

**DRAFT REPORT OF THE**

**SOMALI CRIMINAL LAW**

**RECODIFICATION INITIATIVE**

**Volume 1**  
**Text of Draft Code**

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## PART I: THE GENERAL PART

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#### Article 101. Short Title and Effective Date

- (a) This Act shall be known and may be cited as the “Somalia Penal Code of [2016].”
- (b) This Code shall take effect on [DATE X – 1 YEAR AFTER ENACTMENT].
- (c) Prosecutions for offenses committed prior to [DATE X – 1 YEAR AFTER ENACTMENT] shall be generally governed by the prior law. But in any case pending on or commenced after [DATE X – 1 YEAR AFTER ENACTMENT] involving an offense committed prior to that date, provisions of this Code that provide a defense or mitigation will apply if they are more favorable to the defendant.

#### Article 102. Principle of Construction; General Purposes

(a) *Principle of Construction.* The provisions of this Code shall be construed according to the fair import of their terms. But when the language is susceptible to differing constructions, and remains so after applying general principles of statutory interpretation and available signs of legislative intent, it shall be interpreted to further the general purposes stated in this Article and the special purposes of the particular provision involved.

(b) *General Purpose.*

(1) The general purpose of this Code is to establish a system of prohibitions and penalties to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests entitled to legal protection, including Islam, life, lineage, mind, body, and property.

(2) To this end, the provisions of this Code shall be construed to achieve the following objectives:

(A) to prohibit and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual or public interests, and

(B) to give fair warning of the nature of the conduct prohibited and of the sentences authorized upon conviction, and

(C) to define the act or omission and the accompanying culpability that constitute each offense, and

(D) to prescribe penalties that are proportionate to the seriousness of the offense and to the degree of blameworthiness of the offender.

(c) *Effect of Commentary.* The Commentary accompanying this Code shall be used as an aid in construing the provisions of this Code.

(d) *Effect of Heading.* No heading contained in the Code shall be interpreted to govern, limit, modify, or in any manner affect the scope, meaning, or intent of a provision.

(e) *Partial Repeal.* Unless the repealing act expressly provides, the repeal of any provision of this Code shall not affect:

- (1) the validity of the remainder of the Code; or
- (2) any penalty, forfeiture, or liability incurred under the repealed provision; or
- (3) any prosecution or other legal proceeding in progress under the repealed provision.

**Article 103. Abolition of Non-Statutory Offenses; Applicability**

(a) No conduct constitutes an offense unless it is made an offense by this Code or another statute of the State.

(b) The provisions of Part I of this Code are applicable to offenses defined by other statutes, unless this Code provides otherwise.

(c) This Article does not affect the power of a court to punish for civil contempt, or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

**Article 104. Civil Remedies Preserved; No Merger with Civil Injury**

(a) This Code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other right to recovery, and the civil injury is not merged in the offense.

(b) Unless this Code or another statute provides otherwise, civil proceedings in a court or administrative agency do not affect criminal liability under this Code for the same conduct.

**Article 105. Jurisdiction**

(a) *Basis of Jurisdiction.* A person is subject to prosecution for an offense that the person commits, while either within or outside the Federal Republic of Somalia, by his or her own conduct or that of another for which the person is legally accountable, if:

- (1) the offense is committed within the State; or
- (2) the offense is committed on or against a vessel or aircraft flagged or registered in Somalia; or
- (3) the offense is committed outside the State by or in cooperation with:
  - (A) a citizen; or
  - (B) a person domiciled in Somalia; or
- (4) the conduct outside the State constitutes an attempt to commit an offense within the State; or
- (5) the conduct within the State constitutes an attempt, complicity, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of both this State and the other jurisdiction; or
- (6) the conduct threatens the national security of the State; or
- (7) the conduct is in gross violation of international law or the conduct is in violation of a law created by the State's adoption of an international treaty.

(b) *Offense Within the State.* An offense is committed within the State, as required by Section (a)(1), if:

- (1) the conduct or result that is an element of the offense occurs within the State;
- or

(2) the offense involves telephone or electronic communication or digital information or recordings and the communication, information, or recording is stored on or received by a computer or facility located within the State.

(c) *Exception: Offense Arising from Lawful Conduct Outside of State.* Unless the defendant recklessly caused the result within this State, Section (a)(1) does not apply when:

- (1) causing a particular result is an element of the offense, and
- (2) the result is caused by conduct occurring outside the State, and
- (3) the result is not prohibited by the jurisdiction where the conduct occurred.

(d) *Presumption in Homicide Cases.* If the body of a homicide victim is found within the State, the trier of fact may presume that the death occurred within the State.

(e) *Omission Liability.* An offense that is based on an omission to perform a duty imposed by the law of the State is considered to be committed within the State, regardless of the location of the defendant at the time of omission.

(f) *Jurisdiction Not an Element of an Offense.* Establishing jurisdiction is not an element of an offense. The prosecution need not prove the culpability of the defendant as to any of the criteria for jurisdiction.

(g) *Definition.*

- (1) “Citizen” has the meaning given in Section (b) of Article 107.
- (2) The “State” has the meaning given in Section (f) of Article 107.

#### **Article 106. Burdens of Proof**

(a) *Presumption of Innocence.* A defendant is presumed innocent until proven guilty.

(b) *Burden of Persuasion.*

(1) *Burden on the State.* The burden is on the State:

- (A) to prove all elements of an offense beyond a reasonable doubt,
- (B) to disprove all defenses and exceptions from liability beyond a reasonable doubt, unless this Code expressly provides otherwise, and
- (C) to prove by a preponderance of the evidence all other facts required for liability, unless this Code expressly provides otherwise.

(2) *Burden on the Defendant.* Unless this Code expressly provides otherwise, the burden is on the defendant to prove all elements of a defense or mitigation by a preponderance of the evidence.

(c) *Burden of Production.*

(1) *Burden on the State.* An offense shall be presented to the trier of fact only if the State has presented sufficient evidence:

- (A) considered in the light most favorable to the State, and
- (B) considering all reasonable inferences that may be drawn from that evidence,

(C) to allow a rational trier of fact to find that all required elements of the offense have been proven beyond a reasonable doubt.

(2) *Burden on the Defendant.* An exception, defense, or mitigation shall be presented to the trier of fact only if:

- (A) there exists sufficient evidence:
  - (i) considered in the light most favorable to the defendant, and
  - (ii) considering all reasonable inferences that may be drawn from that evidence,

(B) to allow a rational trier of fact to find that all requirements of the affirmative defense or mitigation are proven by a preponderance of the evidence.

(d) *Defined Terms.*

(1) “Beyond a reasonable doubt” has the meaning given in Section (a) of Article 107.

(2) “Defense” has the meaning given in Section (c) of Article 107.

(3) “Mitigation” has the meaning given in Section (d) of Article 107.

(4) “Preponderance of the evidence” has the meaning given in Section (e) of Article 107.

**Article 107. Definitions**

(a) “Beyond a reasonable doubt” means a standard of proof requiring evidence sufficient to erase any reasonable doubts in the mind of a reasonable person as to the guilt of the defendant.

(b) A “citizen” is a Somali citizen, meaning:

(1) a person who was born in the Federal Republic of Somalia; or

(2) a person who was granted citizenship in the Federal Republic of Somalia; or

(3) a stateless person residing in the Federal Republic of Somalia.

(c) “Defense” means any defense defined in Chapters 500 (Justification Defenses), 600 (Excuse Defenses), or 700 (Nonexculpatory Defenses) of this Code, or any other provision identified as a defense in this Code.

(d) “Mitigation” means an act, circumstance, or fact that reduces the severity of the grade as provided for by this Code.

(e) “Preponderance of the evidence” means a standard of proof requiring evidence sufficient to cause a reasonable person to find it was more likely than not that the element existed at the required time.

(f) The “State” means the Federal Republic of Somalia, which includes the land, water, and the air space above the land and water over which the Somali government has jurisdiction, including the inhabited and uninhabited islands, territorial waters, and Exclusive Economic Zone, as defined by law and treaty. “Exclusive Economic Zone” means the maritime zone beyond and adjacent to the territorial sea up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, within which Somalia may regulate nonliving, living, and economic resources, as well as the maritime scientific research and pollution control.

**Article 108. Index of Definitions**

“Acquiescence” has the meaning given in Section (a) of Article 6305.

“Acquittal” has the meaning given in Section (a) of Article 709.

“Affirmative defense” has the meaning given in Section (a) of Article 107.

“Agent of the organization” has the meaning given in Section (a) of Article 803.

“Alcohol-based product” has the meaning given in Section (a) of Article 6117.

“Alcoholic beverage” has the meaning given in Section (b) of Article 6117.

“Animal” has the meaning given in Section (a) of Article 6208.

“Ascendant” has the meaning given in Section (b) of Article 6208.

“Automatic firearm” has the meaning given in Section (a) of Article 7106.

“Benefit” has the meaning given in Section (a) of Article 4310.

“Beyond a reasonable doubt” has the meaning given in Section (a) of Article 107.

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“Result element” has the meaning given in Section (d) of Article 208.  
“Security interest” has the meaning given in Section (f) of Article 4310.  
“Semiautomatic firearm” has the meaning given in Section (c) of Article 7106.  
“Serious bodily injury” has the meaning given in Section (i) of Article 508.  
“Services” has the meaning given in Section (f) of Article 4209.  
“Sex organs” has the meaning given in Section (e) of Article 6208.  
“Sexual contact” has the meaning given in Section (b) of Article 3303.



“Sexual intercourse” has the meaning given in Section (j) of Article 508.  
“Somali citizen” has the meaning given in Section (f) of Article 107.  
“Stamp” has the meaning given in Section (g) of Article 4310.  
“State” has the meaning given in Section (f) of Article 107.  
“Statement is material” has the meaning given in Section (e) of Article 5309.  
“Storage structure” has the meaning given in Section (f) of Article 4106.  
“Substantive offense” has the meaning given in Section (c) of Article 304.  
“Tamper” has the meaning given in Section (g) of Article 4106.  
“Tangible property” has the meaning given in Section (k) of Article 508.  
“Terrorist group” has the meaning given in Section (b) of Article 7304.  
“Time of war” has the meaning given in Section (b) of Article 1110.  
“Unjustified” has the meaning given in Section (l) of Article 508.  
“Valid consent” has the meaning given in Section (a) of Article 3107.  
“Value of the property” has the meaning given in Section (g) of Article 4209.  
“Violence” has the meaning given in Section (g) of Article 7405.  
“Violent offense” has the meaning given in Section (b) of Article 3107.  
“Weapon of mass destruction” has the meaning give in Section (c) of Article 7304.  
“Witness” has the meaning given in Section (e) of Article 5104.  
“Writing” has the meaning given in Section (h) of Article 4310.

## Chapter 200. Offense Requirements

Article 201	Basis of Liability
Article 202	Offense Elements Defined
Article 203	Culpability Requirements
Article 204	Ignorance or Mistake Negating Required Culpability
Article 205	Mental Disease or Defect Negating Required Culpability
Article 206	Requirement of a Voluntary Act; Omission Liability; Possession Liability
Article 207	Causal Relationship Between Conduct and Result
Article 208	Definitions

### Article 201. Basis of Liability

Subject to the provisions of this Chapter, a person is liable for an offense if the person:

- (a) satisfies all elements of the offense definition, or a provision of Chapter 400 (Imputing Offense Elements) provides that any missing elements can be imputed, and
- (b) does not satisfy the requirements of any exception to liability contained in the offense definition, and
- (c) does not satisfy the requirements of a defense provided in Chapters 500 (Justification Defenses), 600 (Excuse Defenses), or 700 (Nonexculpatory Defenses) of this Code.

### Article 202. Offense Elements Defined

(a) *Offense Elements.* The “elements” of an offense include:

- (1) objective elements, namely:
  - (A) conduct; or
  - (B) the result of conduct; or
  - (C) existing circumstances at the time of the conduct; and
- (2) the culpability requirements, as defined in Article 203 (Culpability Requirements), set out in the offense definition or the provisions establishing the offense grade.

(b) *Defined Terms.*

- (1) A “conduct element” has the meaning given in Section (b) of Article 208.
- (2) A “result element” has the meaning given in Section (d) of Article 208.
- (3) A “circumstance element” has the meaning given in Section (a) of Article 208.

### Article 203. Culpability Requirements

(a) *Culpability Required as to Every Objective Element.* A person is not guilty of an offense unless the person has the culpability required for each objective element of the offense.

(b) *Concurrence Required.* The culpability required by Section (a) must exist at the time of the conduct constituting the offense.

(c) *Intent.* A person acts intentionally:

- (1) with respect to a conduct or result element if it is the person’s conscious object to engage in such conduct or bring about such result;
- (2) with respect to a circumstance element if the person is aware of the existence of such circumstances or hopes or believes that such circumstances exist.
- (3) *Conditional Intent.* A person’s conditional intent satisfies the intent

requirement unless it negates the harm or evil to be prevented by the law defining the offense.

(d) *Knowledge*. A person acts knowingly:

(1) with respect to a conduct element if the person is aware that the person's conduct is of the nature described;

(2) with respect to a circumstance element if the person is aware that there is a high probability that the circumstance exists;

(3) with respect to a result element if the person is aware that it is practically certain that his conduct will cause that result.

(e) *Recklessness*. A person acts recklessly with respect to an objective element if:

(1) the person consciously disregards a substantial and unjustifiable risk that the objective element exists or will result from the person's conduct, and

(2) the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, its disregard is a gross deviation from the acceptable standards of conduct for a person in the same situation.

(f) *Negligence*. A person acts negligently with respect to an objective element if:

(1) the person should be aware of a substantial and unjustifiable risk that the objective element exists or will result from the person's conduct, and

(2) the risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, failure to perceive the risk is a gross deviation from the acceptable standards of conduct for a person in the same situation.

(g) *Proof of Higher Culpability Satisfies Lower Culpability Requirement*. The culpability requirement of:

(1) knowledge is satisfied by proof of purpose;

(2) recklessness is satisfied by proof of purpose or knowledge;

(3) negligence is satisfied by proof of purpose, knowledge, or recklessness.

(h) *Culpability Required Where None Stated*. If a culpability requirement for an objective element is not expressly provided in an offense definition or a grading provision, the minimum culpability required as to that element is recklessness.

(i) *Strict Liability*. No culpability requirement is imposed for an objective element under Section (h) if the offense:

(1) constitutes a violation, or

(2) is defined by a statute outside of this code, if a legislative purpose to impose strict liability for the offense, or with respect to any of its objective elements, plainly appears.

(j) *Effect of a Stated Culpability Requirement*. If a culpability requirement is expressly provided in an offense definition, that culpability is required as to all subsequent elements in the same clause of the offense definition, or as plain meaning would otherwise require.

(k) *Culpability as to Illegality of Conduct Not an Element*. Unless otherwise provided in the offense definition, a person's culpability as to whether his conduct constitutes an offense is not an element of the offense.

#### **Article 204. Ignorance or Mistake Negating Required Culpability**

Except as provided in Article 404 (Mistaken Belief Consistent with a Different Offense),

evidence of ignorance or mistake as to a matter of fact or law is admissible to negate the culpability required for an offense.

**Article 205. Mental Disease or Defect Negating Required Culpability**

(a) *Negation of Culpability.* Evidence of mental disease or defect is admissible to negate the culpability required for an offense.

(b) *Defined Terms.* “Mental disease or defect” has the meaning given in Section (c) of Article 208.

**Article 206. Requirement of a Voluntary Act; Omission Liability; Possession Liability**

(a) *Voluntary Act or Omission Required.* A person is not guilty of an offense unless liability is based upon a voluntary act or a failure to perform an act that the person is physically capable of performing.

(b) *Omission to Perform Legal Duty as an Act.* Where an offense is defined in terms of conduct that causes a prohibited result, a person may satisfy the conduct requirement if the result is caused by the person’s omission to perform a legal duty.

(c) *Possession as a Voluntary Act.* Possession is a voluntary act, as required by Section (a), if the person:

(1) knowingly procured or received the thing possessed; or

(2) was aware of his or her control over the thing possessed for a sufficient time to have been able to terminate possession.

(d) *Defined Term.* “Voluntary act” has the meaning given in Section (e) of Article 208.

**Article 207. Causal Relationship Between Conduct and Result**

(a) *Causal Relationship Requirement.* A person’s conduct is the cause of a result if:

(1) the result would not have occurred but for the person’s conduct, and

(2) the result is not too remote or accidental in its occurrence, and not too dependent upon another’s volitional act, to have a just bearing on the person’s liability or on the gravity of his offense.

(b) *Concurrent Sufficient Causes.* Where the conduct of two or more persons each causally contributes to a result and each alone would have been sufficient to cause the result, the requirement of Section (a)(1) is satisfied as to each person.

**Article 208. Definitions**

(a) “Circumstance element” means that part of an offense definition that requires an objective element other than a conduct or result element.

(b) “Conduct element” means that part of an offense definition that requires a person’s act or failure to act.

(c) “Mental disease or defect” means any abnormal condition of the mind that substantially affects mental or emotional processes or substantially impairs behavioral controls, but does not include intoxication or a mental abnormality manifested only by repeated criminal behavior or antisocial behavior.

(d) “Result element” means that part of an offense definition that requires any change of circumstances caused by the person’s conduct.

## Chapter 300. Principles of Offense Liability

Article 301	Customary License; De Minimus Infractions; Conduct Not Envisaged by Legislature as Prohibited by the Offense
Article 302	Consent
Article 303	Conviction When the Defendant Satisfies the Requirements of More than One Offense
Article 304	Definitions

### Article 301. Customary License; De Minimus Infractions; Conduct Not Envisaged by Legislature as Prohibited by the Offense

(a) *Exemption from Offense Liability.* The court shall dismiss a charged offense if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

- (1) was within a customary license, and was:
  - (A) not expressly negated by the person whose interest was infringed; and
  - (B) not inconsistent with the purpose of the law defining the offense; or
- (2) caused a harm or evil too trivial to warrant the condemnation of criminal conviction; or
- (3) did not actually cause the harm or evil sought to be prohibited by the law defining the offense.

(b) *Requirement of Written Statement.* The court shall not dismiss a charged offense under this Article without filing a written statement of its reasons.

(c) *Burden of Persuasion on Defendant.* The defendant has the burden of proving this exemption by a preponderance of the evidence.

### Article 302. Consent

(a) *Consent as a Defense.* In any prosecution, it is a defense that the victim consented to the conduct constituting the offense if the consent:

- (1) negates an element of the offense; or
- (2) precludes the infliction of the harm or wrong sought to be prohibited by the law defining the offense.

(b) *Consent to Physical Injury.* When conduct constitutes an offense because it causes or threatens bodily injury, consent to that conduct is a defense if the injury caused or threatened by the conduct is:

- (1) not serious, or
- (2) a reasonably foreseeable hazard of joint participation in a lawful concerted activity, athletic contest, or sport.

(c) *Ineffective Consent.* Unless otherwise provided by this Code or by the law defining the offense, consent by the victim is not a defense if:

- (1) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or
- (2) it is given by a person who:
  - (A) because of youth, mental disease or defect, or intoxication,

(B) is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(3) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(4) it is induced by force, coercion, threats, or deception.

