in the present case, the main proceedings are pending at a very early stage and the relevant facts have not yet been the subject of any judicial determination (compare and contrast with Advisory opinion P16-2018-001, cited above, §§ 27-33, in which information as to the precise factual circumstances underlying the legal questions raised in the advisory opinion request was available to the Court). The Court's advisory opinion will proceed on the basis of the facts as provided by the Constitutional Court, albeit those facts may be subject to subsequent review by the first instance court. It should enable the Constitutional Court to resolve the issues before it, that is, to assess the constitutionality of Article 300.1 of the 2009 CC in the light of the requirements flowing from Article 7 of the Convention. In turn, it will be for the First-Instance Court to apply the answer given by the Constitutional Court to the concrete facts of the case against Mr Kocharyan. In the Court's view, such an approach is in line with the principle of subsidiarity on which Protocol No. 16, like the Convention itself, is based.

50. The Constitutional Court has been requested to review the constitutionality of Article 300.1 of the 2009 CC in the light of Articles 72, 73, 78 and 79 of the 2015 Constitution (see paragraph 28 above). These provisions of the Constitution contain in essence the principles of non-retroactivity of criminal law (Article 72), the applicability of the more lenient law (Article 73), the proportionality of any interference with basic rights and freedoms (Article 78) and the lawfulness and foreseeability of any interference with such rights and freedoms (Article 79). This advisory opinion will inform the Constitutional Court's own interpretation of the domestic provisions relevant for the case before it. It is thus the task of the Constitutional Court, not that of the Grand Chamber, to interpret Article 300.1 of the 2009 CC and Article 300(1) of the former Criminal Code and thereby determine the constitutional compatibility of the pending criminal proceedings.

51. Finally, in formulating its opinion, the Court will take due account of the written observations and documents submitted by the participants in the

proceedings (see paragraphs 6-8 above). Nevertheless, it stresses that its task is not to reply to all the grounds and arguments submitted to it or to set out in detail the basis for its reply; under Protocol No. 16, the Court's role is not to rule in adversarial proceedings on contentious applications by means of a binding judgment but rather, within as short a time frame as possible, to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it (see Advisory opinion P16-2018-001, cited above, § 34).

II. THE FIRST AND SECOND QUESTIONS

52. The first and second questions asked by the Constitutional Court read as follows:

> "1) Does the concept of 'law' under Article 7 of the Convention and referred to in other Articles of the Convention, for instance, in Articles 8-11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
>
> 2) If not, what are the standards of delineation?"

53. The Court does not discern any direct link between the first and second questions and the pending domestic proceedings.

54. As far as can be seen from the charges brought against Mr Kocharyan (see paragraph 16 above), there is nothing in the factual context of the case that could be perceived as the exercise of his rights under Articles 8-11 of the Convention.

55. As regards the legal context of the domestic proceedings, the Court finds it difficult to see which questions the Constitutional Court wishes to determine with the help of the Court's opinion. The Court's answer to the Constitutional Court's first and second questions would be of an abstract and general nature, thus going beyond the scope of an advisory opinion as envisaged by Protocol No. 16. In particular, it does not appear possible to reformulate the questions so as to allow the Court to confine its advisory opinion to "points that are directly connected to the proceedings pending at domestic level" (see Advisory opinion P16-2018-001, cited above, § 26, and paragraph 44 above). In so far as some of the reasons adduced by the Constitutional Court for asking the first and second questions may be understood as addressing questions of legal certainty and foreseeability, including the limits of judicial interpretation in the context of Article 7 of the Convention, these can be addressed sufficiently in the Court's answer to the third question.

56. The Court considers that the first and second questions do not fulfil the requirements of Article 1 of Protocol No. 16 and cannot be reformulated so as to enable it to discharge its advisory function effectively and in accordance with its purpose. It therefore cannot answer the first and second questions.

III. THE THIRD QUESTION

57. The third question asked by the Constitutional Court reads as follows:

> "Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?"

58. This question refers to the fact that Mr Kocharyan is accused of an offence, namely overthrowing the constitutional order under Article 300.1 of the 2009 CC, which is defined by the use of the technique of "blanket reference" or "legislation by reference" (as regards the use of terminology, see paragraph 31 above).

59. In the case of Article 300.1 of the 2009 CC, this legislative technique is used to refer to Articles 1 to 5 and 6 § 1 of the Armenian Constitution. According to the Constitutional Court, the referenced legal provisions have supreme legal force in the hierarchy of legal norms and are formulated with a higher level of abstraction than the provisions of the Criminal Code. In substance, the Constitutional Court is asking whether this is compatible with Article 7 of the Convention, and above all with the requirements of clarity and foreseeability.

60. Before providing its opinion on the use of the "blanket reference" or "legislation by reference" technique, the Court finds it useful to reiterate the general principles developed in its case-law as regards the requirements of legal certainty and foreseeability under Article 7.