(d) *Defined Terms.*

(1) “Deception” has the meaning given in Section (a) of Article 304.

(2) “Intoxication” has the meaning given in Section (b) of Article 405.

(3) “Mental disease or defect” has the meaning given in Section (c) of Article

208.

### **Article 303. Conviction When the Defendant Satisfies the Requirements of More than One Offense**

(a) *Limitations on Conviction for Multiple Related Offenses.* The trier of fact may find a defendant guilty of any offense for which the defendant satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses if:

(1) the two offenses are based on the same conduct and:

(A) the harm or evil of one offense is:

(i) entirely accounted for by the other offense; or

(ii) of the same kind, but lesser degree, than that of the other offense; or

(B) the two offenses differ only in that:

(i) one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or

(ii) one requires a lesser kind of culpability than the other; or

(C) the offenses are defined as a continuing course of conduct and the defendant’s course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses; or

(2) one offense consists only of an inchoate offense toward commission of:

(A) the other offense; or

(B) a substantive offense that is related to the other offense in the manner described in Section (a)(1); or

(3) each offense is an inchoate offense toward commission of a single substantive offense; or

(4) the two offenses differ only in that one is based upon the defendant’s own conduct, and another is based upon the defendant’s accountability, under Article 401 (Accountability for the Conduct of Another), for another person’s conduct; or

(5) inconsistent findings of fact are required to establish the commission of the offenses.

(b) *Effect of Multiple Offenses Contained Within the Same Article.* If a person is convicted of any two offenses based upon the same conduct, and those offenses are contained within the same Article of this Code, that fact should be considered by the court as a factor weighing against entry of conviction for both offenses under Section (a)(1).

(c) *Entry of Judgment.* Where Section (a) prohibits multiple judgments of conviction, the court shall enter a judgment of conviction for the most serious offense among the offenses in

question of which the defendant has been found guilty.

(d) *Defined Terms.*

(1) “Inchoate offense” has the meaning given in Section (c) of Article 304.

(2) “Substantive offense” has the meaning given in Section (c) of Article 304.

**Article 304. Definitions**

(a) “Deception” is the act of deceiving. Deceiving has the meaning given in Section (c) of Article 4209.

(b) An “inchoate offense” is an offense defined in Chapter 900 (Inchoate Offenses).

(c) “Substantive offense” means any offense other than an inchoate offense.

## Chapter 400. Imputing Offense Elements

Article 401	Accountability for the Conduct of Another
Article 402	Voluntary Intoxication
Article 403	Divergence Between Consequences Intended or Risked and Actual Consequences
Article 404	Mistaken Belief Consistent with a Different Offense
Article 405	Definitions

### Article 401. Accountability for the Conduct of Another

(a) *Accountability*. A person is legally accountable for the conduct of another person if:

- (1) acting with the culpability required for the commission of the offense, he causes an innocent or irresponsible person to engage in the conduct; or
- (2) he or she purposely aids, solicits, or conspires with the other person in the commission of the offense; or
- (3) the law defining the offense makes the person accountable for the conduct of another person.

(b) *Exceptions to Accomplice Liability*. Unless the statute defining the offense provides otherwise, a person is not liable for an offense committed by another person if:

- (1) the person is a victim of that offense; or
- (2) the person's conduct is inevitably incident to commission of the offense; or
- (3) before commission of the offense, the person terminates his or her complicity,

and

- (A) wholly deprives his or her prior efforts of their effectiveness; or
- (B) gives timely warning to the proper law enforcement authorities; or
- (C) otherwise makes proper efforts to prevent the commission of the offense; or
- (4) the person's conduct independently constitutes a separate offense.

(c) *Accountability Despite Legal Incapacity*. A person who is legally incapable of personally committing a particular offense may be convicted of the offense based on his or her accountability for the conduct of another person who commits the offense, unless that liability would be inconsistent with the purpose of the provision establishing the person's incapacity.

(d) *Unconvicted Principal or Confederate*. A person who is legally accountable for the conduct of another may be convicted upon proof that the objective elements of the offense are satisfied, even if the other person:

- (1) has not been prosecuted or convicted; or
- (2) has been convicted of a different offense or degree of offense; or
- (3) has been acquitted.

(e) *Convictions for Different Degrees of an Offense*. A person who is legally accountable for the conduct of another may only be convicted of the degree of an offense that is consistent with the person's own culpability.

(f) *Attempt Liability for Complicity in Uncommitted Offense*. A person who would have been accountable for the offense conduct of another under Section (a) if the other had committed the offense is guilty of an attempt to commit the offense.

(g) *Attempted Complicity*. A person who attempts to aid, solicit, or conspire with another



in the planning or commission of an offense under Section (a) is guilty of an attempt to commit the offense, whether or not the offense is attempted or committed by the other person.

#### **Article 402. Voluntary Intoxication**

(a) *Imputation of Culpability.* A person's voluntary intoxication while committing an offense:

- (1) may be introduced to negate offense elements of intent or knowledge; but
- (2) may not negate an offense element of recklessness if the person would have been aware of the risk had the person been sober.

(b) *What Constitutes Voluntary Intoxication.* Voluntary intoxication means intoxication:

- (1) caused by substances that the person knowingly introduces into his or her own body,
- (2) the tendency of which to cause intoxication the person knows or ought to know;
- (3) unless the person introduces them:
  - (A) under medical advice; or
  - (B) under circumstances that would afford a defense to prosecution for an offense.

(c) *Defined Terms.* "Intoxication" has the meaning given in Section (b) of Article 405.

#### **Article 403. Divergence Between Consequences Intended or Risked and Actual Consequences**

(a) *When Required Culpability Is Imputed.* When:

- (1) culpability as to a particular consequence of a person's conduct is required by an offense, and
- (2) the consequence that actually occurs is not one intended, contemplated, or risked by the person,
- (3) the required culpability nonetheless is established if the actual consequence differs from the consequence intended, contemplated, or risked only in that:
  - (A) a different person or different property is injured or affected; or
  - (B) the consequence intended, contemplated, or risked is more serious or extensive than the actual consequence.

(b) *Defined Term.* "Consequence" has the meaning given in Section (a) of Article 405.

#### **Article 404. Mistaken Belief Consistent with a Different Offense**

The defense provided by Article 204 (Ignorance or Mistake Negating Required Culpability) is not available if the person would be guilty of another offense of the same or a higher grade had the situation been as the person supposed.

#### **Article 405. Definitions.**

(a) "Consequence" means a result element of an offense and the attendant circumstance elements that characterize the result.

(b) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of a substance into the body.

## Chapter 500. Justification Defenses

Article 501	Lesser Evil
Article 502	Execution of Public Duty
Article 503	Law Enforcement Authority
Article 504	Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others
Article 505	Defense of Person
Article 506	Defense of Property
Article 507	General Provisions Governing Justification Defenses
Article 508	Definitions

### Article 501. Lesser Evil

*Defense Defined.* Conduct is justified if:

- (a) it is immediately necessary to avoid a harm or evil, and
- (b) the harm or evil to be avoided by the defendant's conduct is greater than that sought to be prevented by the law defining the offense charged, and
- (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

### Article 502. Execution of a Public Duty

(a) *Defense Defined.* Conduct is justified if it is required or authorized by:

- (1) the law defining the duties or functions of a public servant or the assistance to be rendered to a public servant in the performance of his duties; or
- (2) the law governing the execution of legal process; or
- (3) the judgment or order of a competent court or tribunal; or
- (4) any other provision of law imposing a public duty.

(b) *Defined Term.* "Public servant" has the meaning given in Section (h) of Article 508.

### Article 503. Law Enforcement Authority

(a) *Law Enforcement Officer's Use of Force in Making an Arrest or Maintaining Detention.*

(1) *Defense Defined.* The conduct of a law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, is justified if:

(A) it is necessary to effect a lawful arrest or maintain a lawful detention;  
and

(B) the arrestee or detainee has been made aware of the purpose of the arrest or detention, unless it is unreasonable to do so.

(2) *Limitation: Use of Deadly Force.* Use of deadly force is not justified under Section (a)(1) unless:

(A) the force is necessary to prevent the arrest from being defeated by resistance or escape, and

(B) the force employed does not create a substantial risk of injury to innocent persons, and

(C) the person to be arrested has committed or attempted a felony involving actual or threatened bodily injury, and

(D) if the person is not arrested without delay, the person will create a substantial risk of serious bodily injury or death.

(3) *Invalid Warrant.* Conduct by a law enforcement officer making an arrest under an invalid warrant is justified if:

(A) the conduct would have been justified had the warrant been valid, and

(B) the officer does not know the warrant is invalid.

(b) *Use of Force to Prevent an Escape.*

(1) *Escape from Custody.* The use of force by a law enforcement officer or other person who has an arrested or lawfully detained person in his or her custody or presence is justified if:

(A) it is necessary to prevent the person's escape from custody, and

(B) it would be justified if performed to arrest the person.

(2) *Escape from a Correctional Institution.* The use of force by a correctional officer or law enforcement officer, including the use of deadly force, is justified if:

(A) it is immediately necessary to prevent the escape from a correctional institution,

(B) of a person lawfully detained in the institution who is either:

(i) under sentence for an offense; or

(ii) awaiting trial or commitment for an offense.

(c) *Defined Terms.*

(1) "Bodily injury" has the meaning given in Section (a) of Article 508.

(2) "Correctional officer" has the meaning given in Section (b) of Article 508.

(3) "Deadly force" has the meaning given in Section (c) of Article 508.

(4) "Force" has the meaning given in Section (e) of Article 508.

(5) "Law enforcement officer" has the meaning given in Section (g) of Article

508.

(6) "Serious bodily injury" has the meaning given in Section (i) of Article 508.

#### **Article 504. Conduct of Persons with Special Responsibility for Care, Discipline, or Safety of Others**

(a) *Defense Defined:* The defendant's use of force upon or toward another person is justified if:

(1) (A) the defendant is:

(i) a parent, guardian, or other person similarly responsible for the general care and supervision of a person less than 18 years of age, or the defendant is a person acting at the request of a person so responsible, and the force is necessary:

(aa) to safeguard or promote the welfare of the person; or

(bb) to further any of the specific purposes for which force may be used in Sections (a)(1)(A)(ii) through (a)(5); or

(ii) a teacher or person otherwise entrusted with the care or supervision of a person less than 18 years of age for a special purpose, and the force used is:

(aa) necessary to further that special purpose, and

- (bb) consistent with the person’s welfare; or
- (iii) the guardian or other person similarly responsible for the general care and supervision of an incompetent person , and the force used is necessary:
  - (aa) to safeguard or promote the welfare of the person; or
  - (bb) if the person is in a hospital or other institution for care and custody, to maintain reasonable discipline in the institution; and
- (B) the force used does not:
  - (i) cause bodily injury, mental distress, or unnecessary degradation; or
  - (ii) create a substantial risk of serious bodily injury or death; or
- (2) the defendant is a doctor or therapist, or a person assisting at the doctor’s or therapist’s direction, and:
  - (A) the force is necessary to administer a recognized form of treatment that is adapted to promoting the physical or mental health of the patient, and
  - (B) the treatment is administered either:
    - (i) with the consent of the patient, or, if the patient is a person less than 18 years of age or an incompetent person, with the consent of a parent, guardian, or other person legally competent to consent on the patient’s behalf; or
    - (ii) in an emergency, when no one competent to consent can be consulted and a reasonable person, wishing to safeguard the welfare of the patient, would consent; or
- (3) the defendant is a correctional officer, and the force used is necessary to enforce the lawful rules or procedures of the institution; or
- (4) the defendant is a person responsible for the safety of an aircraft, train, vehicle, vessel, or other carrier, or a person acting at the responsible person’s direction, and the force used is necessary to prevent:
  - (A) interference with the operation of the carrier; or
  - (B) obstruction of the execution of a lawful order; or
- (5) the defendant is a person who is authorized or required by law to maintain order or decorum in an aircraft, train, vehicle, vessel, or other carrier, or in any place where persons are assembled, and the force used:
  - (A) is necessary for that purpose, and
  - (B) does not create a substantial risk of causing death, bodily injury, or extreme mental distress.

(b) *Use of Deadly Force Not Authorized: Limitation.* The use of deadly force is not justified under this Article, although it may be justified if the defendant satisfies the requirements of the justification defense under Article 505 (Defense of Person).

(c) *Defined Terms.*

- (1) “Deadly force” has the meaning given in Section (c) of Article 508.
- (2) “Incompetent person” has the meaning given in Section (f) or Article 508.

## **Article 505. Defense of a Person**

(a) *Defense Defined.* The use of force against an aggressor is justified when and to the extent the force is immediately necessary to defend oneself or another person against the aggressor's use of unjustified force.

(b) *Limitations.*

(1) *Defense of Another.* The use of force in defense of another person under Section (a) is justified only if:

(A) the person would have been justified in using the force if he had been the object of the aggression, and

(B) the other person would have been justified in using the force on his own behalf.

(2) *Resisting Arrest.* The use of force is not justified under Section (a) to resist an arrest that is being made by a law enforcement officer, regardless of whether the arrest is lawful.

(c) *Use of Deadly Force.*

(1) *Only Available to Defend Against Certain Threats.* The use of deadly force is justified under Section (a) only if it is necessary to protect the defendant or another person against death, serious bodily injury, kidnapping, or sexual intercourse compelled by force or threat.

(2) *Retreat, Surrendering Possession, or Complying with Aggressor's Demands.*

(A) *Generally.* Except for a person acting under Article 503 (Law Enforcement Authority), the use of deadly force is not justified under Section (a) if the necessity of using deadly force can be avoided, thereby securing the complete safety of any person in danger, by:

(i) retreating; or

(ii) surrendering possession of a thing to a person asserting a claim of right to the thing; or

(iii) complying with a demand that the defendant abstain from performing an act that the defendant is not legally obligated to perform.

(B) *Exceptions.*

(i) A defendant is not obligated to retreat in or from his or her own dwelling or if the defendant acts to protect another person in that person's dwelling.

(ii) A defendant is not obligated to retreat in or from his or her place of work or if the defendant acts to protect another person in that person's place of work, unless the defendant was the initial aggressor.

(d) *Use of Force to Prevent Suicide.* The use of non-deadly force upon or toward another person is justified when and to the extent the force is immediately necessary to prevent the other person from committing suicide or inflicting serious bodily injury upon himself or herself.

(e) *Defined Terms.*

(1) "Deadly force" has the meaning given in Section (c) of Article 508.

(2) "Dwelling" has the meaning given in Section (d) of Article 508.

(3) "Serious bodily injury" has the meaning given in Section (i) of Article 508.

(4) "Sexual intercourse" has the meaning given in Section (j) of Article 508.

(5) "Unjustified" has the meaning given in Section (l) of Article 508.

## **Article 506. Defense of Property**

(a) *Defense Defined.* The use of force against an aggressor is justified when and to the extent that:

- (1) the force is immediately necessary to prevent the aggressor's unjustified trespass upon, or other unjustified interference with, real or tangible property, and
- (2) the property is lawfully in the possession of the defendant or another person on whose behalf the defendant acts, and
- (3) before employing force, the defendant first requests that the aggressor cease trespassing upon or interfering with the property.

(b) *Request to Cease Not Required: Exception.* Section (a)(3) is inapplicable if:

- (1) the request would be useless; or
- (2) the request would endanger the defendant or another person; or
- (3) material harm would be done to the physical condition of the property to be protected before the defendant's request could be effectively made.

(c) *Use of Deadly Force Not Authorized: Limitation.* The use of deadly force is not justified under this Article, although it may be justified if the defendant satisfies the requirements of the justification defense under Article 505 (Defense of Person).

(d) *Defined Terms.*

- (1) "Deadly force" has the meaning given in Section (c) of Article 508.
- (2) "Property" has the meaning given in Section (c) of Article 4106.
- (3) "Unjustified" has the meaning given in Section (l) of Article 508.
- (4) "Tangible property" has the meaning given in Section (k) of Article 508.

## **Article 507. General Provisions Governing Justification Defenses**

(a) *Superiority of More Specific Justifications.* The justifications provided in Article 501 (Lesser Evil) or Article 502 (Execution of Public Duty) are not available if the factual circumstances that are the basis of the claimed justification are precluded by another provision of this Chapter.

(b) *Multiple Justifications.* Except as provided in Section (a), if a person's conduct satisfies the requirements of more than one justification defense, all of those justification defenses are available.

(c) *Assistance of, Resistance to, and Interference With Justified Conduct.* Except as otherwise provided by law, conduct that is justified may not lawfully be resisted or interfered with, and lawfully may be assisted.

(d) *Causing Justifying Circumstances.*

(1) *Not Automatic Bar to a Justification Defense.* Although a person causes the justifying circumstances, his or her offense conduct may be justified if it satisfies the requirements of a justification defense.

(2) *Liability for Culpably Causing Justifying Circumstances.* However, the person's conduct in causing the justifying circumstances may be an offense if the person acts with the culpability required by the offense.

(3) *Defense.* A person may have a general defense to his or her conduct that gives rise to liability under Section (d)(2).

(e) *Risk of Injury to Innocent Persons Not Justified.* A justification under this Chapter to use force upon another person does not extend to injury or risk of injury to innocent persons created by that use of force.

(f) *No Civil Liability for Justified Conduct.* There is no civil liability for justified conduct against an aggressor.

**Article 508. Definitions**

(a) “Bodily injury” means physical pain, illness or any impairment of physical condition.

(b) “Correctional officer” means an officer appointed to maintain order over a legally authorized detention center.

(c) “Deadly force” means violent action known to create a substantial risk of causing death or serious bodily injury.

(d) “Dwelling” means any structure, or any portion thereof, whether or not movable, that is used as a residence, whether or not occupied at the time of an offense.

(e) “Force” means violent action known to create a substantial risk of causing bodily injury.

(f) “Incompetent person” means a person entrusted by authority of law to the custody of another person or to a civil institution.

(g) “Law enforcement officer” means a person who:

(1) by virtue of his office or public employment

(2) is vested by law with a duty to:

(A) maintain public order; or

(B) to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses.

(h) “Real property” means land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.

(i) “Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or premature birth of a child.

(j) “Sexual intercourse” means any act of penetration, however slight, of the genitalia, mouth, or anus of one person with the genitalia of another person. Evidence of emission of semen is not required to prove that sexual intercourse occurred.

(k) “Tangible property” means any physical object of value.

(l) “Unjustified” means not legally authorized and not permitted by any Article in Chapter 500.

## Chapter 600. Excuse Defenses

Article 601	Involuntary Act and Omission
Article 602	Insanity
Article 603	Involuntary Intoxication
Article 604	Immaturity and Youth
Article 605	Duress
Article 606	Ignorance Due to Unavailable Law
Article 607	Reliance upon Official Misstatement of Law
Article 608	Reasonable Mistake of Law Unavoidable by Due Diligence
Article 609	Mistake as to a Justification
Article 610	General Provisions Governing Excuse Defenses
Article 611	Definitions

### Article 601. Involuntary Act and Omission

(a) *Involuntary Act*. A person is excused for his or her offense if liability is based upon an act that is not a product of the person's effort or determination.

(b) *Involuntary Omission*. A person is excused for his or her offense if liability is based on an omission, and:

- (1) the person is mentally or physically incapable of performing, or otherwise cannot reasonably be expected under the circumstances to perform, the omitted act; or
- (2) the person would have been liable for an offense, and would have been denied a justification defense, if the person had performed the omitted act.

### Article 602. Insanity

(a) *Insanity Defense*. A person is excused for his or her offense if, at the time of the offense:

- (1) the person suffers from a mental disease or defect, and
- (2) as a result, the person:
  - (A) does not perceive the physical nature or foresee the physical consequences of his or her conduct; or
  - (B) lacks substantial capacity to appreciate the wrongfulness of his or her conduct; or
  - (C) lacks sufficient willpower to choose whether to engage in or refrain from the criminal conduct.

(b) *Defined Term*. "Mental disease or defect" has the meaning given in Section (c) of Article 208.

### Article 603. Involuntary Intoxication

(a) *Involuntary Intoxication*. A person is excused for his or her offense if, at the time of the offense:

- (1) the person is involuntarily intoxicated, and
- (2) as a result, the person:
  - (A) does not perceive the physical nature or foresee the physical consequences of his or her conduct; or



(B) lacks substantial capacity to appreciate the wrongfulness of the person's conduct; or

(C) lacks sufficient willpower to choose whether to engage in or refrain from the person's conduct.

(b) *Liability for Causing Excusing Conditions.* Nothing in this Section precludes liability under Section (b)(2) of Article 610.

(c) *What Constitutes Involuntary Intoxication.* Involuntary intoxication is all intoxication that does not qualify as voluntary intoxication under Section (b) of Article 402 (Voluntary Intoxication).

#### **Article 604. Immaturity and Youth**

(a) *Excuse Defined.* The court shall dismiss a prosecution of a person for his or her offense if, at the time of the offense:

(1) the person lacks the maturity of an adult, and

(2) as a result, the person:

(A) does not foresee the physical consequences of his or her conduct; or

(B) lacks substantial capacity to appreciate the wrongfulness of his or her conduct.

(b) *Presumptions.*

(1) A person less than 14 years of age is conclusively presumed to have satisfied the requirements of this excuse.

(2) A person 14 years of age or older but less than 18 years of age is presumed, subject to rebuttal by the prosecution, to have satisfied the requirements of this excuse.

#### **Article 605. Duress**

*Excuse Defined.* A person is excused for an offense if, at the time of the offense:

(a) the person is coerced to perform the offense conduct,

(b) by means of force or threat that a person of reasonable firmness in the person's situation would have been unable to resist.

#### **Article 606. Ignorance Due to Unavailable Law**

*Excuse Defined.* A person is excused for his or her offense if:

(a) before the conduct constituting the offense was committed, the law relating to the offense was not made available in a way that would give notice to a reasonable person, and

(b) the person makes a reasonable mistake regarding that law, and

(c) as a result, at the time of the offense, the person does not know that his or her conduct is criminal.

#### **Article 607. Reliance Upon Official Misstatement of Law**

*Excuse Defined.* A person is excused for his or her offense if:

(a) the person reasonably relies upon an official misstatement of law contained in:

(1) a statute or other enactment;

(2) a judicial decision, opinion, or judgment;

(3) an administrative order; or

(4) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration, or enforcement of the law

- defining the offense; and
- (b) the person makes a reasonable mistake as to that law, and
- (c) as a result, at the time of the offense, the person does not know that his or her conduct is criminal.

**Article 608. Reasonable Mistake of Law Unavoidable by Due Diligence**

*Excuse Defined.* A person is excused for his or her offense if:

- (a) the person pursues with due diligence all reasonable means available to ascertain the meaning and application of the offense, and
- (b) the person honestly and in good faith concludes that his or her conduct is lawful in circumstances where a law-abiding and prudent person would also so conclude, and
- (c) as a result, at the time of the offense, the person does not know his or her conduct is criminal.

**Article 609. Mistake as to a Justification**

(a) *Excuse Defined.* A person is excused for his or her offense if:

(1) under the circumstances as the person believes them to be, his or her conduct satisfies the requirements of a justification defense defined in Chapter 500, and

(2) the person's mistake is:

(A) reasonable, or

(B) less culpable than the culpability required by:

(i) the result element of the offense charged; or

(ii) if no result element exists, the circumstance element most central to the offense charged.

(b) *Unquestionable Unlawful Orders.* A person is excused for carrying out an unlawful order when the law does not allow him or her to question the legitimacy of the order.

(c) *Defined Terms.*

(1) "Circumstance element" has the meaning given in Section (a) of Article 208.

(2) "Reasonable mistake" has the meaning given in Article 611.

(3) "Result element" has the meaning given in Section (d) of Article 208.

**Article 610. General Provisions Governing Excuse Defenses**

(a) *Assistance of, Resistance to, and Interference with Excused Conduct.* Except as otherwise provided by law, conduct for which a person is excused is not justified, and may be resisted and interfered with as justified by law. A person who assists conduct for which another is excused is not excused for his or her assistance solely because the principal actor is excused.

(b) *Causing the Excusing Circumstances Not Automatic Bar to an Excuse Defense.*

(1) The fact that a person has caused the conditions giving rise to an excuse defense under this Chapter shall not prevent the person from being excused for his or her offense.

(2) *Liability for Culpably Causing Excusing Conditions.* Nevertheless, a person commits an offense if, acting with the culpability required by the offense, the person causes the conditions that excuse the person or another person for engaging in the offense.

(3) *Defense to Causing Excusing Conditions.* A person may have a general defense to his or her conduct that gives rise to liability under Section (b)(2).

(c) *Mistake as to an Excuse is No Defense.* Except as otherwise provided by law, it is no defense that a person mistakenly believes that the person satisfies the requirements of an excuse defense.

(d) *Burden of Persuasion.* Unless expressly provided otherwise by this Chapter, the defendant carries the burden of persuasion on all excuse defenses by a preponderance of the evidence.

**Article 611. Definition**

“Reasonable mistake” is an erroneous belief that the actor is non-negligent in forming or holding.

## Chapter 700. Nonexculpatory Defenses

Article 701	Prosecution Barred if Not Commenced Within Time Limitation Period
Article 702	Entrapment
Article 703	Unfitness to Plead, Stand Trial, or Be Sentenced
Article 704	Prior Prosecution for Same Offense as Bar to Present Prosecution
Article 705	Prior Prosecution for Different Offense as a Bar to Present Prosecution
Article 706	Prior Prosecution by Another Jurisdiction as a Bar to Present Prosecution
Article 707	Prosecution Not Barred Where Former Prosecution Was Before a Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid
Article 708	General Provisions Governing Nonexculpatory Defenses
Article 709	Definitions

### Article 701. Prosecution Barred if Not Commenced Within Time Limitation Period

(a) *Time Limitations.* A prosecution is barred unless commenced within the following time period from the time the offense is committed:

- (1) a prosecution for a Class A felony may be commenced at any time;
- (2) a prosecution for any other felony must be commenced within [10] years;
- (3) a prosecution for any other offense must be commenced within [5]<sup>1</sup> years.

(b) *Extended Periods.* If the period prescribed in Section (a) has expired, a prosecution nevertheless may be commenced:

- (1) within 2 years after the offense has been discovered or should reasonably have been discovered, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years;
- (2) for any offense based upon misconduct of a public officer in office, within 2 years of the end of the time the defendant holds office.

(c) *Period of Limitation Tolloed.* The period of limitation does not run during any period of time:

- (1) during which the defendant is fleeing or hiding from justice, so that the defendant's identity or whereabouts cannot be ascertained, despite a diligent search;
- (2) after the defendant has failed to appear for any scheduled court proceeding related to the prosecution, for which lawful notice was provided or properly attempted; or
- (3) during which a prosecution against the defendant for the same conduct is pending, even if the information or indictment was defective.

(d) *Start of the Limitation Period.* The period of limitation starts to run on the day after the offense is committed. An offense is committed either:

- (1) when every element of the offense occurs; or
- (2) if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity in it is terminated.

[(e) *Commencement of Prosecution.* A prosecution is commenced when either an

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<sup>1</sup> **Query:** Are these the appropriate time periods?

indictment is returned or information is filed.]<sup>2</sup>

(f) *Period During Which Prosecution is Pending.* A prosecution is pending from the time it is commenced through the final disposition of the case, including the final disposition of the case upon appeal.

(g) *Defined Term.* “Public officer” has the meaning given in Section (e) of Article 709.

### **Article 702. Entrapment**

(a) *Defense Defined.* A person has a defense if:

(1) the person engages in an offense because the person is induced to do so by a law enforcement officer, or an agent acting in knowing cooperation with the officer, and

(2) the officer’s or agent’s conduct creates a substantial risk that a reasonable, law-abiding citizen would have been induced to commit the offense, and

(3) the person is not predisposed to commit the offense.

(b) *Defense Unavailable for Causing or Threatening Physical Injury.* The defense afforded by Section (a) is unavailable when causing or threatening bodily injury is an element of the offense charged.

(c) *Defined Terms.*

(1) “Bodily injury” has the meaning given in Section (a) of Article 508.

(2) “Law enforcement officer” has the meaning given in Section (g) of Article 508.

### **Article 703. Unfitness to Plead, Stand Trial, or be Sentenced**

A defendant may not be required to plead, stand trial, or be sentenced if, because of the person’s mental condition, the person is unable:

(a) to understand the nature of the proceedings against him or her; or

(b) to assist in the person’s own defense.

### **Article 704. Prior Prosecution for Same Offense as a Bar to Present Prosecution**

(a) *Bar to Prosecution Defined.* When a prosecution is for a violation of the same statutory provision and is based upon the same facts as a prior prosecution, it is barred by the prior prosecution if:

(1) the prior prosecution resulted in an acquittal that was not later set aside.

(2) the prior prosecution was terminated, after [the information was filed or the indictment was returned],<sup>3</sup> by a final order or judgment in favor of the defendant, which has not been set aside, reversed, or vacated, and that necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the present offense.

(3) the prior prosecution resulted in a conviction.

[(4) the prior prosecution was improperly terminated.]<sup>4</sup>

(b) *Defined Terms.*

(1) “Acquittal” has the meaning given in Section (a) of Article 709.

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<sup>2</sup> **Query:** Commencement of the prosecution should correspond to the criminal procedure code. Are indictment or filing the appropriate steps to include here?

<sup>3</sup> See footnote 2.

<sup>4</sup> **Query:** Is improper termination appropriate here?

- (2) “Conviction” has the meaning given in Section (b) of Article 709.
- (3) “Improperly terminated” has the meaning given in Section (c) of Article 709.

**Article 705. Prior Prosecution for Different Offense as a Bar to Present Prosecution**

*Bar to Prosecution Defined.* Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a prior prosecution in a court having jurisdiction over the subject matter of the present prosecution if:

- (a) the prior prosecution resulted in either an acquittal that was not later set aside, or a conviction, and the present prosecution is for:
  - (1) any offense of which the defendant could have been convicted in the prior prosecution; or
  - (2) the same conduct, unless:
    - (A) the offense for which the defendant is presently being prosecuted requires proof of a fact not required by the prior offense, and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
    - (B) the presently prosecuted offense was not consummated when the prior trial began.
- (b) the prior prosecution was terminated by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated, and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the present offense.]
- (c) The prior prosecution was improperly terminated and the present prosecution is for an offense of which the defendant could have been convicted had the prior prosecution not been improperly terminated.

**[Article 706. Former Prosecution by Another Jurisdiction as a Bar to Present Prosecution**

*Bar to Prosecution Defined.* When conduct constitutes an offense within concurrent jurisdictions, a prosecution in one of those jurisdictions is a bar to later prosecution if:

- (a) the first prosecution resulted in either an acquittal that was not later set aside, or in a conviction, and the second prosecution is based on the same conduct, unless:
  - (1) the offense for which the defendant is later prosecuted requires proof of a fact not required by the former offense, and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
  - (2) the second offense was not consummated when the former trial began.
- (b) the former prosecution was terminated, after the information was filed or the indictment returned, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated, and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is later prosecuted.
- (c) the former prosecution was improperly terminated and the second prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.]<sup>5</sup>

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<sup>5</sup> The inclusion of this Article depends on the resolution of the concurrent jurisdictional questions now under discussion by the Somalis. Note the corresponding current law, Penal Code (1962) Art. 10.

**Article 707. Prosecution Not Barred Where Prior Prosecution Was Before a Court Lacking Jurisdiction, or Was Fraudulently Procured by Defendant, or Resulted in Conviction Held Invalid**

A prosecution is not a bar within the meaning of Articles 705 through 707 if the prior prosecution:

- (a) was before a court that lacked jurisdiction over the defendant or the offense;
- or
- (b) was procured by the defendant without the knowledge of the appropriate prosecuting officer and with intent to avoid the sentence that might otherwise be imposed; or
- (c) resulted in a judgment of conviction that was held invalid on appeal or in a later proceeding.

**Article 708. General Provisions Governing Nonexculpatory Defenses**

(a) *Assistance of, Resistance To, and Interference With Conduct Subject to a Nonexculpatory Defense.* Except as otherwise provided by law, conduct for which a person has a nonexculpatory defense is not justified, and may be resisted and interfered with as authorized by law. A person who assists conduct for which another has a nonexculpatory defense does not have a defense based solely upon the nonexculpatory defense of the other person.

(b) *Mistake as to a Nonexculpatory Defense is No Defense.* Except as otherwise provided by this Code, it is no defense that a person mistakenly believes the person has a nonexculpatory defense.

(c) *Burden of Persuasion on Defendant.* Unless expressly provided otherwise, the defendant has the burden of persuasion for a nonexculpatory defense and must prove the defense by a preponderance of the evidence.

[(d) *Determination by Court.* Unless expressly provided otherwise, the defenses in this Chapter are to be determined by the court.]<sup>6</sup>

(e) *Defined Term.* “Nonexculpatory defense” has the meaning given in Section (d) of Article 709.

**Article 709. Definitions**

(a) “Acquittal” means the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of an included offense is an acquittal of the inclusive offense, even if the conviction is later set aside.

- (b) “Conviction” means the prosecution resulted in:
  - (1) a judgment of conviction that has not been reversed or vacated; or
  - (2) a verdict of guilty that has not been set aside and is capable of supporting a judgment; or
  - (3) a plea of guilty or nolo contendere accepted by the court.

(c) A prosecution is “improperly terminated” if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before the verdict. Termination under the following circumstances is not improper:

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<sup>6</sup> This should correspond to the procedures outlined in the code of criminal procedure.

(1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, the right to object to the termination.

(2) The trial court declares a mistrial in accordance with law.

(d) A “nonexculpatory defense” is any defense, bar to prosecution, or bar to pleading, trial, or sentencing described in Chapter 700.

(e) “Public Officer” means:

(1) an officer or employee of the State or any of its subdivisions, and

(2) jurors, advisors, consultants, or any other person performing a governmental function; but

(3) the term does not include witnesses.



## **Chapter 800. Liability of Corporations and Other Non-Human Entities**

Article 801 Criminal Liability of Organizations

Article 802 Criminal Liability of an Individual for Organizational Conduct

Article 803 Definitions

### **Article 801. Criminal Liability of Organizations**

(a) An organization may be prosecuted for the commission of an offense if the conduct constituting the offense:

(1) consists of an omission to discharge a specific duty of affirmative performance imposed upon organizations by law; or

(2) is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by:

(A) the board of directors or a high managerial agent

(B) acting within the scope of employment and on behalf of the organization; or

(3) is engaged in by an agent or employee of the organization while acting within the scope of the employment or agency and on behalf of the organization, and:

(A) the offense is a misdemeanor or a violation; or

(B) the offense is defined by a statute that clearly indicates a legislative intent to impose criminal liability on an organization.

(b) *Impermissible Organizational Activity No Defense.* In a prosecution of an organization for an offense, it is no defense that the conduct charged to constitute the offense was not permitted by the organization's bylaws or other governing instruments.

(c) *Defined Terms.*

(1) "Agent of the organization" has the meaning given in Section (a) of Article 803.

(2) "High managerial agent" has the meaning given in Section (b) of Article 803.

(3) "Organization" has the meaning given in Section (c) of Article 803.

### **Article 802. Criminal Liability of an Individual for Organizational Conduct**

(a) *Membership in Organization No Shield from Liability.* An individual is legally accountable for conduct constituting an offense that the person performs or causes to be performed in the name of or on behalf of an organization to the same extent as if the conduct were performed in the person's own name or behalf.

(b) *Punishment for Individuals Applies.* An individual who has been convicted of an offense by reason of his or her legal accountability for the conduct of an organization is subject to the punishment authorized by law for an individual upon conviction of the offense, even if a lesser or different punishment is authorized for the organization.

(c) *Exception for Following Reasonable Instruction.* A person who commits an act constituting an offense under this Chapter shall not be liable for the offense if the person was acting on the order of his or her supervisor or manager and the person:

(1) reasonably believed he or she was obeying a lawful instruction; or

(2) the law does not allow him to question the legitimacy of the instruction.

(d) *Defined Term.* "Organization" has the meaning given in Section (c) of Article 803.

**Article 803. Definitions**

(a) “Agent of the organization” means a director, officer, or employee of an organization, or any other person who is authorized to act on behalf of the organization.

(b) “High managerial agent” means an officer of an organization, or any other organizational agent in a position of comparable authority as to the formulation of organizational policy or the managerial supervision of subordinate employees.

(c) “Organization” means any legal person other than an individual human being.

## Chapter 900. Inchoate Offenses

- Article 901 Criminal Attempt
- Article 902 Criminal Solicitation
- Article 903 Criminal Conspiracy
- Article 904 Unconvictable Confederate No Defense
- Article 905 Defense for Victims and for Conduct Inevitably Incident
- Article 906 Defense for Renunciation Preventing Commission of the Offense
- Article 907 Grading of Criminal Attempt, Solicitation and Conspiracy
- Article 908 Possession of Instruments of Crime

### Article 901. Criminal Attempt

- (a) *Offense Defined.* A person is guilty of attempt to commit an offense if:
- (1) acting with the culpability required for commission of the offense, and
  - (2) intending to engage in conduct that would constitute the offense,
  - (3) the person takes a substantial step toward commission of the offense.
- (b) *Conduct Constituting a Substantial Step.*
- (1) Conduct shall not be held to constitute a substantial step toward commission of the offense under Section (a)(3) unless it is strongly corroborative of the defendant's intention to engage in the conduct that constitutes the offense.
  - (2) The requirement of a substantial step in Section (a)(3) is satisfied if the person has completed, or believes he or she has completed:
    - (A) the conduct constituting the offense; or
    - (B) the last act needed to cause the result element of the offense.
  - [(3) The following conduct, if strongly corroborative of the person's purpose to complete the offense, shall not be held insufficient as a matter of law to constitute a substantial step:
    - (A) lying in wait, searching for, or following the contemplated victim of the offense;
    - (B) enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for the offense's commission;
    - (C) reconnoitering the place contemplated for the commission of the offense;
    - (D) unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the offense will be committed;
    - (E) possession of materials to be employed in the commission of the offense, if such materials are specially designed for such unlawful use or can serve no lawful purpose of the person under the circumstances; or
    - (F) possession, collection, or fabrication of materials to be employed in the commission of the offense, at or near the place contemplated for its

commission, if such possession, collection, or fabrication serves no lawful purpose of the person under the circumstances.]<sup>7</sup>

(c) *Defined Term.* “Result element” has the meaning given in Section (d) of Article 208.