The Court recalls that in *Del Río Prada v. Spain* ([GC], no. 42750/09, ECHR 2013; see also *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 50, ECHR 2015), it set out the following general principles:

> "(a) Nullum crimen, nulla poena sine lege
>
> 77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom, 22 November 1995, § 34, Series A no. 335-B; C.R. v. the United Kingdom, 22 November 1995, § 32, Series A no. 335-C; and Kafkaris [v. Cyprus [GC], no. 21906/04], ... § 137[, ECHR 2008]).
>
> 78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege* – see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits

in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

...

(c) Foreseeability of criminal law

91. When speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Kokkinakis*, cited above, §§ 40-41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (ibid.). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the*

> *United Kingdom*, cited above, § 36; *C.R. v. the United Kingdom*, cited above, § 34; *Streletz, Kessler and Krenz* [*v. Germany* [GC], nos. 34044/96 and 2 others, § 50[, ECHR 2001-II]; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, 22 March 2001; *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated."

61. The Court also underlines that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying out a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 157, ECHR 2015).

62. As already mentioned above, the development resulting from a gradual clarification of the rules of criminal liability through judicial interpretation must be consistent with the essence of the offence and be reasonably foreseeable. A judicial interpretation that follows a perceptible line of case-law could be regarded as reasonably foreseeable (see *S.W. v. the United Kingdom*, 22 November 1995, §§ 41-43, Series A no. 335-B and *C.R. v. the United Kingdom*, 22 November 1995, §§ 39-41, Series A no. 335-C, in which the Court found that the domestic courts, by invalidating the common-law defence of marital immunity in respect of the offence of rape, had followed a perceptible line of case-law which was consistent with the essence of that offence). The said requirement can be fulfilled even where the domestic courts interpret and apply a provision for the first time (see, as an example, *Jorgic v. Germany*, no. 74613/01, §§ 106-09, ECHR 2007-III, concerning the domestic courts' first interpretation of the offence of genocide as defined in German domestic law; see, as further examples, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 115, ECHR 2015 and *Huhtamäki v. Finland*, no. 54468/09, §§ 46-54, 6 March 2012).

63. Bearing these general principles in mind, the Court will now turn to the question whether the use of the "blanket reference" or "legislation by reference" technique as such is compatible with Article 7 of the Convention,

either as regards references to provisions outside criminal law in general or as regards references to provisions of constitutional law in particular.

64. Although the Court has not yet explicitly ruled on that question, there are cases which are of interest in the present context in that they raised issues under Article 7 in respect of criminal law provisions setting out the constituent elements of an offence by referring to provisions or principles of constitutional law or to other areas of law.

65. The Court would mention in particular the following cases: *Kuolelis and Others v. Lithuania* (nos. 74357/01 and 2 others, §§ 51-55 and 78, 19 February 2008), relating to the convictions of former communist politicians, *inter alia* under Article 70 of the Lithuanian Criminal Code – which contains a reference to the Constitution – for continuing to militate for maintaining Lithuania in the USSR in the period when it re-established its independence, and *Haarde v. Iceland* (no. 66847/12, §§ 40 and 42-43, 23 November 2017), relating to the conviction of the then Prime Minister of Iceland in impeachment proceedings for gross negligence under Article 17 of the Constitution in conjunction with section 8 (c) of the Ministerial Accountability Act for failing to hold ministerial meetings on "important government matters" namely the threat to the Icelandic banking system in the period preceding its collapse.

66. None of these cases explicitly raised the question whether or not the use of references to the Constitution (constitutional principles or specific Articles) or other areas of law in provisions of criminal law containing the definition of an offence is as such compatible with Article 7 of the Convention. The Court's examination instead concentrated on the question whether the laws (that is, the criminal law referencing a provision of the Constitution and the referenced constitutional provision) read together were sufficiently clear and foreseeable in their application (see, as regards the relevant general principles established in the Court's case-law *Del Río Prada*, cited above, §§ 77-79 and 91-93, and *Vasiliauskas*, cited above, §§ 153-55 and 157).

67. In the two cases referred to above, although the relevant provisions of domestic law were worded in rather broad terms, the Court did not find that they lacked sufficient clarity or were not reasonably foreseeable in their application. It had regard, *inter alia*, to the status of the accused (see, *Kuolelis and Others*, cited above, §§ 120-21, underlining that as leading professional politicians the applicants must have been aware of the risk they were running in maintaining their activities, and *Haarde*, cited above, §§ 130, noting that the applicant, as Prime Minister and head of government, was responsible for ensuring that the requirements of the relevant Article of the Constitution were complied with). The latter case raised another question of relevance. The applicant argued that there was a constitutional practice of discussing at ministerial meetings only such issues that should be submitted to the President of the Republic under

Article 16(2) of the Constitution and that, by following that tradition, he could not have foreseen that he would be convicted for failing to implement an obligation under Article 17. The Court of Impeachment had dismissed the argument, having examined the history of the two Articles of the Constitution in depth and finding that their different wording unequivocally supported a literal interpretation of the term "important government matters" in Article 17 (ibid., § 129). The Court observed that Article 17 of the Icelandic Constitution was a provision of central importance in the constitutional order, in that it set out important principles on how the Government is expected to function, and that the applicant was responsible for ensuring compliance with those principles. It agreed with the Court of Impeachment in finding that Article 17 could not be regarded as lacking in sufficient clarity and endorsed the conclusion drawn by the Court of Impeachment as regards the meaning to be given to the notion of "important government matters". The Court accepted that the latter's interpretation was consistent with the essence of the offence and that the applicant could have reasonably foreseen that he would render himself criminally liable (ibid., §§ 131-32). In both cases referred to, *Kuolelis and Others* and *Haarde*, the Court concluded that there had been no violation of Article 7.