### **Article 902. Criminal Solicitation**

(a) *Offense Defined.* A person is guilty of solicitation to commit an offense if:

- (1) acting with the culpability required for commission of the offense, and
- (2) intending to bring about conduct that would constitute the offense under the circumstances as the defendant believes them to be,
- (3) the person intentionally commands, directs, encourages, or requests another person to engage in:

(A) conduct that would constitute the offense; or

(B) an attempt to commit the conduct that would constitute the offense.

(b) *Uncommunicated Solicitation.* It is immaterial under Section (a) that the person fails to communicate with the person he or she solicits to commit an offense, if the person’s conduct is designed to accomplish that communication.

### **Article 903. Criminal Conspiracy**

(a) *Offense Defined.* A person is guilty of conspiracy to commit an offense if:

- (1) acting with the culpability required for commission of the offense, and
- (2) intending to bring about conduct that would constitute the offense under the circumstances as the defendant believes them to be,
- (3) the person agrees with another person or persons that one or more of them will engage in:

(A) conduct that would constitute the offense; or

(B) an attempt or solicitation to commit the conduct that would constitute the offense; and

- (4) the person or another person with whom he or she conspired performed an overt act in support of the conspiracy.

(b) *Mere Agreement Not Sufficient.* Prosecution under this Article requires an overt act in support of the conspiracy; mere agreement to commit an offense is not enough to incur liability under this Article.

(c) *Knowledge of Co-Conspirator’s Identity Not Required.* A defendant may be found to have conspired with a third person, even if the defendant is unaware of the third person’s identity, if:

- (1) the defendant has conspired with another person to commit an offense, and
- (2) the defendant knows or would reasonably expect that the other person has conspired with the third person to commit the same offense.

(d) *Duration of Conspiracy.* A conspiracy is deemed to continue until its objectives are accomplished, frustrated, or abandoned. A person who commits an offense under Section (a) is deemed to be a continuing conspirator for the duration of the conspiracy, unless he formally withdraws from the conspiracy.

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<sup>7</sup> Section (b)(3) is included to provide additional guidance on what conduct can constitute a substantial step, if deemed necessary to do so. This draft Section is included in brackets to denote that while codifying specific substantial steps is helpful, it is not necessary.

(e) *Withdrawal*. A person formally withdraws from a conspiracy if the person informs:  
(1) those persons with whom the person conspired of his or her abandonment; or  
(2) law enforcement authorities of the existence of the conspiracy and of his participation in it.

(f) *Joinder in Conspiracy Prosecutions*. Subject to the provisions in Section (a), two or more persons charged with conspiracy to commit an offense may be prosecuted jointly if:

(1) they are charged with conspiring with one another; or  
(2) the conspiracies alleged, whether they involve the same or different parties, are so related that they constitute different aspects of a single scheme of criminal conduct.

#### **Article 904. Unconvictable Confederate Not a Defense**

It is no defense for a person who solicits or conspires with another to commit an offense that the other person:

(a) has not been prosecuted or convicted; or  
(b) has been convicted of a different offense or grade of offense; or  
(c) lacked the capacity to commit an offense; or  
(d) has been acquitted; or  
(e) is otherwise not liable or subject to criminal sanction.

#### **Article 905. Defense for Victims and for Conduct Inevitably Incident**

Unless otherwise provided by this Code or by the law defining the offense, it is a defense to soliciting or conspiring to commit an offense that:

(a) the person is the victim of the offense; or  
(b) the offense is defined in such a way that the person's conduct is inevitably incident to its commission.

#### **Article 906. Defense for Renunciation; Preventing Commission of the Offense**

(a) In a prosecution under Articles 901 (Criminal Attempt), 902 (Criminal Solicitation), or 903 (Criminal Conspiracy) in which the offense contemplated was not in fact committed, it is an affirmative defense that:

(1) the defendant prevented the commission of the offense; and  
(2) did so under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

(b) *Voluntary or Complete Renunciation Defined*. A renunciation is not "voluntary and complete" within the meaning of Section (a)(2) when it is motivated in whole or in part by:

(1) the renunciator's belief that circumstances exist that would:  
(A) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or  
(B) render accomplishment of the criminal purpose more difficult; or  
(2) a decision to:  
(A) postpone the criminal conduct until another time; or  
(B) transfer the criminal effort to:  
(i) another victim; or  
(ii) a separate but similar objective.

(c) *Burden of Persuasion on Defendant.* The defendant has the burden of persuasion for this affirmative defense and must prove the defense by a preponderance of the evidence.

**Article 907. Grading of Criminal Attempt, Solicitation, and Conspiracy**

Attempt, solicitation, and conspiracy are offenses of one grade lower than the most serious offense that is attempted, solicited, or the object of the conspiracy.

**Article 908. Possession of Instruments of Crime**

(a) *Offense Defined.* A person commits an offense if:

(1) with intent to employ it criminally,

(2) the person possesses anything:

(A) specially made or specially adapted for criminal use; or

(B) commonly used for criminal purposes and possessed by the person

under circumstances consistent with the intent to commit a crime.

(b) *Grading.* The offense is a Class [A] misdemeanor.

## Chapter 1000. Offense Grades and Authorized Sentences

Article 1001	Offense Grades
Article 1002	Authorized Sentences
Article 1003	Authorized Terms of Imprisonment; Presumptive Sentencing Range
Article 1004	Authorized Fines
Article 1005	Unclassified Offenses
Article 1006	General Adjustments to Offense Grade for Recidivism
Article 1007	Valuation of Property for Purposes of Grading
Article 1008	Definition

### Article 1001. Offense Grades.

Each offense in this Code is classified as a:

- (a) Class A felony; or
- (b) Class B felony; or
- (c) Class C felony; or
- (d) Class D felony; or
- (e) Class E felony; or
- (f) Class F felony; or
- (g) Class A misdemeanor; or
- (h) Class B misdemeanor; or
- (i) Class C misdemeanor; or
- (j) Class D misdemeanor; or

(k) a violation. A violation does not constitute a crime, and conviction of a violation shall not give rise to criminal liability.

### Article 1002. Authorized Sentences

(a) A sentencing judge may impose any sentence authorized in this chapter, or any proportionate combination of the sentences authorized, such that the total sentence has the equivalent punitive bite of any authorized sentence.

(b) *Maximum Authorized Term Reserved.* The maximum authorized term of imprisonment for a given offense grade is reserved for:

- (1) the most egregious form of the offense; or
- (2) instances in which the offender was previously convicted of an offense of the same or higher grade, and the offender committed the subsequent offense:
  - (A) within 5 years of the prior conviction; or
  - (B) while the offender was serving a sentence for a prior conviction; or
  - (C) while the offender was knowingly evading criminal sanction for a prior offense.

(c) *Sentences Outside the Presumptive Range.* If a sentencing judge imposes a sentence of imprisonment outside of the presumptive range specified in Article 1003, the judge shall give a written explanation of the reasons for the sentence that justify deviating from the presumptive range.

(d) *Alternatives to Imprisonment.* It is an adequate justification for a deviation from the presumptive range that the sentencing judge imposes an alternative form of punishment, either in

addition to or in lieu of imprisonment, if that non-incarcerative sentence has a punitive bite equivalent to that of the reduction in the term of imprisonment provided.

**Article 1003. Authorized Terms of Imprisonment; Presumptive Sentencing Range.**

(a) Except as otherwise provided, the maximum authorized term of imprisonment are as follows. The authorized sentence for:

(1) Class A felony is life imprisonment, unless a punishment of death is specified in the offense provision. The presumptive sentence is life imprisonment. The court must impose a sentence of at least 5 years.

(2) Class B felony is not more than 25 years; the presumptive sentencing range is between 6 and 18 years.

(3) Class C felony is not more than 15 years; the presumptive sentencing range is between 4 and 12 years.

(4) Class D felony is not more than 8 years; the presumptive sentencing range is between 2 and 6 years.

(5) Class E felony is not more than 4 years; the presumptive sentencing range is between 1 and 3 years.

(6) Class F felony is not more than 2 years; the presumptive sentencing range is between 6 and 18 months.

(7) Class A misdemeanor is not more than 1 year.

(8) Class B misdemeanor is not more than 6 months.

(9) Class C misdemeanor is not more than 3 months.

(10) Class D misdemeanor is not more than 30 days.

(11) Violation: No term of imprisonment is authorized for a violation.

**Article 1004. Authorized Fines.**

Except as otherwise provided, the maximum authorized fine for an offense is the greater of either:

(a) the following amounts:

(1) [SOS 50,000,000] for a Class A felony; or

(2) [SOS 25,000,000] for a Class B felony; or

(3) [SOS 10,000,000] for a Class C felony; or

(4) [SOS 5,000,000] for a Class D felony; or

(5) [SOS 2,500,000] for a Class E felony; or

(6) [SOS 1,000,000] for a Class F felony; or

(7) [SOS 5,000,000] for a Class A misdemeanor; or

(8) [SOS 250,000] for a Class B misdemeanor; or

(9) [SOS 100,000] for a Class C misdemeanor; or

(10) [SOS 50,000] for a Class D misdemeanor; or

(11) [SOS 25,000] for violations<sup>8</sup>; or

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<sup>8</sup> **Query:** Do these amounts seem appropriate? We used the current market conversion rate of exchange to substitute SOS for US Dollars, however this may not capture price differences between the countries. The maximum fine for a Class B felony was, in US currency, an amount approximately equal to the average one year household income in the United States. The average cost of groceries for a month is approximately an amount between the maximum fines for a Class C and a Class D misdemeanor.



(b) twice the harm caused or the gain derived.

(c) *Capacity to Pay*. The court shall not impose a fine that is beyond the offender's ability to pay.

(d) *No Effect on Civil Compensation*. Imposing a fine upon an offender does not alter the offender's obligation to pay any civil compensation to the victim that is ordered by a court.

(e) *Inflation Adjustment*. Every three years, at the direction of the Attorney General, the fine amounts provided in Section (a) shall be adjusted according to the inflation index provided by the Central Bank.

#### **Article 1005. Unclassified Offenses.**

An offense outside of the Code:

(a) that provides a term of imprisonment of:

- (1) 25 years or more or imposes capital punishment is a Class A felony;
- (2) 15 years or more is a Class B felony;
- (3) 8 years or more is a Class C felony;
- (4) 4 years or more is a Class D felony;
- (5) 2 years or more is a Class E felony;
- (6) 1 year or more is a Class F felony;
- (7) 6 months or more is a Class A misdemeanor;
- (8) 3 months or more is a Class B misdemeanor;
- (9) 30 days or more is a Class C misdemeanor;
- (10) one day or more is a Class D misdemeanor;

(b) is a violation if it does not declare itself to be a felony or misdemeanor, and it does not provide a sentence of imprisonment.

#### **Article 1006. Adjustments to Offense Grade; Aggravated Recidivism.**

(a) The offense grade may be increased by one level if the offender:

- (1) is a professional offender; or
- (2) was previously convicted of three or more offenses of the same or higher grade; or
- (3) was previously convicted of two offenses of the same or higher grade, and one of the conditions listed in Article 1003(b)(2)(A)-(C) is present; or
- (4) was previously convicted of one offense of the same or higher grade, and two or more of the conditions listed in Article 1003(b)(2)(A)-(C) are present.

(b) *Defined Terms*. "Professional offender" has the meaning given in Article 1008.

#### **Article 1007. Valuation for the Purposes of Grading.**

(a) *Valuation Generally*. Except as provided under Section (b), where an offense grade is based on the value of benefit derived or harm caused, the value used to calculate the grade shall be:

- (1) the highest possible value of the benefit or harm at the time and place of the offense that can be established by a preponderance of the evidence; or
- (2) if that value cannot be ascertained, then the value is:
  - (A) the cost of replacing, reproducing, or recovering the property
  - (B) within a reasonable time after the offense.

(b) *Writing*. Whenever the value of a writing determines the grade of an offense, and the instrument:

(1) is evidence of a debt, such as a check, draft, or promissory note, the value of the instrument is:

(A) the amount due or collectible on the debt,

(B) taking into account any amount already satisfied; or

(2) creates, releases, discharges, or otherwise affects any valuable legal right, privilege or obligation, the value of the instrument is:

(A) the greatest amount of economic loss

(B) that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(c) *Default*. When value cannot be ascertained under Section (a) or (b), it is assumed to be the value that corresponds to the lowest possible offense grade.

(d) *Defined Terms*. “Writing” has the meaning given in Section (h) of Article 4310.

**Article 1008. Definition.**

“Professional offender” means a person who, after he or she is convicted for an offense:

(a) commits one or more additional offenses, and

(b) there is reason to believe that the person is habitually living, in whole or in part, on the proceeds of offenses.

## PART II: THE SPECIAL PART

### Chapter 1100. Crimes Against the State

Article 1101	Treason
Article 1102	Aiding the Enemy in Time of War
Article 1103	Failure to Execute Contracts for Wartime Supplies
Article 1104	Destruction or Sabotage of Military Works
Article 1105	Subversive or Anti-National Activity
Article 1106	Hostile Acts against a Foreign State
Article 1107	Espionage
Article 1108	Unauthorized Use or Disclosure of Classified Information
Article 1109	Attempts Against the Political Rights of a Citizen
Article 1110	Definitions

#### **Article 1101. Treason**

(a) *Offense Defined.* A person commits an offense if the person:

- (1) takes up arms against the Somali State; or
- (2) commits an act with the intent of causing all or part of the territory of the Somali State to come under the control of a foreign state or organization.

(b) *Exception: Foreign Combatants.* The offense under this Article does not apply to persons in foreign states who act under an obligation imposed by those states during a time of war.

(c) *Grading.* The offense is a Class [A] felony.

(d) *Defined Term.* “Time of war” has the meaning given in Section (b) of Article 1111.

#### **Article 1102. Aiding the Enemy**

(a) *Offense Defined.* A person commits an offense if the person:

- (1) is:
  - (A) a Somali citizen, or
  - (B) in the territory of the Somali State; and
- (2) knowingly:
  - (A) provides arms, ammunition, supplies, money, or other things that may be used to the detriment of the Somali State to an enemy of the Somali State; or
  - (B) harbors, protects, or otherwise aids the enemy, either directly or indirectly.

(b) *Grading.*

- (1) The offense is a Class [C] felony if committed during a time of war.
- (2) Otherwise, the offense is a Class [D] felony.

(c) *Defined Terms.* “Time of war” has the meaning given in Section (b) of Article 1111.

#### **Article 1103. Failure to Execute Contracts for Wartime Supplies**

(a) *Offense Defined.* A person commits an offense if, during a time of war, the person fails to carry out the obligations arising from a contract for the supply of goods or services necessary for the war effort.

(b) *Grading.* The offense is a Class [E] felony.

#### **Article 1104. Destruction or Sabotage of Military Works**

(a) *Offense Defined.* A person commits an offense if the person renders unusable any military work or works designed for use by or being currently used by the armed forces of the Somali State.

(b) *Grading.*

(1) The offense is a Class [D] felony if committed during a time of war.

(2) Otherwise, the offense is a Class [F] felony.

(c) *Defined Terms.*

(1) “Time of war” has the meaning given in Section (b) of Article 1110.

(2) “Military work” has the meaning given in Section (a) of Article 1110.

#### **Article 1105. Subversive or Anti-National Activity**

(a) *Offense Defined.* A person commits an offense if the person knowingly participates in or promotes an association whose purpose is to overthrow the Somali government or incite others to harm or overthrow the Somali government.

(b) *Grading.* The offense is a Class [F] felony.

#### **Article 1106. Hostile Acts Against a Foreign State**

(a) *Offense Defined.* A person commits an offense if the person:

(1) commits a hostile action against a foreign state without the approval of the Somali government, and

(2) the act disturbs relations with the foreign government or exposes the Somali State or its citizens to the danger of reprisal or retaliation.

(b) *Grading.*

(1) The offense is a Class [A] felony if the person intends that war result.

(2) Otherwise, the offense is a Class [C] felony.

#### **Article 1107. Espionage**

(a) *Offense Defined.* A person commits an offense if the person:

(1) knowingly causes a military disadvantage to the Somali State

(2) by obtaining, delivering, communicating, or receiving information concerning the Somali military or government.

(b) *Grading.*

(1) The offense is a Class [A] felony if committed during a time of war.

(2) Otherwise, the offense is a Class [B] felony.

#### **Article 1108. Unauthorized Use or Disclosure of Classified Information**

(a) *Offense Defined.* A person commits an offense if the person uses, publishes, divulges, or otherwise makes known any classified government information without authorization.<sup>9</sup>

(b) *Grading.* The offense is:

(1) a Class [B] felony if it causes another's death or endangers the stability of the State.<sup>10</sup>

(2) otherwise, a Class [C] felony.

#### **Article 1109. Attempts Against the Political Rights of a Citizen**

(a) *Offense Defined.* A person commits an offense if, by force, threat, or deception, the person inhibits or prevents the exercise of any of the following political rights by a citizen:

(1) the right to vote;

(2) the right to hold public office;

(3) the right to petition the government and have the petition examined;

(4) the right to reside in, return to, and travel freely in the State; or

(5) the right to associate with lawful political parties.

(b) *Grading.* The offense is a Class A misdemeanor.

#### **Article 1110. Definitions**

(a) "Military work" means:

(1) a base, camp, post, station, yard, center, or other facility servicing the armed forces of the Somali State; or

(2) a ship, airplane, train, car, or other device servicing the armed forces of the Somali State.

(b) "Time of war" means a situation in which war has been declared or armed conflict is in progress, including any period when war is imminent and later occurs.

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<sup>9</sup> **Query:** Is there a system of information classification in existence at present that can be referenced in this offense? If not, is there some other mechanism that can be used to identify the kind of information to which the offense applies? Or, should the offense simply be dropped?

<sup>10</sup> **Query:** Should this change from current law be added? This increased grade is not in current law, but a member of the Working Group suggested it might be appropriate.

## Chapter 2100. Genocide and Human Trafficking

- Article 2101 Genocide
- Article 2102 Human Trafficking

### Article 2101. Genocide

- (a) *Offense Defined.* A person commits an offense if:
  - (1) with the intent to destroy, in whole or in significant part, a national, ethnic, racial, religious group, or clan,
  - (2) the person:
    - (A) kills members of the group; or
    - (B) causes serious bodily injury to members of the group; or
    - (C) commits sexual offenses against members of the group; or
    - (D) deports members of the group; or
    - (E) intentionally inflicts inhumane living conditions on members of the group, or denies them access to necessary services; or
    - (F) imposes measures intended to prevent births within the group; or
    - (G) forcibly transfers children of the group to another group.
- (b) *Grading.* The offense is a Class [A] felony punishable by death.
- (c) *Defined Terms.*
  - (1) “Serious bodily injury” has the meaning given in Section (i) of Article 508.
  - (2) “Sexual offenses” are defined as offenses in Chapter 3300.

### Article 2102. Human Trafficking

- (a) *Offense Defined.* A person commits an offense if:
  - (1) with the intent to exploit, which includes profiting from another’s sexual acts, forced labor or services, or the removal of organs,
  - (2) the person recruits, transports, transfers, harbors, or receives a person:
    - (A) who is under the age of 18; or
    - (B) by means of:
      - (i) criminal coercion; or
      - (ii) unlawful restraint; or
      - (iii) deception; or
      - (iv) abuse of power or of a victim who is in a position of vulnerability; or
      - (v) giving or receiving of payments or benefits to obtain the consent of a person having control over another person.
- (b) *Grading.* The offense is a Class [B] felony.
- (c) *Defined Terms.*
  - (1) “Criminal coercion” is defined as an offense in Article 3404.
  - (2) “Deception” has the meaning given in Section (a) of Article 304.
  - (3) “Unlawful restraint” is defined as an offense in Article 3402.

## Chapter 3100. Homicide Offenses

Article 3101	Murder in the First Degree
Article 3102	Murder in the Second Degree
Article 3103	Manslaughter
Article 3104	Negligent Homicide
Article 3105	Causing Suicide; Aiding, Soliciting, or Attempting Suicide
Article 3106	Unlawful Abortion
Article 3107	Definitions

### Article 3101. Murder in the First Degree

(a) *Offense Defined.* A person commits an offense if the person knowingly causes the death of another person.

(b) *Grading.* The offense is a Class [A] felony punishable by death.

### Article 3102. Murder in the Second Degree

(a) *Offense Defined.* A person commits an offense if the person:

- (1) recklessly causes the death of another person,
- (2) under circumstances manifesting an extreme indifference to the value of human life.

(b) *Violent Crime Triggers Rebuttable Presumption.* The trier of fact shall presume, subject to rebuttal, the existence of the recklessness and extreme indifference required in Section (a) if the person is engaged in or is an accomplice in the commission, attempt to commit, or flight after commission of any violent offense.

(c) *Grading.* The offense is a Class [B] felony.

(d) *Defined Term.* “Violent offense” has the meaning given in Section (b) of Article 3107.

### Article 3103. Manslaughter

(a) *Offense Defined.* A person commits an offense if the person recklessly causes the death of another person.

(b) *Murder Mitigated for Extreme Mental or Emotional Disturbance.* Conduct that causes the death of another person under circumstances that would be murder under Article 3101 or 3102 is mitigated to an offense under Section (a) of this Article if:

- (1) the offense was committed under the influence of extreme mental or emotional disturbance,
- (2) for which there is a reasonable explanation, the reasonableness of which is to be determined:
  - (A) from the viewpoint of a reasonable person in the defendant’s situation,
  - (B) under the circumstances as the defendant believed them to be.

(c) *Grading.* The offense is a Class [C] felony.

### Article 3104. Negligent Homicide

(a) *Offense Defined.* A person commits an offense if the person negligently causes the death of another person.

(b) *Grading*. The offense is a Class [D] felony.

**Article 3105. Causing Suicide; Aiding, Soliciting, or Attempting Suicide**

(a) *Causing Suicide: Offense Defined*. A person commits an offense if the person knowingly causes, by force, coercion, threats, or deception, another to commit suicide.

(b) *Aiding, Soliciting, or Attempting Suicide: Offense Defined*. A person commits an offense if the person knowingly:

- (1) aids or solicits another to commit suicide; or
- (2) attempts to commit suicide.

(c) *Grading*.

(1) The offense under Section (a) is:

(A) a Class [A] felony if the person who committed suicide was under the age of 14; or

(B) a Class [B] felony in all other cases.

(2) The offense under Section (b) is a Class [E] felony.

**Article 3106. Unlawful Abortion**

(a) *Offense Defined*. A person commits an offense if the person intentionally:

- (1) terminates a pregnancy of more than 120 days,
- (2) by means other than live birth.

(b) *Grading*. The offense is:

(1) a Class [D] felony if the abortion was performed without valid consent from the mother; or

(2) a Class [A] misdemeanor in all other cases.

(c) *Grading Enhancement and Other Consequences for Medical Professionals*. The grade of the offense shall be increased by one grade if the offense is committed by a medical professional. If the medical professional has previously been convicted of an offense under this Article, the medical professional shall be permanently barred from practicing medicine.

(d) *Exception: Mother at Risk*. A person does not commit an offense under this Article if a licensed medical professional has determined that the pregnancy puts the mother's life at risk.

(e) *Defined Terms*.

(1) "Bodily injury" has the meaning given in Section (a) of Article 508.

(2) "Valid consent" has the meaning given in Section (a) of Article 3107.

**Article 3107. Definitions**

(a) "Valid consent" means the person:

- (1) verbally assents to the act, and
- (2) is over the age of 18, and
- (3) the consent was not obtained by violence, threat, or fraud.

(b) "Violent offense" means any offense that causes or is likely to cause bodily injury, such as Article 3301 (Rape and Sexual Assault), Article 3201 (Robbery), Article 3202 (Assault), or Article 4101 (Criminal Destruction Through Fire or Explosion).



## Chapter 3200. Robbery, Assault, Endangerment, and Threat Offenses

Article 3201	Robbery
Article 3202	Assault
Article 3203	Causing or Risking Catastrophe
Article 3204	Recklessly Endangering Another Person
Article 3205	Terroristic Threats
Article 3206	Unlawfully Administering Drugs
Article 3207	Procuring the Impotence of a Person to Procreate
Article 3208	Definitions

### Article 3201. Robbery

(a) *Robbery: Offense Defined.* A person commits an offense if, in the course of committing a theft by taking or unlawful disposition, the person:

- (1) inflicts serious bodily injury upon another; or
- (2) threatens another with or intentionally puts him or her in fear of immediate serious bodily injury.

(b) *Grading.*

(1) *Hijacking Public Transportation Vehicles.* If the person takes possession of a motor vehicle, airplane, motorboat, or other vehicle, the offense is:

- (A) a Class [A] felony if the vehicle is an airplane; or
- (B) a Class [C] felony if the vehicle is a public transportation vehicle other than an airplane.

(2) Otherwise, the offense is:

- (A) a Class [C] felony if the person commits the act using a dangerous weapon, wearing a disguise, or with one or more other persons; or
- (B) a Class [D] felony in all other cases.

(c) *Defined Terms.*

- (1) The elements of “theft by taking” are defined in Article 4202 (Theft by Taking or Unlawful Disposition).
- (2) “Dangerous weapon” has the meaning given in Section (b) of Article 3208.
- (3) “Serious bodily injury” has the meaning given in Section (i) of Article 508.

### Article 3202. Assault

(a) *Offense Defined.* A person commits an offense if, without the consent of the victim, the person negligently:

- (1) injures the victim; or
- (2) touches the victim in a way known to be offensive or cause alarm; or
- (3) puts the victim in fear of imminent bodily injury.

(b) *Grading.*

(1) If the person causes serious bodily injury, the offense is:

- (A) a Class [D] felony if the person intentionally caused the injury; or
- (B) a Class [E] felony if the person:
  - (i) recklessly caused the injury; or
  - (ii) intentionally caused the injury under circumstances where the

defendant proves, by preponderance of the evidence, that:

(1) it was committed under the influence of extreme mental or emotional disturbance,

(2) for which there is a reasonable explanation, the reasonableness of which is to be determined:

(A) from the viewpoint of a reasonable person in the defendant's situation,

(B) under the circumstances as the defendant believed them to be.

(C) Otherwise, a Class [A] misdemeanor.

(2) If the person causes bodily injury, the offense is:

(A) a Class [F] felony if the person intentionally caused the injury; or

(B) a Class [A] misdemeanor if the person recklessly caused the injury.

(3) Otherwise, the offense is a Class [C] misdemeanor.

(c) *Defined Terms.*

(1) "Bodily injury" has the meaning given in Section (a) of Article 508.

(2) "Serious bodily injury" has the meaning given in Section (i) of Article 508.

### **Article 3203. Causing or Risking Catastrophe**

(a) *Causing Catastrophe: Offense Defined.* A person commits an offense if the person causes a catastrophe by:

(1) explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material, contamination of anything intended for human consumption; or

(2) any other means of causing potentially widespread injury or damage.

(b) *Risking Catastrophe: Offense Defined.* A person commits an offense if the person creates a risk of catastrophe in the employment of fire, explosives, or other dangerous means listed in Section (a).

(c) *Failure to Prevent Catastrophe: Offense Defined.* A person commits an offense if the person recklessly fails to take reasonable measures to prevent or mitigate a catastrophe if the person:

(1) performed or assented to the act causing or threatening catastrophe; or

(2) knows that he or she is under a legal duty to take such measures.

(d) *Grading.*

(1) The offense in Section (a) is:

(A) a Class [B] felony if the person intentionally causes the catastrophe.

(B) a Class [C] felony if the person recklessly causes the catastrophe.

(2) The offense in Section (b) is:

(A) a Class [D] felony if the person intentionally creates the risk.

(B) a Class [E] felony if the person recklessly creates the risk.

(3) The offense in Section (c) is a Class [A] misdemeanor.

(e) *Defined Term.* "Catastrophe" has the meaning given in Section (a) of Article 3208.

### **Article 3204. Recklessly Endangering Another Person**

(a) *Offense Defined.* A person commits an offense if the person recklessly creates a substantial risk of serious bodily injury or death to another person.

(b) *Grading*. The offense is a Class [F] felony.

**Article 3205. Terroristic Threats**

(a) *Threats: Offense Defined*. A person commits an offense if the person:

(1) being reckless as to causing another person to experience extreme fear or distress,

(2) threatens to commit an offense likely to result in death, serious bodily injury, or substantial damage to property.

(b) *Threatening Explosions: Offense Defined*. A person commits an offense if the person:

(1) causes an explosion of a bomb, firecracker, or other explosive materials,

(2) with the intent to cause extreme fear or distress.

(c) *Grading*. The offense is a Class [A] misdemeanor.

**Article 3206. Unlawfully Administering Drugs**

(a) *Offense Defined*. A person commits an offense if he or she:

(1) administers a drug to another person,

(2) without that person's consent,

(3) thereby intentionally causing stupor, unconsciousness, or any other alteration of the person's physical or mental condition.

(b) *Grading*. The offense is a Class [F] felony.

**Article 3207. Procuring the Impotence of a Person to Procreate**

(a) *Offense Defined*. A person commits an offense if he or she intentionally performs an act that causes a person to become impotent to procreate.

(b) *Grading*. The offense is a Class [A] misdemeanor.

**Article 3208. Definitions.**

(a) "Catastrophe" means:

(1) serious bodily injury to five or more persons; or

(2) substantial damage to five or more buildings or occupied structures; or

(3) substantial damage to a vital public facility that seriously impairs its usefulness or operation.

(b) "Dangerous weapon" means any weapon, device, instrument, material or substance, whether animate or inanimate, that is capable of producing death or serious bodily injury.

## Chapter 3300. Sexual Offenses

Article 3301	Rape and Sexual Assaults
Article 3302	Seduction
Article 3303	Definitions

### Article 3301. Rape and Sexual Assault

(a) *Rape: Offense Defined.* A person commits an offense if he or she has sexual intercourse with another person, and:

(1) he or she:

(A) compels the other person to submit by force or by a threat against anyone in a manner that would prevent resistance by a person of ordinary resistance; or

(B) administers or employs drugs, intoxicants, or other means to substantially alter the other person's power to appraise his or her conduct in order to prevent resistance; or

(C) deceives the other person as to his or her identity; or

(D) is a public officer who abuses the power of his or her office to compel a person under arrest or in his or her custody to submit; or

(2) the other person:

(A) is incapable of giving consent due to mental disease or defect, lack of consciousness, or other similar impairment; or

(B) is under the age of [16], and:

(i) the defendant is at least [four]<sup>11</sup> years older than the other person, and

(ii) the two persons are not married to each other.

(b) *Sexual Assault: Offense Defined.* A person commits an offense if he or she has sexual contact with another person and he or she:

(1) satisfies the requirements of Section (a)(1) or (a)(2); or

(2) knows that the conduct is offensive to the other person.

(c) *Marital Relations: Rebuttable Presumption.* If the person engages in the sexual intercourse or sexual contact with his or her spouse, the trier of fact shall presume, subject to rebuttal, that consent existed.

(d) *Grading.*

(1) An offense under Section (a) is a Class [C] felony.

(2) An offense under Section (b) is a Class [E] felony.

(e) *Defined Terms.*

(1) "Public officer" has the meaning given in Section (e) of Article 709.

(2) "Sexual contact" has the meaning given in Section (b) of Article 3303.

(3) "Sexual intercourse" has the meaning given in Section (j) of Article 508.

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<sup>11</sup> **Query:** Is the age of 16 and the age difference of 4 years appropriate?

**Article 3302. Seduction**

(a) *Offense Defined.* A person commits an offense if he or she has sexual intercourse or sexual contact with another person to whom he or she is not married, and the other person:

(1) is less than 18 years old and the defendant is his or her guardian or otherwise responsible for general supervision of his or her welfare; or

(2) is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him or her.

(b) *Grading.*

(1) The offense is a Class [C] felony if the person has sexual intercourse.

(2) Otherwise, the offense is a Class [D] felony.

(c) *Defined Terms.*

(1) “Guardian” has the meaning given in Section (a) of Article 3303.

(2) “Sexual contact” has the meaning given in Section (b) of Article 3304.

(3) “Sexual intercourse” has the meaning given in Section (j) of Article 508.

**Article 3303. Definitions**

(a) “Guardian” means someone who has the legal authority and duty to care for another person due the other person’s infancy, incapacity, or disability.

(b) “Sexual contact” means the touching of another person’s sex organs in a way that does not amount to sexual intercourse with the intent to create sexual arousal or gratification.

## Chapter 3400. Kidnapping, Restraint, Coercion, and Related Offenses

Article 3401	Kidnapping
Article 3402	Unlawful Restraint
Article 3403	Interference with Custody
Article 3404	Criminal Coercion
Article 3405	Definitions

### Article 3401. Kidnapping

(a) *Offense Defined.* A person commits an offense if:

(1) he or she:

(A) removes another person from his or her residence or place of business;

or

(B) moves another person a substantial distance from the place where he or she found that person; or

(C) confines another person for a substantial period in a place of isolation;

and

(2) does so:

(A) by force, threat, or deception; or

(B) without the consent of a parent, guardian, or other person responsible for general supervision and welfare of the person moved or confined under Section (a)(1), if the person moved or confined is:

(i) under 14 years of age; or

(ii) incompetent; and

(3) in order to:

(A) hold for ransom or reward, or as a shield or hostage; or

(B) facilitate the commission of any felony or flight thereafter; or

(C) inflict bodily injury on or to terrorize the other person or any other individual; or

(D) interfere with the performance of any governmental or political function; or

(E) marry that person.

(b) *Grading.*

(1) The offense is a Class [B] felony if the person does not voluntarily release the victim alive and in a safe place prior to trial.

(2) Otherwise, except under Section (a)(3)(E), the offense is a Class [C] felony.

(3) The offense under Section (a)(3)(E) is a Class [E] felony.

### Article 3402. Unlawful Restraint and Involuntary Servitude

(a) *Restraint: Offense Defined.* A person commits an offense if the person:

(1) knowingly restrains another in violation of any legally recognized duty, and

(2) the restraint substantially interferes with his or her liberty.

(b) *Involuntary Servitude: Offense Defined.* A person commits an offense if the person knowingly holds another in a condition of involuntary servitude.

(c) *Grading.*

- (1) The offense under Section (b) is a Class [B] felony.
- (2) The offense under Section (a) is:
  - (A) a Class [D] felony if the person restrains another:
    - (i) in circumstances the person knows exposes the restrained person to risk of serious bodily injury; or
    - (ii) for more than [24 hours]<sup>12</sup>; or
  - (B) a Class [A] misdemeanor in all other cases.

(d) *Defined Terms.*

- (1) “Involuntary servitude” has the meaning given in Section (b) of Article 3405.
- (2) “Serious bodily injury” has the meaning given in Section (i) of Article 508.

**Article 3403. Interference with Custody**

(a) *Improper Custody of Children: Offense Defined.* A person commits an offense if the person knowingly:

- (1) takes, entices, harbors, or detains any child under the age of 18,
- (2) away from the custody of his or her parent, guardian, or other lawful custodian,
- (3) without legal privilege to do so.

(b) *Improper Custody of Committed Persons: Offense Defined.* A person commits an offense if the person knowingly:

- (1) takes, entices, harbors, or detains any committed person
- (2) away from lawful custody
- (3) without legal privilege to do so.

(c) *Defense of Child Welfare or Child’s Instigation.* It is a defense to an offense under Section (a) that:

- (1) the person [reasonably]<sup>13</sup> believed that his or her action was necessary to protect the child from danger; or
- (2) the person took the child away:
  - (A) at the child’s own instigation, without enticement, and without intent to commit a criminal offense with or against the child, and
  - (B) at the time, the child was:
    - (i) 14 years of age or older; or
    - (ii) under 14 years of age, but the person reasonably believed the child was 14 years old or older.

(d) *Grading.*

- (1) The offense under Section (a) is a Class [E] felony if the person:
  - (A) is not a parent, guardian, or close relative to the child, and
  - (B) acted with reckless disregard of causing alarm for the child’s safety.
- (2) Otherwise, the offense is a Class [A] misdemeanor.

(e) *Defined Term.* “Committed person” has the meaning given in Section (a) of Article 3405.

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<sup>12</sup> **Query:** Is 24 hours the right amount of time here?

<sup>13</sup> **Query:** Is “reasonably” appropriate here? Without this word, the belief could be honestly held but unreasonable, and would constitute a defense.

### **Article 3404. Criminal Coercion**

(a) *Offense Defined.* A person commits an offense if:

- (1) with the intent to cause another to perform or to omit to perform any act,
- (2) the person threatens to:
  - (A) commit a criminal offense; or
  - (B) accuse anyone of a criminal offense; or
  - (C) expose private information tending to subject any person to hatred, contempt or ridicule, or to impair the person's credit or business repute; or
  - (D) take or withhold action as an official, or cause an official to take or withhold action.

(b) *Defense of Benign Intent.* A person does not commit an offense under (a)(2)(B), (C), or (D), if the person:

- (1) believed that the accusation or private information was true, or that the proposed official action was justified, and
- (2) acted with the limited intent to compel the other person to behave in a way reasonably related to the circumstances that were the subject of the accusation, exposure, or proposed official action, including, but not limited to:
  - (A) ceasing from further misbehavior,
  - (B) correcting a wrong, or
  - (C) refraining from taking any action or responsibility that the person reasonably believes the other is not authorized to take.<sup>14</sup>

(c) *Grading.* The offense is:

- (1) a Class [D] felony if:
  - (A) either:
    - (i) the person threatens to commit a felony; or
    - (ii) the compelled conduct would constitute a felony, if performed;
  - and
  - (B) the offense is committed:
    - (i) by ten or more persons acting together; or
    - (ii) by five or more persons acting together, and at least one person uses a dangerous weapon.
- (2) a Class [A] misdemeanor in all other cases.