68. It is true, as the requesting court has pointed out, that constitutional norms may be of a higher level of abstraction than the provisions of criminal law. Moreover, they are placed at the highest level of the hierarchy of norms in many legal systems. The Court has held in the context of the examination whether an interference with rights guaranteed by Article 10 was "prescribed by law" because of the general nature of constitutional provisions, that the level of precision required of them may be lower than that required of other legislation (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III). In the context of Article 7 the above-cited cases *Haarde* and *Kuolelis and Others* demonstrate that the Court has not considered either the constitutional nature of the referenced provisions or the rather broad terms of the provisions at stake as raising in themselves an issue under Article 7. As regards in particular the foreseeability of criminal law referencing provisions of constitutional law, the Court applied its general case law, requiring judicial interpretation of an offence to be consistent with the essence of that offence (referred to in paragraph 60 above). Also in line with the Court's general case-law (referred to in paragraph 61 above), these cases appear to indicate that particular caution in assessing whether a specific conduct may entail criminal liability may be required from professional politicians or high office holders.

69. The Court bears in mind that, as in the case underlying the request for the present Advisory Opinion, the referenced constitutional provisions may be formulated as general principles and, therefore, in a general and very abstract manner. Due to their high level of abstraction, such provisions are often developed further through acts of lower hierarchical levels,

through non-codified constitutional customs and through jurisprudence. In the context of fundamental constitutional principles regulating the separation of powers, the Court held in *Haarde* (cited above, paras. 129-131) that Article 7 of the Convention does not exclude that evidence of existing constitutional practice may form part of the national court's overall analysis of foreseeability of an offence based on a provision of a constitutional nature. The Court sees no reason to depart from this finding.

70. The Court's case-law thus indicates that the use of the "blanket reference" or "legislation by reference" technique in criminal law is not in itself incompatible with Article 7. As set out above, examples can be found in the Court's case-law where the criminal law at issue contained references to other areas of law, including provisions or principles of the respective State's Constitution. Although the Court has not made an explicit statement in respect of the compatibility of such a technique with Article 7, it has implicitly accepted its use and determined whether the criminal law at issue was sufficiently precise and foreseeable within the meaning of its case-law.

71. Moreover, the comparative-law material suggests that the "blanket reference" or "legislation by reference" technique is widely used by member States in their criminal law; more than half of the States surveyed also have recourse to that technique in respect of criminal offences against the constitutional order of their country (see paragraphs 32-33 above).

72. However, in order to comply with Article 7 of the Convention a criminal law defining an offence by making use of the "blanket reference" or "legislation by reference" technique must fulfil the general "quality of law" requirements, that is, it must be sufficiently precise, accessible and foreseeable in its application. Given that the referenced provision becomes part of the definition of the offence, both norms (the referencing and the referenced provision) taken together must enable the persons concerned to foresee, if need be with the help of appropriate legal advice, what conduct may make them criminally liable. In the Court's view, this follows from the general principles of its case-law regarding the requirements of the quality of law and is also supported by the comparative-law materials available to it (see paragraphs 34-35 above).

73. Furthermore, the Court considers that the most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

74. The Court is therefore of the opinion that using the "blanket reference" or "legislation by reference" technique in criminalising acts or

omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.

The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

IV. THE FOURTH QUESTION

75. The fourth question asked by the Constitutional Court reads as follows:

> "In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?"

76. This question refers to the fact that Mr Kocharyan is charged with overthrowing the constitutional order under Article 300.1 of the 2009 CC in respect of acts allegedly committed in February and March 2008 (see paragraph 16 above), that is, before the entry into force of that provision. At that time, acts aimed at the violent overthrow of the constitutional order were punishable under Article 300 of the former version of the CC as part of the offence of "usurpation of power" (see paragraph 25 above).

77. The Constitutional Court submits that Article 300.1 of the 2009 CC differs significantly from Article 300 of the CC in the version in force at the material time. The latter was broader in that any action *aimed* at overthrowing the constitutional order was punishable, whereas under Article 300.1 of the 2009 CC, only the *de facto* elimination of specified fundamental principles of the Constitution (namely those laid down in Articles 1-5 and 6 § 1 of the 2005 Constitution) manifested by the termination of the validity of that norm in the legal system is punishable. In other respects, Article 300 of the former Criminal Code was narrower, as it contained an element of violence which is missing from Article 300.1 of the 2009 CC.

78. It is in that context, namely in relation to the amendment of the definition of the offence of overthrowing the constitutional order, that the

Constitutional Court asks what standards apply under Article 7 for the comparison of the law in force at the time of the commission of the offence and the amended criminal law. The amendment of the law underlying the proceedings before the Constitutional Court does not concern the applicable penalty, which is the same under Article 300 of the former version of the CC and under Article 300.1 of the 2009 CC, namely a term of imprisonment of between ten and fifteen years.