(d) *Defined Term.* "Dangerous weapon" has the meaning given in Section (b) of Article 3208.

### **Article 3405. Definitions**

(a) "Committed person" means a person who is entrusted to another's custody by or through a recognized social agency or otherwise by authority of law, and is:

- (1) committed under judicial warrant; or
- (2) an orphan, neglected or delinquent child; or
- (3) a person with a mental disease or defect; or

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<sup>14</sup> This nonexhaustive list of examples could be in the commentary rather than in the text of the statute itself. It is currently in the text because this list aids the reader in comprehending this defense without needing to reference the commentary.



(4) a person who is dependent or incompetent.

(b) “Involuntary servitude” means exacting work or service from a person under the threat of any penalty for which the person has not offered him or herself voluntarily.

## Chapter 4100. Property Damage and Trespass Offenses

Article 4101	Criminal Destruction Through Fire or Explosion
Article 4102	Criminal Damage
Article 4103	Criminal Mischief
Article 4104	Criminal Trespass
Article 4105	Environmental Destruction
Article 4106	Definitions

### Article 4101. Criminal Destruction Through Fire or Explosion

(a) *Criminal Destruction: Offense Defined.* A person commits an offense if the person knowingly starts a fire or causes an explosion with intent to either:

- (1) destroy a building or occupied structure of another; or
- (2) destroy or damage a property in order to collect insurance for the loss.

(b) *Reckless Burning or Exploding: Offense Defined.* A person commits an offense if the person recklessly starts a fire or causes an explosion on any property, and:

- (1) places another person in danger of death or bodily injury; or
- (2) places a building or occupied structure of another in danger of damage or destruction.

(c) *Failure to Control or Report a Dangerous Fire: Offense Defined.* A person commits an offense if the person:

- (1) knowing that a fire endangers life or a substantial amount of property of another,
- (2) fails to take reasonable measures to put out or control the fire, or to give a prompt fire alarm, but only if:
  - (A) the person has:
    - (i) an official, contractual, or other legal duty to prevent or combat the fire; or
    - (ii) custody or control of property on which the fire started; and
  - (B) the person can control the fire or give prompt fire alarm without substantial risk to himself or herself.

(d) *Grading.* The offense:

- (1) under Section (a) is a Class [D] felony.
- (2) under Section (b) is a Class [F] felony.
- (3) under Section (c) is a Class [B] misdemeanor.

(e) *Defined Terms.*

- (1) “Bodily injury” has the meaning given in Section (a) of Article 508.
- (2) “Occupied structure” has the meaning given in Section (b) of Article 4105.
- (3) “Property” has the meaning given in Section (c) of Article 4106.
- (4) “Property of another” has the meaning given in Section (d) of Article 4106.

### Article 4102. Criminal Damage

(a) *Offense Defined.* A person commits an offense if the person engages in conduct that recklessly causes:

- (1) damage to the property of another; or

(2) property of another to be tampered with, and thereby creates a risk of damage to the property; or

(3) property used to deliver a public service to be tampered with; or

(4) serious injury to the national production or a substantial shortage of goods of common consumption by destroying raw materials, agricultural or industrial products, or means of production; or

(5) animals in flocks or herds to enter another person's property, or leaves them there; or

(6) the spread of any disease to plants and animals; or

(7) any property belonging to himself or herself to be destroyed, dispersed, spoiled, or concealed, with the intent to secure for himself or another the amount of an insurance against accidents.

(b) *Grading.*

(1) The offense is:

(A) a Class [C] felony if committed against an air navigation facility;

(B) a Class [E] felony if the harm caused is equivalent to [SOS 500,000,000] or more;

(C) a Class [F] felony if the harm caused is equivalent to [SOS 50,000,000] or more;

(D) a Class [A] misdemeanor if:

(i) the harm caused is equivalent to [SOS 5,000,000] or more; or

(ii) the affected property is an automobile, airplane, motorcycle, motor boat, or other motor-propelled vehicle; or

(iii) the affected property is three or more cattle, bovine, or equine animals; or

(iv) the affected property is part of a system of irrigation; or

(v) the affected property has a governmental or religious purpose;

or

(vi) the affected property is a plantation of trees or crops for agricultural or economic use; or

(vii) the affected property is damaged by employees relating to a labor strike or lock-out;

(viii) animals are taken into or left on another person's property with the intention of making them graze on the property, and the property is damaged as a result of the grazing; or

(ix) the offense impacts processes of industrial or agricultural production;

(E) a Class [B] misdemeanor:

(i) if the harm caused is equivalent to [SOS 1,000,000] or more; or

(ii) animals are taken into or left on another person's property with the intention of making them graze on the property;

(F) a Class [C] misdemeanor if the harm caused is equivalent to [SOS 50,000] or more;

(G) a Class [D] misdemeanor in all other cases.

(2) *Grade Adjustment.* If the damage is intentionally caused, as opposed to recklessly, the grade of the offense shall be increased by one grade.

(c) *Defined Terms.*

- (1) “Public service” has the meaning given in Section (e) of Article 4106.
- (2) “Tamper” has the meaning given in Section (g) of Article 4106.

**Article 4103. Criminal Mischief**

(a) *Offense Defined.* A person commits an offense if the person:

- (1) causes another person to suffer pecuniary loss by deception or threat; or
- (2) deflects public or private watercourses or alters place features in the property of another with intent to obtain a wrongful gain for himself or herself or for another person.

(b) *Grading.* The offense is a Class [E] felony.

(c) *Defined Term.* “Property of another” has the meaning given in Section (d) of Article 4106.

**Article 4104. Criminal Trespass**

(a) *Offense Defined.* A person commits an offense if the person, knowing the person has no license or privilege to do so, knowingly:

- (1) enters or remains in a place; or
- (2) removes or alters the boundaries of another person’s property with intent to appropriate the property; or
- (3) with the sole object of preventing or disturbing the normal course of work, invades or occupies an agricultural or industrial undertaking belonging to another.

(b) *Exceptions.* A person does not commit an offense under this Article if:

- (1) the building or occupied structure involved in the offense was abandoned; or
- (2) the person reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.

(c) *Grading.*

(1) The offense is:

(A) a Class [F] felony if it is committed in a dwelling, highly secured premise, premise marked or signed as dangerous, or a place where admittance is forbidden in the military interest of the State; or

(B) a Class [A] misdemeanor if it is committed in any separately secured building, inhabited structure, storage structure, or any other place enclosed in a way as to manifestly exclude intruders; or

(2) a Class [B] misdemeanor in all other cases.

(d) *Defined Terms.*

- (1) “Dwelling” has the meaning given in Section (d) of Article 508.
- (2) “Highly secured premises” has the meaning given in Section (a) of Article 4106.
- (3) “Storage structure” has the meaning given in Section (f) of Article 4106.

**Article 4105. Environmental Destruction**

(a) *Offense Defined.* A person commits an offense if the person recklessly:

- (1) causes death or serious injury to any person, or substantial damage to the natural environment, by:

- (A) discharging, emitting, or introducing materials or ionizing radiation into the air, soil, or water or
- (2) producing, processing, using, storing, or transporting materials; or
- (2) kills, destroys, possesses, takes, or trades in specimens of protected wild fauna or flora on the [LIST OF PROTECTED SPECIES] so as to have a non-negligible impact on the quantity of such specimens; or
- (4) causes the significant deterioration of a habitat within a site on the [LIST OF PROTECTED ENVIRONMENTAL SITES]<sup>15</sup>; or
- (5) (A) removes all or substantially all of the trees from any large, forested area without government authorization; and
- (B) does not replant the area with trees within [a year]<sup>16</sup>.
- (b) *Grading*. The offense is a Class [E] felony.<sup>17</sup>

#### **Article 4106. Definitions**

(a) “Highly secured premises” means any place that is continuously guarded and where display of identification is required for entry.

(b) “Occupied structure” means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business, whether or not a person is actually present.

(c) “Property” means anything of value, movable or immovable, tangible or intangible, and includes but is not limited to: goods; services; interests in property; control of property; rights in contract; access to utilities, communications, or information; captured or domesticated animals; and official documents representing interests in property, such as tickets, deeds, and licenses.

(d) “Property of another” means property to which another person holds a greater claim of right, whether the claim is temporary, permanent, or illegal.

(e) “Public service” means a service provided or facilitated by the government for the convenience or benefit of the general public, either collectively or on an individual basis.

(f) “Storage structure” means any structure, vehicle, vessel, or aircraft that is used primarily for storage or transportation.

(g) “Tamper” means to interfere with or otherwise impede the ordinary function or effect of property.

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<sup>15</sup> References to any lists provided under current law, or to lists provided by international law, should be added here.

<sup>16</sup> **Query:** Should there be a specific time specified here? Is one year appropriate?

<sup>17</sup> **Query:** This provision was added as a result of the Nairobi meetings in June, 2016. Is this provision what the Working Group had in mind?

## Chapter 4200. Theft and Related Offenses

Article 4201	Consolidation of Theft Offenses
Article 4202	Theft by Unlawful Taking or Disposition
Article 4203	Theft by Deception
Article 4204	Theft by Extortion
Article 4205	Theft of Property Lost, Mislaid, or Delivered by Mistake
Article 4206	Theft of Services
Article 4207	Receiving Stolen Property
Article 4208	Unauthorized Use of Property or Facilities
Article 4209	Definitions

### Article 4201. Consolidation of Theft Offenses

(a) *Consolidation.* Conduct prohibited by Articles 4202 through 4206 constitutes a single offense of theft. A prosecution for theft may be supported by evidence that it was committed in any manner described in Articles 4202 through 4206.

(b) *Defenses.*

(1) *Belief in Right to Use.* It is a defense to prosecution for theft that the person reasonably believes he or she has a right to use or possess the property.

(2) *Parental or Spousal Use.* It is a defense to prosecution for theft that:

(A) the defendant is a parent who made reasonable use of or reasonably possessed the property of his or her minor child; or

(B) the defendant made reasonable use of or reasonably possessed his or her spouse's property to meet the maintenance needs of the household and its members.

(c) *Grading.* Any offense defined in Articles 4202 through 4206 is a:

(1) Class [D] felony if the value of the property is [SOS 500,000,000] or more.

(2) Class [E] felony if the value of the property is [SOS 50,000,000] or more.

(3) Class [F] felony if:

(A) the value of the property is [SOS 5,000,000] or more; or

(B) the property is a firearm; or

(C) the property is an automobile, airplane, motorcycle, motor boat, or other motor-propelled vehicle; or

(D) the property is three or more cattle, bovine, or equine animals.

(4) Class [A] misdemeanor if the value of the property is [SOS 1,000,000] or

more.

(5) Class [B] misdemeanor if the value of the property is [SOS 50,000] or more.

(6) In all other cases, the offense is a Class [C] misdemeanor.

(d) *Aggregation of Amounts.* When theft is committed in a single scheme or continuous course of conduct, whether from the same or several sources:

(1) the conduct may be considered a single offense, and

(2) the value of the property or services may be aggregated for grading purposes.

(e) *Grade Adjustments.*

(1) *Extortion.* When theft is committed in the manner described in Article 4204, the offense grade shall be increased by one grade.

(2) *Public Property*. When a person commits theft of public property or services, the offense grade shall be increased by one grade.

(f) *Defined Terms*.

- (1) “Firearm” has the meaning given in Section (d) of Article 4209.
- (2) “Property” has the meaning given in Section (c) of Article 4106.
- (3) “Public service” has the meaning given in Section (e) of Article 4106.
- (4) “Value of the property” has the meaning given in Section (g) of Article 4209.

**Article 4202. Theft by Unlawful Taking or Disposition**

(a) *Offense Defined*. A person commits theft if the person:

- (1) knowingly takes, obtains, or exerts unauthorized control over the property of another person
- (2) with the intent to permanently deprive the other person of that property.

(b) *Defined Terms*.

- (1) “Owner” has the meaning given in Section (e) of Article 4209.
- (2) “Property” has the meaning given in Section (c) of Article 4106.
- (3) “Property of another” has the meaning given in Section (d) of Article 4106.

**Article 4203. Theft by Deception**

(a) *Offense Defined*. A person commits theft if the person:

- (1) intentionally obtains the property of another person
- (2) by deceiving the other person or a third person.

(b) *Unlikely Deception: Exception*. A person does not commit an offense under this Article if he or she commits deception by using statements unlikely to deceive a person of ordinary judgment.

(c) *Mere Breach of Contract: Prohibited Inference*. Deception as to a person’s intention to perform a promise may not be inferred solely from the fact that the promise was not later performed.

(d) *Defined Terms*.

- (1) “Deceive” has the meaning given in Section (b) of Article 4209.
- (2) “Property” has the meaning given in Section (c) of Article 4106.
- (3) “Property of another” has the meaning given in Section (d) of Article 4106.

**Article 4204. Theft by Extortion**

(a) *Offense Defined*. A person commits theft if the person, without legal authority:

- (1) intentionally deprives another of property
- (2) by means of coercion.

(b) *Defined Terms*.

- (1) “Coercion” has the meaning given in Section (a) of Article 4209.
- (2) “Property” has the meaning given in Section (c) of Article 4106.

**Article 4205. Theft of Property Lost, Mislaid, or Delivered by Mistake**

(a) *Offense Defined*. A person commits theft if the person:

- (1) comes into possession of property
- (2) that the person knows has been lost, mislaid, or delivered by mistake as to the recipient, nature, or amount of the property, and

(3) with the intent to deprive another of the property, fails to take reasonable measures to return the property to its owner.

(b) *Defined Terms.*

(1) “Property” has the meaning given in Section (c) of Article 4106.

(2) “Owner” has the meaning given in Section (e) of Article 4209.

#### **Article 4206. Theft of Services**

(a) *Offense Defined.* A person commits theft if the person:

(1) with the intent to avoid payment for services,

(2) obtains services that the person knows are available only for compensation,

(3) by:

(A) deception or threat; or

(B) installing, rearranging, or tampering with any facility or equipment.

(b) *Defined Terms.*

(1) “Deception” has the meaning given in Section (a) of Article 304.

(2) “Services” has the meaning given in Section (f) of Article 4209.

#### **Article 4207. Receiving Stolen Property**

(a) *Offense Defined.* A person commits an offense if the person:

(1) knowing that the property has been stolen,

(2) receives, retains, or disposes of property of another,

(3) with the intent to deprive the owner of the property.

(b) *Grading.* The grade of this offense shall be set according to the terms of Section (c) of Article 4201.

(c) *Defined Term.* “Property of another” has the meaning given in Section (d) of Article 4106.

#### **Article 4208. Unauthorized Use of Property or Facilities**

(a) *Offense Defined.* A person commits an offense if the person:

(1) knowingly uses another’s property or facilities that one would reasonably expect to have to pay to use, without authorization or substantially exceeding the conditions of authorization; or

(2) having custody of another’s property under an agreement for a specified time:

(A) intentionally retains or withholds possession without consent of the owner,

(B) for a period so long that it grossly deviates from the agreement.

(b) *Reasonable Belief in Consent: Defense.* It is a defense to prosecution under this Article that the person reasonably believed the owner would have consented to the use had he or she known of it.

(c) *Grading.* The offense is a Class [C] misdemeanor.

#### **Article 4209. Definitions**

(a) “Coercion” means the use of economic, physical, political, or moral threats or force to influence another individual in the exercise of his rights, freedoms, or any other lawful activity.

(b) “Deceive” means:



(1) creating or to confirming a false impression, including one relating to law, value, or state of mind; or

(2) preventing another person from gaining knowledge that might alter the outcome of a transaction; or

(3) failing to correct a false impression previously created or confirmed by the person.

(d) "Firearm" means a device designed to expel a projectile by the action of an explosion, expansion of gas, or escape of gas, that produces:

(1) a muzzle velocity in excess of 250 meters per second; or

(2) produces at least 60 foot-pounds of energy.

(e) "Owner" means any person who has a legal claim of right to property.

(f) "Services" means labor performed in exchange for compensation, including but not limited to transportation, public service or utilities, accommodation, admission to exhibitions, use of intellectual or movable property, or access to an electronic service.

(g) "Value of the property" means the maximum current market value of the property of which the person knew or should have known at the time of the offense.

## Chapter 4300. Forgery and Fraudulent Practices

- Article 4301 Forgery and Counterfeiting
- Article 4302 Tampering with Writing, Record, or Device
- Article 4303 Identity Fraud
- Article 4304 Deceptive Practices
- Article 4305 Commercial Bribery and Breach of Duty to Act Disinterestedly
- Article 4306 Rigging Publicly Exhibited Contest or Public Bid
- Article 4307 Defrauding Secured Investors
- Article 4308 Fraud in Insolvency
- Article 4309 Receiving Deposits in a Failing Financial Institution
- Article 4310 Definitions

### Article 4301. Forgery and Counterfeiting

(a) *Forgery and Counterfeiting: Offense Defined.* A person commits an offense if, with the intent to deceive another or conceal any wrongdoing, the person knowingly:

- (1) creates or alters any object or writing so that it falsely purports to have a particular antiquity, rarity, value, origin, or authorship; or
- (2) makes, completes, executes, authenticates, issues, or transfers a writing so that it falsely purports:

- (A) to be the act of another; or
- (B) to have been executed at a particular time or place, or in a particular manner or numbered sequence; or
- (C) to be a copy of an original; or
- (D) to create, show, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or
- (E) to be any writing issued or received by the government; or

(3) relies upon or treats as authoritative any writing or object that the person knows to be a forgery under Section (a)(1) or (a)(2).

(b) *Possession of Forged or Counterfeit Writings: Offense Defined.* A person commits an offense if the person knowingly possesses any writing that is a forgery or counterfeit under Section (a).

(c) *Grading.*

(1) The offense under Section (a) is:

- (A) a Class [D] felony if it is committed by a public officer in the performance of his duties, regardless of the object or writing at issue; or
- (B) a Class [E] felony if, as a consequence of the offense, the value of the national currency is decreased or its credit in the internal or external market is adversely affected; or
- (C) a Class [A] misdemeanor if the writing at issue is a stamp or a public transit ticket; or
- (D) a Class [F] felony in all other cases.

(5) The offense under Section (b) is a Class [B] misdemeanor.

(d) *Defined Terms.*

(1) “Deceive” has the meaning given in Section (b) of Article 4209.

- (2) “Stamp” has the meaning given in Section (g) of Article 4310.
- (3) “Writing” has the meaning given in Section (h) of Article 4310.

**Article 4302. Tampering with Writing, Record, or Device**

- (a) *Offense Defined.* A person commits an offense if:
  - (1) with the intent to deceive anyone or conceal any wrongdoing,
  - (2) the person alters, destroys, removes, or conceals any record, writing, or object,
  - (3) knowing that he or she has no legitimate reason or authority to do so.
- (b) *Grading.* The offense is a Class [F] felony.
- (c) *Defined Terms.*
  - (1) “Deceive” has the meaning given in Section (b) of Article 4209.
  - (2) “Writing” has the meaning given in Section (h) of Article 4310.

**Article 4303. Identity Fraud and Trafficking**

- (a) *Identity Fraud: Offense Defined.* A person commits an offense if:
  - (1) with reckless disregard for whether the person’s conduct will:
    - (A) cause harm to any other person; or
    - (B) give the person a benefit to which the person is not entitled; or
    - (C) cause any other person to believe that the person is lawfully exercising official or legislative authority when in fact the person is not;
  - (2) the person:
    - (A) represents himself to be another person; or
    - (B) wears in public the uniform or the distinctive marks of a public office or post, or assumes academic dignities or degrees, titles, decorations or other public honorific insignia to which the person is not entitled.
- (b) *Identity Trafficking: Offense Defined.* A person commits an offense if:
  - (1) with:
    - (A) reckless disregard for whether such conduct will cause harm to any other person; or
    - (B) intent to obtain a benefit to which the person is not entitled,
  - (2) the person:
    - (A) manufactures, transfers, or sells information constituting identification of another person; or
    - (B) purchases information constituting identification of another person.
- (c) *Grading.*
  - (1) The offense under Section (a) is:
    - (A) a Class [F] felony if the person represents himself to be a public officer; or
    - (B) a Class [A] misdemeanor in all other cases.
  - (3) The offense under Section (b) is a Class [B] misdemeanor.
- (d) *Defined Terms.*
  - (1) “Benefit” has the meaning given in Section (a) of Article 4310.
  - (2) “Information constituting identification” has the meaning given in Section (d) of Article 4310.
  - (3) “Public officer” has the meaning given in Section (e) of Article 709.

#### **Article 4304. Deceptive Practices**

(a) *Offense Defined.* A person commits an offense if, in connection with a proposed or completed transaction in goods or services, the person:

- (1) recklessly supplies materially false or misleading information; or
- (2) knowingly deceives anyone by acting contrary to established commercial practice.

(b) *Grading.* The offense is a Class [A] misdemeanor.

(c) *Defined Term.* “Deceives” has the meaning given in Section (b) of Article 4209.

#### **Article 4305. Commercial Bribery**

(a) *Soliciting or Accepting a Commercial Bribe: Offense Defined.* A person commits an offense if the person:

- (1) knowingly solicits or accepts a benefit, and
- (2) does so as consideration for violating a duty of fidelity to which the person is subject as:

- (A) a partner, agent, or employee of another; or
- (B) a trustee, guardian, or other fiduciary; or
- (C) a lawyer, doctor, accountant, appraiser, or other professional adviser;

or

- (D) an officer, director, manager, or other participant in the direction of the affairs of a corporation or an unincorporated association; or
- (E) an arbitrator or other purportedly disinterested adjudicator or referee.

(b) *Offering, Conferring, or Paying a Commercial Bribe: Offense Defined.* A person commits an offense if the person

- (1) knowingly offers, confers, or pays a benefit,
- (2) the acceptance of which is prohibited under Section (a).

(c) *Grading.* Each offense is a Class [D] felony.

(d) *Defined Terms.*

- (1) “Benefit” has the meaning given in Section (a) of Article 4310.
- (2) “Consideration” has the meaning given in Section (b) of Article 4310.

#### **Article 4306. Rigging Public Contests or Bids**

(a) *Rigging Public Contests: Offense Defined.* A person commits an offense if:

(1) with intent to prevent a public contest or exhibition from being conducted in accordance its governing rules and usages, the person:

- (A) offers, confers, or pays a benefit to a participant, official, or other person associated with the contest or exhibition; or
- (B) threatens bodily injury to any participant, official, or other such person; or
- (C) tampers with any person, animal, or other thing associated with the contest or exhibition; or

(2) the person knowingly solicits or accepts any benefit the giving of which would be an offense under Section (a)(1)(A); or

(3) the person:

- (A) sponsors, produces, judges, or otherwise participates in a publicly exhibited contest or exhibition,

(B) knowing that the contest or exhibition is not being conducted in accordance with its governing rules and usages.

(b) *Rigging Public Bids: Offense Defined.* A person commits an offense if the person knowingly engages in conduct that violates the laws governing the bidding process for a public contract.

(c) *Grading.*

(1) The offense under Sections (a)(1), (a)(2), and (b) is a Class [D] felony.

(2) The offense under Section (a)(3) is a Class [E] felony.

(d) *Defined Terms.*

(1) "Benefit" has the meaning given in Section (a) of Article 4310.

(2) "Tamper" has the meaning given in Section (g) of Article 4106.

#### **Article 4307. Defrauding Secured Investors**

(a) *Offense Defined.* A person commits an offense if the person destroys, removes, conceals, encumbers, transfers, or otherwise deals with:

(1) property subject to a security interest,

(2) with the intent to hinder enforcement of that interest.

(b) *Grading.* The amount of the loss caused by the offense shall be used to determine the grade of the offense, according to the pecuniary values set forth in Section (c) of Article 4201.

(c) *Defined Terms.*

(1) "Property" has the meaning given in Section (c) of Article 4106.

(2) "Security interest" has the meaning given in Section (f) of Article 4310.

#### **Article 4308. Fraud in Insolvency**

(a) *Offense Defined.* A person commits an offense if:

(1) knowing that:

(A) proceedings have been or are about to be instituted for the appointment of any person entitled to administer property for the benefit of creditors; or

(B) any other composition or liquidation for the benefit of creditors has been, or is about to be, made;

(2) the person:

(A) undertakes an obligation in which the person knowingly conceals his or her financial position with the intent to secure the obligation; or

(B) deals with any property with the purpose of:

(i) defeating or obstructing the claim of any creditor; or

(ii) otherwise obstructing the operation of any law relating to administration of property for the benefit of creditors; or

(C) knowingly falsifies any writing relating to the property; or

(D) knowingly misrepresents or refuses to disclose to any person entitled to administer property for the benefit of creditors the existence of any information that the person could be legally required to furnish in relation to such administration.

(b) *Extinguishing Obligation: Exception.* A person who performed the conduct in Section (a)(2)(B) does not commit an offense if, before the person is charged with the offense under Section (a)(2)(B), the person takes lawful action extinguishing the obligation.

(c) *Grading*. The amount of the loss caused by the offense shall be used to determine the grade of the offense, according to the pecuniary values set forth in Section (c) of Article 4201.

(d) *Defined Terms*.

(1) “Benefit” has the meaning given in Section (a) of Article 4310.

(2) “Property” has the meaning given in Section (c) of Article 4106.

#### **Article 4309. Receiving Deposits in a Failing Financial Institution**

(a) *Offense Defined*. A person commits an offense if, while directing or participating in the direction or management of a financial institution, the person:

(1) knowingly receives or permits the receipt of an investment or deposit in the institution,

(2) knowing that, due to serious financial difficulties, the financial institution is about to suspend operations or go into receivership or reorganization, and

(3) reckless as to whether the person making the deposit or investment is unaware of the financial institution’s serious financial difficulties.

(b) *Grading*. The amount of the loss caused by the offense shall be used to determine the grade of the offense, according to the pecuniary values set forth in Section (c) of Article 4201.

(c) *Defined Terms*.

(1) “Financial institution” has the meaning given in Section (c) of Article 4310.

(2) “Investment” has the meaning given in Section (e) of Article 4310.

#### **Article 4310. Definitions**

(a) “Benefit” means any compensation, gift, present, or material or non-material advantage, regardless of monetary value.

(b) “Consideration” means anything of value to the parties that is exchanged for anything else of value. Consideration may always be the performance or promise of performance of some act or omission by the other party.

(c) “Financial institution” means an establishment that administers or facilitates financial transactions, such as investments, loans and deposits. Financial institutions include, but are not limited to banks, trust companies, insurance companies and investment dealers.

(d) “Information constituting identification” includes, but is not limited to, a person’s name, birth date, personal identification number or code, financial information, and any other information that could be used to identify a person.

(e) “Investment” means any form of money committed or property acquired in order to obtain future income. Investments include, but are not limited to: securities such as equity and debt, derivatives, project finance, and property interests.

(f) “Security interest” means a property interest created by agreement or operation of law over assets in order to secure the performance of an obligation, usually the payment of a debt.

(g) “Stamp” means any stamped paper, receipt stamps, postage stamps, and other papers of value made equivalent by law.

(h) “Writing” means any symbol of value, right, privilege, or identification, regardless of medium. It includes:

(1) documents or other recorded information, and

(2) money, coins, tokens, stamps, seals, credit cards, badges, and trademarks, and

(3) any other symbols of value, right, privilege, or identification.

## Chapter 5100. Bribery and Other Official Misconduct.

Article 5101 Bribery

Article 5102 Improper Influence

Article 5103 Official Misconduct and Profiteering

Article 5104 Definitions

### Article 5101. Bribery

- (a) *Offering a Bribe: Offense Defined.* A person commits an offense if the person:
- (1) knowingly offers, confers, or agrees to confer a personal benefit;
  - (2) that the person believes would influence the performance of an act related to the employment or function of a:
    - (A) public officer; or
    - (B) party officer; or
    - (C) witness; and
  - (3) the other person is not authorized by law to accept that personal benefit.
- (b) *Accepting a Bribe: Offense Defined.* A person commits an offense if the person:
- (1) knowingly solicits, accepts, or agrees to accept a personal benefit from another person; and
  - (2) that personal benefit is consideration for influencing or agreeing to influence the performance of an act related to the employment or function of a:
    - (A) public officer; or
    - (B) party officer; or
    - (C) witness; and
  - (3) the person is not authorized by law to accept that personal benefit.
- (c) *Grading.* Each offense is a Class [E] felony.
- (d) *Forfeiture of Office.* A public officer convicted under this Section forfeits his or her public office or employment.
- (e) *Defined Terms.*
- (1) "Party officer" has the meaning given in Section (c) of Article 5104.
  - (2) "Personal benefit" has the meaning given in Section (d) of Article 5104.
  - (3) "Public officer" has the meaning given in Section (e) of Article 709.
  - (4) "Witness" has the meaning given in Section (e) of Article 5104.

### Article 5102. Improper Influence

- (a) *Offense Defined.* A person commits an offense if he or she:
- (1) uses coercion with intent to influence another person's decision, opinion, vote, or other exercise of discretion as a public officer, party officer, voter, or witness; or
  - (2) representing another person and having professional training to do so, acts before a judicial authority in a way that the person knows is contrary to the interests of the represented person.
- (b) *Grading.* The offense is a Class [F] felony.
- (c) *Defined Terms.*

- (1) “Coercion” has the meaning given in Section (a) of Article 4210.
- (2) “Party officer” has the meaning given in Section (c) of Article 5104.
- (3) “Public officer” has the meaning given in Section (e) of Article 709.
- (4) “Witness” has the meaning given in Section (e) of Article 5104.

**Article 5103. Official Misconduct and Profiteering**

(a) *Official Misconduct: Offense Defined.* A person commits an offense if:

- (1) the person is a public officer, and
- (2) intending to obtain a personal benefit or to cause harm to another person,
- (3) the person:
  - (A) performs an act the person knows is in excess of the person’s authority; or
  - (B) knowingly refrains from performing a personal duty that is imposed by law or is clearly inherent in the nature of the office; or
  - (C) performs official functions in a way intended to benefit the person’s own property or financial interests; or
  - (D) knowingly performs official functions in a way that is intended to discriminate on the basis of race, creed, color, sex, age, handicapped status, national origin, clan, or geographical location; or
  - (E) interrupts a public service; or
  - (F) removes, conceals, destroys, wastes, or causes to deteriorate property subjected to attachment or sequestration and entrusted to his or her custody; or
  - (G) subjects a person arrested or detained to rigorous measures not allowed by law; or
  - (H) carries out a personal search or inspection generally authorized by the powers inherent in his or her office.

(b) *Profiteering: Offense Defined.* A person commits an offense if the person is a public officer, and the person knowingly:

- (1) acquires a pecuniary interest in any property, transaction, or enterprise through an official action by the public officer or by a governmental entity with which the public officer is associated; or
- (2) speculates or wagers in reliance upon information to which the public officer has access in an official capacity, but that has not been made public.

(c) *Grading.*

- (1) The offense under Section (a) is a Class [F] felony.
- (2) The offense under Section (b) is a Class [A] misdemeanor.

(d) *Forfeiture of Office.* Any public officer convicted under this Section forfeits their public office or employment.

(e) *Defined Terms.*

- (1) “Enterprise” has the meaning given in Section (a) of Article 5104.
- (2) “Harm to another person” has the meaning given in Section (b) of Article 5104.
- (3) “Personal benefit” has the meaning given in Section (d) of Article 5104.
- (4) “Property” has the meaning given in Section (c) of Article 4106.
- (5) “Public officer” has the meaning given in Section (e) of Article 709.
- (6) “Public service” has the meaning given in Section (3) of Article 4106.



**Article 5104. Definitions**

- (a) "Enterprise" means:
  - (1) a sole proprietorship, partnership, corporation, trust, or governmental or other legal entity; or
  - (2) any union, association, or group of persons associated in fact, even if not a legal entity.
- (b) "Harm to another person" means loss, disadvantage, injury, or anything so regarded by the person affected, including acts done to third persons in whose welfare the person is interested.
- (c) "Party officer" means a person who holds any position or office in a political party, whether by election, appointment, or otherwise.
- (d) "Personal benefit" means:
  - (1) any gain or advantage to the recipient personally; or
  - (2) a gain or advantage conferred on the behalf of another person in whose welfare the person is interested.
- (e) "Witness" means a person who testifies in a public adjudication or proceeding under oath or affirmation, whether:
  - (1) in person,
  - (2) by oral or written deposition, or
  - (3) by affidavit.

## Chapter 5200. Official Falsification Offenses

Article 5201	Perjury
Article 5202	Written Falsification; False Statements
Article 5203	Tampering with Public Records
Article 5204	Definitions

### Article 5201. Perjury

- (a) *Offense Defined.* A person commits an offense if the person:
- (1) makes a false statement of fact or affirms a false statement of fact previously made,
  - (2) that the person does not believe to be true,
  - (3) while under oath, and
  - (4) the statement is made in an official proceeding.
- (b) *Grading.* The offense is a Class [A] misdemeanor.
- (c) *Forfeiture of Office.* Any public officer of Somalia convicted under this Article forfeits their public office or employment.
- (d) *Retraction: Defense.* It is a defense to prosecution under this Article that the person retracted the false statement before final judgment is passed on the matter at issue.
- (e) *No Defense.* In a prosecution under this Article, it is no defense that:
- (1) the oath or affirmation was administered or taken in an irregular manner; or
  - (2) the person was not qualified to make the statement.
- (f) *Corroboration Required.* In any prosecution under this Article, the falsity of a statement may not be established solely by the uncorroborated testimony of a single witness.
- (g) *Defined Term.* “Official proceeding” has the meaning given in Section (a) of Article 5204.

### Article 5202. Written Falsification; False Statements

- (a) *Written Falsification: Offense Defined.* A person commits an offense if:
- (1) with intent to mislead a public officer or law enforcement officer in performing his or her official function,
  - (2) the person:
    - (A) makes a false written statement that the person does not believe to be true; or
    - (B) omits information necessary to prevent a written statement from being misleading.
- (b) *False Statements: Offense Defined.* A person commits an offense if:
- (1) the person makes a false statement of fact
  - (2) that the person does not believe to be true, and
  - (3) the statement is made to a public officer or law enforcement officer in the performance his or her official function.
- (c) *Retracted Statement: Defense.* It is a defense to prosecution under this Article that the person retracted the false statement before final judgment is passed on the matter at issue.
- (d) *Corroboration Required.* In any prosecution under this Article, the falsity of a

statement may not be established solely by the uncorroborated testimony of a single witness.

(e) *Grading.*

(1) The offense is a Class [C] misdemeanor.

(2) The grade of the offense shall be increased by one grade if the false statement relates to the investigation of a felony.

(f) *Defined Terms.*

(1) “Law enforcement officer” has the meaning given in Section (g) of Article 508.

(2) “Official proceeding” has the meaning given in Section (a) of Article 5204.

(3) “Public officer” has the meaning given in Section (e) of Article 709.

### **Article 5203. Tampering with Public Records**

(a) *Offense Defined.* A person commits an offense if:

(1) with the intent to conceal wrongdoing or deceive anyone,

(2) the person alters, destroys, mutilates, removes, or conceals any public record, writing, or object, knowing that he or she has no authority to do so.

(b) *Grading.* The offense is a Class [F] felony.

(c) *Defined Term.* “Public record” has the meaning given in Section (b) of Article 5204.

### **Article 5204. Definitions**

(a) “Official proceeding” means a proceeding heard before any:

(1) legislative, judicial, administrative, or governmental agency; or

(2) official authorized to take evidence under oath.

(b) “Public record” means any record, document or thing belonging to, received by, or kept by the government for information or record.

## Chapter 5300. Obstruction of Governmental Operations; Escape

Article 5301	Obstructing Justice
Article 5302	Obstructing Administration of Law or Other Government Function
Article 5303	Failure to Report a Felony or Dangerous Person
Article 5304	Refusal to Give Information about Identity
Article 5305	Resisting Arrest or Other Law Enforcement Officer
Article 5306	Escape
Article 5307	Implements for Escape; Other Contraband
Article 5308	Bail Jumping; Default in Required Appearance
Article 5309	Definitions

### Article 5301. Obstructing Justice

(a) *Offense Defined.* A person commits an offense if:

(1) with intent to prevent, hinder, or delay the investigation, discovery, apprehension, prosecution, or defense of any person,

(2) he or she:

(A) harbors or conceals the other person; or

(B) warns the other person of impending discovery or apprehension; or

(C) provides the other person with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension; or

(D) prevents a third party from aiding in the discovery or apprehension of, or lodging a criminal charge against, any person; or

(E) destroys, alters, conceals, or falsifies evidence; or

(F) suppresses use of evidence by force, intimidation, or deception; or

(G) produces or offers false physical or electronic evidence in a proceeding; or

(H) solicits, confers, or accepts a benefit in exchange for dropping, withholding, or refraining from initiating a criminal prosecution.

(b) *Exception for Restitution or Indemnification.* A person does not commit an offense under Section (a)(2)(H) if the benefit solicited, conferred, or accepted did not exceed the amount that the accused believed to be due to him or her as restitution or indemnification for harm caused by the underlying offense.

(c) *Grading.* The offense is:

(1) a Class [F] felony if:

(A) the offense was committed under Section (a)(2)(E), (F), or (G); or

(B) the offense under investigation or prosecution is a felony.

(2) a Class [A] misdemeanor in all other cases.

(d) *Defined Terms.*

(1) “Bodily injury” has the meaning given in Section (a) of Article 508.

(2) “Deception” has the meaning given in Section (a) of Article 304.