79. The Court notes at the outset that the comparative-law material available to it indicates that when assessing – for the purposes of the principle of non-retroactivity of criminal law – whether or not a law passed after an offence has been committed is more or less favourable to the accused than the law in force at the time of the commission of the offence, the principle of concretisation is used by more than half of the member States surveyed (see paragraphs 37-38 above). It is worth noting that the principle of concretisation is also strongly reflected in the Court's case-law (see paragraphs 86-89 below).

80. The Court reiterates that Article 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where this is to an accused's disadvantage (see for the general principles concerning that principle, *Del Río Prada*, cited in paragraph 60 above). The principle of non-retroactivity of criminal law applies both to the provisions defining the offence (see *Vasiliauskas*, cited above, §§ 165-66) and to those establishing the penalties incurred (see *M. v. Germany*, no. 19359/04, §§ 123 and 135-37, ECHR 2009).

81. In addition, the principle of retrospective application of the more lenient criminal law could come into play. This principle is not explicitly stated in Article 7 of the Convention. It was established for the first time in the case of *Scoppola v. Italy (no. 2)* [GC] (no. 10249/03, 17 September 2009) which related to changes regarding the applicable penalty. The Court affirmed that Article 7 § 1 of the Convention guaranteed not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (ibid., §§ 108-09).

82. Although the requirement of retrospective application of the more lenient criminal law was worded in general terms in *Scoppola (no. 2)*, it is to be noted that this requirement has been developed and subsequently applied in the context of changes in the applicable penalties or sentencing regime (see, for instance, *Gouarré Patte v. Andorra*, no. 33427/10, §§ 28-36, 12 January 2016, and *Koprivnikar v. Slovenia*, no. 67503/13, § 59, 24 January 2017). In the case of *Parmak and Bakir v. Turkey*

(nos. 22429/07 and 25195/07, § 64, 3 December 2019), the Court found for the first time that the principle of retrospective application of the more lenient criminal law also applied in the context of an amendment relating to the definition of the offence.

83. In the present proceedings the Constitutional Court's question requires the Court to give an opinion on the application of the principle on non-retroactivity. Two situations have to be distinguished in the context of applying the principle of non-retroactivity to the provisions defining the offence.

The first concerns instances where an accused, under the criminal law in force at the time of the conviction, could be found guilty of an act that did not constitute an offence at the time of its commission.

The second concerns instances where the act was proscribed – even if under different names – both at the moment of the commission of the offence and at the moment of the conviction. The latter situation concerns the reclassification of charges in the event of a succession of criminal laws over the course of time. Having regard to the context in which the Constitutional Court is asking its question, the Court considers that its case-law relating to the reclassification of charges under an amended version of the Criminal Code which has entered into force after the commission of the act in question is of particular interest. In such situations, the Court primarily seeks to determine whether there is continuity of the offence, taking into account the moment of the commission of the offence and the moment of the conviction.

84. The Court would mention in particular the following cases.

In the case of *G. v. France* (27 September 1995, §§ 25-26, Series A no. 325-B), relating to the applicant's conviction for indecent assault with coercion and abuse of authority under the new version of the Criminal Code which had entered into force after the commission of the acts, the Court, having regard to the domestic court's interpretation of the provisions which had been in force at the material time, found that the acts in question fell within the scope of the relevant provisions of the former Criminal Code and also within the scope of the new provision.

In the case of *Ould Dah v. France* ((dec.), no. 13113/03, 17 March 2009), the applicant was charged with having committed acts of torture and barbarity which, under the Criminal Code in force at the time of their commission, had constituted aggravating circumstances in respect of certain other offences, including the crime of aggravated assault. In the new version of the Criminal Code, which applied at the time of his conviction, acts of torture were classified as a separate offence.

In the case of *Berardi and Mularoni v. San Marino* (nos. 24705/16 and 24818/16, §§ 52-56, 10 January 2019), the applicants, civil servants responsible for the supervision of safety at construction sites, were charged with bribery for having accepted money in exchange for omitting to carry

out their duties. The relevant provision of the Criminal Code in force at the material time defined bribery as the receipt of undue profit by a public official for "carrying out an act contrary to the duties arising from his functions".

The case of *Rohlena v. the Czech Republic* [GC] (no. 59552/08, ECHR 2015) concerned the applicant's conviction for the offence of abusing a person living under the same roof, committed at least between 2000 and February 2008. The conviction was based on a provision of the Criminal Code which had entered into force on 1 June 2004.

85. In such cases, the Court has examined in essence whether the acts in question were already punishable under the provisions in force at the time of their commission. Furthermore, it has held that the punishment imposed could not exceed the limits fixed by the provision that was in force at the time of the commission of the offence (see, *Berardi and Mularoni*, cited above, § 41; see also *Rohlena*, cited above, § 56, as regards the specific issue of a continuing offence).

86. The Court's case-law does not offer a comprehensive set of criteria for comparing the criminal law in force at the time of commission of the offence and the amended criminal law. Nonetheless, it is possible to draw the conclusion that the Court has regard to the specific circumstances of the case, that is, the concrete facts of the case as established by the national courts, when assessing whether the acts committed were punishable under the provision in force at the time of their commission. Moreover, in line with the general principles of its case-law regarding the foreseeability of the law in force at the time of the commission of the relevant offences, the Court has regard to the domestic court's case-law, if any exists, elucidating the notions used in the law in force at that time (see *G. v France*, cited above, §§ 25-26, and *Berardi and Mularoni*, cited above, §§ 46-56).

87. In contrast, the Court is not concerned with the formal classifications or names given to criminal offences under domestic law (see, in particular, *Ould Dah* (cited above, *in fine*), where at the time of their commission, the applicant's acts were punishable not as a separate offence, but as an aggravating circumstance; see also *Rohlena* (cited above, §§ 62-63), where acts committed by the applicant before the entry into force of the provision under which he was convicted were punishable, albeit as different offences).

88. Thus, the comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law has to be carried out by the competent court, not by comparing the definitions of the offence *in abstracto*, but having regard to the specific circumstances of the case.

89. In this context the Court considers it to be particularly instructive to look at the manner of application of the principle of non-retroactivity in respect of penalties, notably the way in which this was done in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* ([GC], nos. 2312/08

and 34179/08, ECHR 2013 (extracts)). That case applied the method of comparison *in concreto* (ibid., § 65). It concerned the applicants' conviction for war crimes. While the definition of the crimes at issue had been the same under the Criminal Code applicable when they had been committed and under the new Criminal Code which had been applied in the applicants' cases (ibid., §§ 67-68), the sentencing framework had changed in that the new law had abolished the death penalty but provided for a higher minimum term of imprisonment. In assessing whether the application of the new law had been to the applicants' disadvantage, the Court considered that the crimes of which they had been convicted had not involved any loss of life, and clearly did not belong to the category of the most serious cases, for which the death penalty could have been applied under the law that had been in force at the time of the commission of the crimes in question. The Court also had regard to the fact that the lowest possible sentence had been imposed on one applicant and the other had received a sentence slightly above the minimum provided for in the new Criminal Code. Although the applicants' sentences were within the latitude of both Criminal Codes and there was no certainty that they would have received lower sentences had the former Code been applied, there was a real possibility that the retroactive application of the new law had operated to the applicant's disadvantage. The Court concluded that they had not been afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention (ibid., §§ 69-70).

90. Even though the principle of concretisation was developed in cases relating to an amendment of the relevant penalties, the Court, having regard to the considerations set out above (see paragraphs 87-88**),** considers that the same principle also applies to cases involving a comparison between the definition of the offence at the time of its commission and a subsequent amendment.

91. As indicated in paragraph 77 above, in its request for an advisory opinion, the Constitutional Court pointed out that the definition of the offence of overthrowing the constitutional order in Article 300.1 of the 2009 CC is broader in one respect while it is narrower in another compared to Article 300 of the CC which was in force in February/March 2008, at the time of the alleged commission of the offence. Having regard to the considerations set out above, the Court is of the view that the question whether the application of Article 300.1 of the 2009 CC would violate the principle of non-retroactivity contained in Article 7 of the Convention, should not be answered *in abstracto*. Instead Article 7 requires an assessment *in concreto*, on the basis of the specific circumstances of the case. It will be for the competent domestic courts to compare, in light of the alleged actions or omissions by the accused and other specific circumstances of the case, the legal effects of possible application of Article 300.1 of the 2009 CC and of Article 300 of the Criminal Code in the

version in force at the time of the impugned events. In particular, they should establish whether all constitutive elements of the offence and other conditions for criminality were fulfilled under the provisions of the Criminal Code in the version in force at the time of the impugned events. Should this not be so, the subsequent Article 300.1 of the 2009 CC cannot be considered as more lenient and, consequently, may not be applied in the case. Furthermore, should the domestic courts establish that the application of Article 300.1 of the 2009 CC would attract more serious consequences for the accused than the application of Article 300 of the CC in the version in force at the time of the events, the new provision equally may not be applied in the case.

92. The Court is therefore of the opinion that in order to establish whether, for the purposes of Article 7 of the Convention, a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case (the principle of concretisation). If the subsequent law is more severe than the law that was in force at the time of the alleged commission of the offence, it may not be applied.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Delivers the following opinion:

1. The Court cannot answer the first and second questions as they do not fulfil the requirements of Article 1 of Protocol No. 16.

2. Using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.

   The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

3. In order to establish whether, for the purpose of Article 7 of the Convention, a law passed after an offence has allegedly been committed is more or less favourable to the accused than the law that was in force at the time of the alleged commission of the offence, regard must be had to the specific circumstances of the case (the principle of concretisation). If the subsequent law is more severe than the law that was in force at the time of the alleged commission of the offence, it may not be applied.

Done in English and French, and delivered in writing on 29 May 2020.

Søren Prebensen Deputy to the Registrar	Linos-Alexandre Sicilianos President

In accordance with Article 4 § 2 of Protocol No. 16 to the Convention and Rule 94 § 2 of the Rules of Court, the separate opinion of *ad hoc* judge Sarvarian is annexed to this advisory opinion.

L.A.S.
S.C.P.

CONCURRING OPINION OF *AD HOC* JUDGE SARVARIAN

1. Whilst I have voted in favour of each of the operative paragraphs, I preferred the Grand Chamber to go farther than it did in its reasoning. I am especially cognisant of the fact that these advisory proceedings have necessarily occasioned delay of some ten months to the proceedings before the Constitutional Court and by extension to the underlying trial. In light of this consideration, I consider it to be my duty to record publicly those additions to the Advisory Opinion that I wished to be adopted in order to provide, in my view, the most valuable guidance possible to the Constitutional Court.

Preliminary Issues

2. Concerning paragraphs 45 to 47 of the Advisory Opinion, I welcome the position taken by the Grand Chamber on its role in relation to that of the Panel. As a number of procedural matters were left by the drafters of Protocol No. 16 to the Court to decide in its practice,[1] I wished the Grand Chamber to clarify two issues. First, whether the Panel should give reasons for its decision to accept a request. Second, by what criteria should the Panel decide the admissibility of the request.

3. Whereas Article 2(1) of Protocol No. 16 does not oblige the Panel to give reasons for a decision to accept a request, a reasoned decision would further the 'object and purpose'[2] of Protocol No. 16 to 'reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto", which would provide guidance to the domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests'.[3] I opine that clarification of this question would promote consistency and efficiency in the management of requests from the highest courts of Member States by providing them with guidance when considering the "necessity and utility"[4] of submitting such requests.

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[1] E.g. – Dzehtsiarou and O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket control?', 34(3) *Legal Studies* (2014), 444-468; Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal', 21 *Maastricht Journal of European and Comparative Law* (2014) 630-651; Loemmens, 'Protocol no 16 to the ECHR: managing backlog through complex judicial dialogue?', 15(4) *European Constitutional Review* (2019) 691-713.

[2] Vienna Convention on the Law of Treaties 1969 ('VCLT'), Art. 31(1).

[3] Protocol No. 16, Art. 1(3); Explanatory Report to Protocol No. 16, § 15.

[4] Protocol No. 16, Art. 1(3); Explanatory Note to Protocol No. 16, §11.

4. Article 2(1) of Protocol No. 16 does not oblige the Panel to give reasons, as inversely evinced by the inclusion of an express duty in cases of refusals to requests.[5] However, I consider that it does not forbid the Panel from doing so: in the absence of an express prohibition in the text, neither its 'context' nor the 'object and purpose' of Protocol No. 16 as a whole[6] indicates an implied intention to so constrain the panel. Recourse to the Explanatory Note to Protocol No. 16 to confirm or to clarify the meaning of Article 2(1)[7] supports this hypothesis:

> 'Unlike the procedure under Article 43, however, the panel must give reasons for any refusal to accept a domestic court or tribunal's request for an advisory opinion. This is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto', which would provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests. The Court should inform the High Contracting Party concerned of the acceptance of any requests made by its courts or tribunals.'[8]

I deduce that the Panel has a power to give reasons when accepting a request.

5. Comparison of the advisory procedures of international courts and tribunals shows it to be the invariable practice to give reasons for acceptance of advisory opinion requests. Whereas the Inter-American Court of Human Rights ('IACtHR') has considered itself to be obliged to give reasons when refusing requests,[9] in practice the IACtHR also gives reasons when accepting requests.[10] Though not provided in its Rules of Court, in practice a panel of five judges decides upon the admissibility of requests.[11] As requests for advisory opinions are submitted not by national courts, as is the case in the Protocol No. 16 procedure, but by the Governments of the States Parties,[12] the full Court may rule upon objections may be raised to the jurisdiction or admissibility of the request by other States Parties[13] by analogy to its contentious procedure.[14]

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[5] Ibid., § 29; VCLT, Art. 31(1).
[6] Ibid.
[7] VCLT, Art. 32.
[8] Explanatory Report to Protocol No. 16, *supra* note 4, § 15.
[9] Advisory Opinion OC-1/82 of September 24, 1982, *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, § 30.
[10] E.g. – Advisory Opinion OC-23/17 of November 15, 2017 presented by the Republic of Colombia, paras 13-31; *Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights* (Order of 29 May 2018), §§ 3-4.
[11] IACtHR Rules of Procedure 2009, Art. 75.
[12] American Convention on Human Rights 1969, Art. 64.
[13] E.g. – Advisory Opinion OC-1/82, *supra* note 9, §29; Opinión consultiva OC-25/18 de 30 de mayo de 2018 solicitada por la República del Ecuador, párr. 19, párr. 20 (only

6. Whilst the African Court on Human and Peoples' Rights ('ACtHPR') is not expressly required to give reasons for decisions on admissibility,[15] in practice it provides reasons for decisions to accept or reject requests for advisory opinions.[16] Unlike the IACtHR, however, decisions on admissibility are taken by the full Court. Whereas the Rules of Court of the Court of Justice of the European Union do not address the admissibility of a request for an advisory opinion,[17] in practice the Grand Chamber of the CJEU provides reasoned decisions in plenary to admissibility issues in the advisory opinion.[18] Though the Rules of Court of the International Court of Justice ('ICJ') do not address admissibility,[19] the ICJ gives reasoned decisions in plenary in the advisory opinion when State Parties challenge a request.[20] Whilst the Rules of the International Tribunal for the Law of the Sea ('ITLOS') likewise do not address the admissibility of requests by 'authorised bodies' for advisory opinions to the Seabed Disputes Chamber or to the Tribunal as a whole,[21] reasoned decisions on questions of jurisdiction and admissibility are in practice given by the full Chamber or Tribunal in advisory opinions.[22]

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available in Spanish).

[14] IACtHR Rules, *supra* note 11, Art. 74: 'The Court shall apply the provisions of Title II of these Rules to advisory proceedings to the extent that it deems them to be compatible.' This provision was added to the Rules in the first amendments of 1991 and appears to be directly based upon the pronouncement made in the first advisory opinion of the Court.

[15] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998, Art. 4; ACtHPR Rules of Court 2010, Art. 39.

[16] E.g. – No. 002/2013, *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights* (Advisory Opinion of 5 December 2014), paras 33-43; No. 001/2014, *Request for Advisory Opinion by the Coalition for the International Criminal Court and Others* (Order of 5 June 2015), §§ 8-13.

[17] CJEU Rules of Procedure 2012, Arts 196-200. See also Treaty on the Functioning of the European Union 2009, Arts 218, 256, 267.

[18] E.g. – Opinion 2/94 (28 March 1996), paras 1-22; Opinion 2/13 (18 December 2014), paras 144-152. A request has only ever been declared to be inadmissible in one instance – Opinion 3/94 (13 December 1995), §§ 14-23.

[19] ICJ Rules of Court 2019, Arts 102-109. See also Charter of the United Nations 1945, Art. 96.

[20] E.g. – *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion of 25 February 2019), paras 54-91. A request for an advisory opinion has been rejected in only one instance for want of jurisdiction – *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion of 8 July 1996), §§ 13-32.

[21] ITLOS Rules of Tribunal 2018, Arts 130-138.

[22] Case No. 17 *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)*(Advisory Opinion of 1 February 2011), paras 25-49; Case No. 21 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*

7. I would have preferred the Grand Chamber to have stated that the panel ought to provide reasons for a decision to accept a request. This could be done, for example, by means of an internal report transmitted by the panel to the Grand Chamber and published in summary form in the Advisory Opinion. This could not only assist the Grand Chamber in its examination of the questions but also facilitate the dialogue between the Court and the national courts for the efficient management of the Protocol No. 16 procedure.

8. Taking account of its unique context – particularly the fact that it is national courts, rather than State Parties or Council of Europe institutions, that submit requests – I propose the following criteria for panels to apply:

> 1) whether the request has originated from a competent court;
> 2) whether the request is not abstract but rather based upon pending proceedings of which the competent court is actively seized;
> 3) whether the essence of the request as well as its legal and factual context are sufficiently clear to enable the Court to answer it;[23] and
> 4) whether the request raises a novel issue of Convention law.

Whereas such criteria could be adopted as an amendment to Rule 93 of the Rules of Court, I desired the Grand Chamber to articulate them in this Advisory Opinion with a view to subsequent adoption in the Rules. This indeed appears to be the approach taken by the IACtHR in the early days of its advisory procedure.

9. Though I concur in the decision of the Grand Chamber to answer the third and fourth questions posed by the Constitutional Court, I preferred to reformulate them to improve their lucidity.

10. I wish the request submitted by the Constitutional Court to be published on HUDOC alongside the Advisory Opinion. Whilst I am not aware of a procedural rule on this point, I note that such requests are routinely published by the IACtHR, ICJ and ITLOS. There is nothing in the request to indicate that the Constitutional Court intended to confidentially submit the request, which is a document of a public body. This appears to me to be useful both in principle and to explain those passages of the Advisory Opinion (e.g. – §§ 77 and 91) that refer to the request.

The Fourth Question

11. Regarding paragraphs 89 to 92, I wished the Grand Chamber to have gone farther in articulating the applicable standard to compare the criminal

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(SRFC)(Request for Advisory Opinion Submitted to the Tribunal)(Advisory Opinion of 2 April 2015), §§ 37-79.

[23] E.g. – Permanent Court of International Justice, Series B, No. 5, *Status of Eastern Carelia* (Advisory Opinion of 23 July 1923), p.28.

offence in force at the time of the relevant act or omission with the modified criminal offence under the 'principle of concretisation'. Based upon the jurisprudence of the Court, I consider this to be 'reasonable foreseeability', as expressed in *Kononov v. Latvia* (§ 60 of the Advisory Opinion) and *Maktouf and Damjanović v. Bosnia and Herzegovina* (§ 89 of the Advisory Opinion):

> 'Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.'[24]

12. I consider the critical issue to be the addition of a stricter element in a modified definition of a criminal offence. According to the jurisprudence of the Court, Article 7(1) permits the retroactive application of a modified offence, such as the abolition of a defence, which was 'reasonably foreseeable' with the benefit of legal advice at the time of the act or omission. This is articulated in *C.R. v. United Kingdom* and *S.W. v. United Kingdom* (cited at §§ 60-61 of the Advisory Opinion):

> 'It is to be observed that a crucial issue in the judgment of the Court of Appeal (summarised at paragraph 14 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether 'removal' of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term 'unlawful' excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 15 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 14 above).
>
> The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 14 and 20-25 above). There was no doubt under the law

[24] App. No. 36376/04 *Kononov v. Latvia* (Grand Chamber, Judgment of 17 May 2010), § 185 cited in App. Nos 2312/08 and 34179/08 *Maktouf and Damjanović v. Bosnia and Herzegovina* (Grand Chamber, Judgment of 18 July 2013), § 66.

> as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 34 above).'

13. Whereas it is the task of the Constitutional Court to determine the meaning of Article 300.1 and the former Article 300(1) of the Criminal Code (§ 50 of the Advisory Opinion), I consider there to be three potential outcomes for the purposes of Article 7 of the Convention, namely: 1) the Article 300.1 offence is substantively identical to the Article 300 offence (§ 84 of the Advisory Opinion); 2) the Article 300.1 offence is stricter than the Article 300 offence; and 3) the Article 300.1 offence is more lenient than the Article 300 offence. To provide the most valuable guidance possible, I preferred the Grand Chamber to have addressed the second and third possibilities in detail.

14. To apply the principle of concretisation, I desired the Grand Chamber to advise that, if the Constitutional Court were to interpret Article 300.1 of the Criminal Code as containing a stricter standard of criminal liability than did the former Article 300(1), it should consider whether that stricter standard was 'reasonably foreseeable' to the defendant with the benefit of legal advice at the time of the act or omission. Factors to consider in the specific context of the legal system of Armenia might include, for example, whether draft legislation contemplating that stricter standard was under consideration or decisions of the Armenian courts had already interpreted the former Article 300 in a manner compatible with the standard subsequently prescribed in Article 300.1.

15. Concerning the third possibility whereby the Constitutional Court were to interpret Article 300.1 to be more lenient than Article 300(1), in the recent case of *Parmak and Bakir v. Turkey* (§ 82 of the Advisory Opinion) the national legislation required that 'in the event of there being a difference between the legal provisions in force on the date an offence was committed and those in force after that date, the provision which is more favourable is applied to offender.'[25] This provision was twice applied by the national courts in response to amendments to the elements of the crime to quash convictions of the applicants for the crime of membership of a terrorist organisation.[26] For present purposes, the key finding of the Chamber was the following:

> 'The Government have made the argument that the applicants' conviction was foreseeable in accordance with the original versions of sections 1 and 7 of Law no.

[25] App. Nos 22429/07 and 25195/07 *Parmak and Bakir v. Turkey* (Second Section, Judgment of 3 December 2019), § 38.
[26] Ibid., §§ 23, 27, 33.

> 3713 – in force at the time the offences were committed – given that those provisions had in any event defined terrorism in a broader sense. The Court is unable to agree with that argument on the basis of the following observations. First, the principle that more lenient provisions of criminal law must be applied retrospectively is implicitly guaranteed by Article 7 of the Convention. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see, *mutatis mutandis*, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009, and *Koprivnikar v. Slovenia*, no. 67503/13, § 49, 24 January 2017). The Court also notes in that connection that in Turkish criminal law, courts are required to comply with Article 7 § 2 of the Criminal Code, in accordance with which the provisions most favourable to the offender shall be applied (see also *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 51, ECHR 1999-IV).'[27]

16. In *Parmak and Bakir*, the criminal proceedings against the applicants had been pending when each of the successive amendments was enacted. The temporal effect of legislation retroactively modifying the elements of the criminal offence is that the act or omission could not constitute a criminal offence at the time it was committed unless so designated by the modifying definition. Therefore, it was the *conviction* of the applicants by the State Party through her failure to apply the benefit of the modified definition of the offence, as required by her national legislation, which constituted a violation of Article 7(1).

17. In my opinion, the key factor is the existence of national legislation requiring a State Party to retroactively apply the benefit of a more lenient definition of an offence to all persons not already convicted of the old offence. If such legislation exists, as it did in *Parmak and Bakir*, then the State Party is obliged by Article 7(1) to apply it to persons who have not yet been convicted of the criminal offence. If the State Party did so, the next question is whether her application of it was done in a 'reasonably foreseeable' manner.[28] If the State Party has no such legislation, then Article 7(1) does not oblige her to retroactively apply a more lenient definition. This is because the State Party, by *convicting* the persons of the criminal offence, would not have violated the *nullum crimen* rule due to the fact that the elements of the criminal offence in force at the time of the act or omission would not have been retroactively modified by national legislation.

[27] Ibid., § 64.
[28] *Parmak and Bakir*, *supra* note 25 §§ 65-76.