(3) “Physical or electronic evidence” has the meaning given in Section (d) of Article 5309.

(4) “Statement is material” has the meaning given in Section (e) of Article 5309.

### Article 5302. Obstructing Administration of Law or Other Government Function

- (a) *Offense Defined.* A person commits an offense if the person:
  - (1) intentionally obstructs, impairs, or distorts the administration of law or other governmental function,
  - (2) by force, violence, physical interference or obstacle, breach of official duty, or any unlawful act.
- (b) *Grading.* The offense is:
  - (1) a Class [E] felony if the person leads, promotes, or organizes others in the commission of this offense; or
  - (2) a Class [F] felony if the person [usurps a public function]<sup>18</sup>; or
  - (3) a Class [A] misdemeanor in all other cases.

**Article 5303. Failure to Report a Felony or Dangerous Person**

(a) *Failure to Report a Class A Felony: Offense Defined.* A person commits an offense if the person:

- (1) either:
  - (A) knows that another person has committed a Class A felony; or
  - (B) possesses any information related to the commission of a felony under Chapter 7300 (Terrorism); and
- (2) knowing the person has the obligation to make the report, fails to take reasonable measures to report the offense to the law enforcement authorities.

(b) *Failure of Public Servants to Report a Felony: Offense Defined.* A person commits an offense if the person:

- (1) is a public officer, and
- (2) in the exercise of his or her professional duties, obtained knowledge of another's commission of a felony, and
- (3) omits or delays giving information of the offense to an appropriate law enforcement authority.

(c) *Failure of Medical Professionals to Report a Felony or Dangerous Person: Offense Defined.* A person commits an offense if the person:

- (1) is a medical professional, and
- (2) in the exercise of his or her professional duties, obtained knowledge that:
  - (A) someone:
    - (i) committed a felony, and
    - (ii) reporting the offense would not expose the patient to criminal proceedings; or
  - (B) the patient is of unsound mind and poses a danger to himself or others;
- and
- (3) omits or delays giving information about the offense or danger to an appropriate law enforcement authority.

(d) *Application of Privilege.* Nothing in this Article requires the disclosure of information protected by privilege.

(e) *Immunity for Good Faith Disclosure.* Any person who in good faith discloses information under Section (a) of this Article shall not be prosecuted for disclosing that

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<sup>18</sup> Query: Should this be defined more precisely? This corresponds to current law, Art. 273 (Usurpation of Public Functions).

information.

(f) *Grading*. The offense is:

(1) a Class [E] felony if it is committed by possessing the information described in Section (a)(1)(B).

(2) a Class [F] felony if the person is a public officer who has knowledge of the other's offense under Section (a)(1)(A) by reason of his or her performance of official duties.

(3) Otherwise, the offense under Section (a) or Section (b) is a Class [A] misdemeanor.

(4) The offense under Section (c) is a violation.

(g) *Defined Terms*.

(1) "Law enforcement authorities" has the meaning given in Section (a) of Article 5309.

(2) "Medical professional" has the meaning given in Section (b) of Article 5309.

(3) "Public officer" has the meaning given in Section (e) of Article 709.

#### **Article 5304. Refusal to Give Information about Identity**

(a) *Offense Defined*. A person commits an offense if:

(1) knowing a public officer in the performance of his or her duties asks for the person's name, occupation, or residence,

(2) the person refuses to give the information requested.

(b) *Grading*. The offense is a Class [D] misdemeanor.

(c) *Defined Term*. "Public officer" has the meaning given in Section (e) of Article 709.

#### **Article 5305. Acting Contrary to the Enforcement of Law or Safety**

(a) *Resisting Law or Safety Enforcement: Offense Defined*. A person commits an offense if the person knowingly resists, obstructs, or interferes with:

(1) a:

(A) law enforcement officer, firefighter, or correctional officer

(B) performing any act authorized and within the course and scope of employment; or

(2) a person called upon to assist performance of an act under Section (a)(1).

(b) *Refusal to Assist Law Enforcement Officer: Offense Defined*. A person commits an offense if:

(1) a person fulfilling the conditions of Section (a)(1) requests the person's assistance, and

(2) with the intent to further an ongoing public disaster, common danger, or the commission of a felony,

(3) he or she declines to provide the requested assistance.

(c) *Grading*. The offense:

(1) under Section (a) is a Class [E] felony if the person uses force or threats.

(2) is a Class [C] misdemeanor in all other cases.

#### **Article 5306. Escape**

(a) *Escape: Offense Defined*. A person commits an offense if, knowing the person is not permitted to do so, the person:

- (1) removes himself or herself from official detention; or
- (2) fails to return to official detention following temporary leave granted for a specific purpose or limited period.

(b) *Permitting or Failing to Report an Escape: Offense Defined.* A public officer commits an offense if the person:

- (1) permits an escape; or
- (2) discharges a committed person, knowing the discharge is not permitted; or
- (3) knowingly fails to give notice to a law enforcement authority of a committed person's impermissible departure from custody.

(c) *Grading.* The offense:

(1) under Section (a) is:

(A) a Class [E] felony if the person:

- (i) uses a dangerous weapon; or
- (ii) was under arrest for or detained on a felony charge, or following conviction of a crime; or

(B) a Class [F] felony if the person employs force or threat of violence on any person; or

(C) a Class [A] misdemeanor in all other cases.

(2) under Section (b)(1) is:

(A) a class [F] felony if the public officer intentionally permits the escape;

or

(B) a Class [A] misdemeanor in all other cases; or

(3) under Section (b)(2) is a Class [B] misdemeanor; or

(4) under Section (b)(3) is a [violation].

(5) *Grade Reduction for Voluntary Return.* The grade of the offense under Section (a) shall be reduced by one grade if the person, completely and under his or her own volition, turns himself or herself over to law enforcement authorities after the escape.

(d) *Defined Terms.*

- (1) "Committed person" has the meaning given in Section (a) of Article 3405.
- (2) "Dangerous weapon" has the meaning given in Section (b) of Article 3208.
- (3) "Official detention" has the meaning given in Section (c) of Article 5309.
- (4) "Public officer" has the meaning given in Section (e) of Article 709.

### **Article 5307. Implements for Escape; Other Contraband**

(a) *Providing Contraband: Offense Defined.* A person commits an offense if the person, without authorization:

- (1) introduces within a detention facility, or provides an inmate with,
- (2) anything that the person knows is unlawful for the inmate to possess.

(b) *Procuring Contraband: Offense Defined.* An inmate commits an offense if the person, without authorization:

- (1) possesses, procures, makes, or otherwise provides himself or herself with,
- (2) anything that the inmate knows is unlawful for the inmate to possess.

(c) *Grading.* The offense is:

(1) a Class [B] misdemeanor if the item involved is a weapon, tool, or other thing that may be useful for escape; or

(2) a Class [C] misdemeanor in all other cases.

**Article 5308. Bail Jumping; Default in Required Appearance**

(a) *Offense Defined.* A person commits an offense if the person is:

(1) set at liberty by court order, with or without bail, upon condition that the person will subsequently appear at a specified time and place, and

(2) the obligation to appear was not incident to release on probation or parole or under a suspended sentence, and

(3) the person fails to appear at that time or place, and

(4) the person was physically capable of appearing.

(b) *Grading.* The offense is:

(1) a Class [F] felony if:

(A) the required appearance was to answer to a felony charge, or for disposition of a felony charge, and

(B) the person took flight or went into hiding to avoid apprehension, trial, or punishment.

(2) a Class [A] misdemeanor in all other cases.

**Article 5309. Definitions**

(a) “Law enforcement authorities” means any person who has the legal authority to arrest, detain, prosecute, or investigate a criminal offense.

(b) “Medical professional” means a person who has a professional obligation to care for another’s physical or mental wellbeing.

(c) “Official detention” means:

(1) arrest; or

(2) detention in a facility for custody of persons under charge or conviction of a crime or alleged or found to be delinquent; or

(3) detention for extradition or deportation, or any other detention for law enforcement purposes.

(4) But “official detention” does not include supervision of probation or parole, or constraint incidental to release on bail.

(d) “Physical or electronic evidence” means an object, document, record, or other item that is, or is about to be, used as evidence in an official proceeding.

(e) A “statement is material” when, regardless of its admissibility in a court proceeding, it could have affected the course or outcome of the proceeding or investigation.



## Chapter 6100. Public Order & Safety Offenses

Article 6101	Rioting; Failure to Disperse
Article 6102	Disorderly Conduct
Article 6103	Harassment
Article 6104	Public Alarms
Article 6105	Defamation
Article 6106	Obstructing Highways or Other Public Passages
Article 6107	Disrupting Meetings and Processions
Article 6108	Desecration of Venerated Objects
Article 6109	Cruelty to Animals
Article 6110	Operating a Regulated Business or Importing without a License
Article 6111	Alcohol Manufacture and Distribution
Article 6112	Unlawful Consumption
Article 6113	Public Drunkenness; Drug Incapacitation
Article 6114	Unlawful Begging
Article 6115	Refusal to Accept Legal Tender
Article 6116	Failure to Render Assistance
Article 6117	Definitions

### Article 6101. Rioting; Failure to Disperse

(a) *Rioting: Offense Defined.* A person commits an offense if the person participates with two or more others in a course of disorderly conduct:

(1) with intent to commit or facilitate the commission of a felony or misdemeanor; or

(2) with intent to substantially obstruct law enforcement or other government function; or

(3) when the person uses a firearm or other dangerous weapon, or knows that any other participant in the riot uses a firearm or other dangerous weapon.

(b) *Failure to Disperse: Offense Defined.* A person commits an offense if:

(1) three or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, and

(2) a public officer engaged in executing or enforcing the law orders the participants and others in the immediate vicinity to disperse, including the person, and

(3) the person knowingly fails to obey such order.

(c) *Grading.*

(1) *Injurious Rioting.* The offense under Section (a) is a Class [E] felony if it causes serious bodily injury or death.

(2) *Rioting.* Otherwise, the offense under Section (a) is a Class [F] felony.

(3) *Failure to Disperse.* The offense under Section (b) is a Class [B] misdemeanor.

(d) *Defined Terms.*

(1) “Dangerous weapon” has the meaning given in Section (b) of Article 3208.

(2) “Disorderly conduct” is defined as an offense under Article 6102.

(3) “Public officer” has the meaning given in Section (e) of Article 709.

(4) “Serious bodily injury” has the meaning given in Section (i) of Article 508.

#### **Article 6102. Disorderly Conduct**

(a) *Offense Defined.* A person commits an offense if, with intent to cause or create a risk of public inconvenience, annoyance, or alarm, the person:

- (1) engages in fighting or threatening, or in violent or tumultuous behavior; or
- (2) makes unreasonable noise; or
- (3) uses abusive or obscene language, or makes an obscene gesture; or
- (4) addresses abusive language to any person present; or
- (5) creates a hazardous or physically offensive condition by any act that serves no legitimate purpose of the person.

(b) *Grading.*

- (1) The offense is a Class [D] misdemeanor if:
  - (A) the person’s intention is to cause substantial harm or serious inconvenience; or
  - (B) the person persists in disorderly conduct after reasonable warning or request to desist by a public officer.
- (2) Otherwise, the offense is a violation.

#### **Article 6103. Harassment**

(a) *Offense Defined.* A person commits an offense if, with the intent to harass another person, he or she:

- (1) makes a telephone call without purpose of legitimate communication; or
- (2) insults, taunts or challenges another in a manner likely to provoke a violent or disorderly response; or
- (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or
- (4) subjects another to an offensive touching; or
- (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

(b) *Grading.* The offense is a Class [D] misdemeanor.

#### **Article 6104. Public Alarms**

(a) *Offense Defined.* A person commits an offense if the person:

- (1) initiates or circulates a report or warning of an impending fire, explosion, offense, catastrophe, or other emergency,
- (2) knowing that the report or warning is:
  - (A) false or baseless, and
  - (B) likely to cause evacuation of a building, place of assembly, or facility of public transportation, or any other serious public inconvenience.

(b) *Grading.* The offense is a Class [A] misdemeanor.

#### **Article 6105. Defamation**

(a) *Offense Defined.* A person commits an offense if:

- (1) the person communicates a statement that:
  - (A) the person knows to be false, and

(B) is about:

(i) another person; or

(ii) a legislative, administrative, executive, or judicial body; and

(2) the person:

(A) represents the communication as fact, and

(B) causes substantial harm to the target's reputation.

(b) *Provocation: Defense.* It is a defense to prosecution under this Article that the person engaged in the prohibited conduct in a state of anger caused by and immediately following the target's unlawful act.

(c) *Grading.*

(1) The offense is a Class [F] felony if the target of the offense is:

(A) a judge during a hearing; or

(B) the head of state; or

(C) an organization under Section (a)(1)(B)(ii), or a representative of such an organization because of his or her status as a representative.

(2) The offense is a Class [A] misdemeanor if the communication:

(A) attributes a specific act to the target; or

(B) is directed to the target's nationality, ethnic group, or family; or

(C) is made in a publicly accessible writing.

(3) The offense is a Class [B] misdemeanor in all other cases.

#### **Article 6106. Obstructing Highways or Other Public Passages**

(a) *Offense Defined.* A person commits an offense if the person:

(1) obstructs a highway or other public passage without a legal privilege to do so;

or

(2) is a member of a gathering of people, and

(A) refuses to obey a reasonable official request or order to move, and

(B) the official request or order is issued for the purpose of:

(i) preventing or remedying obstruction of a highway or other public passage; or

(ii) maintaining public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

(b) *Exception: Legitimate Gathering.* A person does not commit an offense under Section (a)(1) solely because:

(1) persons have gathered to hear him or her speak or communicate; or

(2) he or she is a member of a gathering to hear another person speak or communicate.

(c) *Reasonable Orders to Move.* An "official request or order to move" addressed to a person whose speech or other lawful behavior attracts an obstructing audience under Section (a)(2) is not reasonable if the obstruction can readily be remedied by law enforcement authorities' control of the size or location of the gathering.

(d) *Grading.*

(1) The offense under Section (a)(1) is a Class [D] misdemeanor if the person persists in the offense after reasonable warning or request to desist by a public officer.

(2) In all other cases, the offense is a violation.

(c) *Defined Terms.*

(1) “Law enforcement authorities” has the meaning given in Section (a) of Article 5309.

(2) “Obstructs” has the meaning given in Section (e) of Article 6117.

(3) “Public officer” has the meaning given in Section (e) of Article 709.

**Article 6107. Disrupting Meetings and Processions**

(a) *Offense Defined.* A person commits an offense if:

(1) with intent to prevent or disrupt a lawful meeting, procession, or gathering,

(2) the person:

(A) engages in conduct tending to physically obstruct or interfere with the meeting, procession, or gathering; or

(B) makes an utterance, gesture, or display designed to outrage the sensibilities of the group holding the meeting, procession, or gathering.

(b) *Grading.* The offense is a Class [C] misdemeanor.

**Article 6108. Desecration of Venerated Objects**

(a) *Offense Defined.* A person commits an offense if:

(1) knowing that his or her action will outrage the sensibilities of persons likely to observe or discover it,

(2) the person intentionally defaces, damages, pollutes, or otherwise physically mistreats:

(A) a public monument or structure; or

(B) a place of worship or burial; or

(C) any other object of veneration by the public, or a substantial segment thereof, in a public place.

(b) *Grading.* The offense is a Class [F] felony.

**Article 6109. Cruelty to Animals**

(a) *Offense Defined.* A person commits an offense if the person cruelly:

(1) mistreats an animal; or

(2) neglects an animal in his or her custody.

(b) *Grading.*

(1) *Aggravated Cruelty.* The offense is a Class [D] misdemeanor if the person employs the animal in a game or show while committing the offense.

(2) *Cruelty.* The offense is a [violation] in all other cases.

(c) *Exception: Veterinary Practice or Scientific Research.* A person does not commit an offense under this Article if the person is acting in accordance with accepted veterinary practices or accepted procedures for performing scientific research.

**Article 6110. Operating a Regulated Business or Importing Without a License**

(a) *Offense Defined.* A person commits an offense if the person:

(1) operates a business, or imports items, regulated by law,

(2) without a license or other legally required permission to do so.

(b) *Grading.*

(1) *Importing Dangerous Material.* The offense is a Class [C] felony if the person imports a firearm, catastrophic agent, or controlled drug into Somalia.

(2) *Unlicensed Business*. The offense is a Class [B] misdemeanor in all other cases.

(c) *Defined Terms*.

(1) “Catastrophic agent” has the meaning given in Section (c) of Article 6117.

(2) “Controlled drug” has the meaning given in Section (d) of Article 6117.

(3) “Firearm” has the meaning given in Section (d) of Article 4209.

### **Article 6111. Alcohol Manufacture and Distribution**

(a) *Offense Defined*. A person commits an offense if, knowingly and without legal authorization, the person, being a Muslim:

(1) imports, manufactures, or possesses for the purpose of manufacture, alcoholic beverages or alcohol-based products; or

(2) sells or distributes:

(A) alcoholic beverages; or

(B) alcohol-based products with the knowledge that the purchaser or recipient intends to use the product for its intoxicating effect.

(b) *Grading*.

(1) *Manufacture and Import*. The offense under Section (a)(1) is a Class [A] misdemeanor.

(2) *Sale and Distribution*. The offense under Section (a)(2) is:

(A) a Class [B] misdemeanor if performed in public, or if the alcoholic beverage or alcohol-based product is sold or distributed to a person who is:

(i) under the age of 14; or

(ii) mentally disabled; or

(iii) manifestly intoxicated; or

(B) a Class [C] misdemeanor otherwise.

(c) *Loss of Public Permit Upon Conviction*. Conviction shall result in the suspension of the license or permit for the operation of an establishment is:

(1) the offender is the proprietor of a public establishment, and

(2) the offense occurred in that establishment.

(d) *Defined Terms*.

(1) “Alcohol-based product” has the meaning given in Section (a) of Article 6117.

(2) “Alcoholic beverage” has the meaning given in Section (b) of Article 6117.

### **Article 6112. Unlawful Consumption**

(a) *Offense Defined*. A person commits an offense if, knowingly and in public, the person consumes or acquires:

(1) an alcoholic beverage;<sup>19</sup>

(2) an alcohol-based product for the purpose of intoxication.

(b) *Grading*. The offense:

(1) under Section (a)(1) is a Class [B] misdemeanor.

(2) under Section (a)(2) is a Class [C] misdemeanor.

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<sup>19</sup> **Query:** Should places of religious practice be explicitly excluded from the definition of “in public” for the purposes of this provision?

(c) *Defined Terms.*

- (1) “Alcohol-based product” has the meaning given in Section (a) of Article 6117.
- (2) “Alcoholic beverage” has the meaning given in Section (b) of Article 6117.

**Article 6113. Public Drunkenness; Drug Incapacitation**

(a) *Offense Defined.* A person commits an offense if the person:

(1) appears in a public place manifestly under the influence of alcohol, narcotics, or other drug, not therapeutically administered,

(2) to the degree that the person may:

(A) endanger himself or other persons; or

(B) damage property; or

(C) annoy persons in the vicinity.

(b) *Grading.* The offense is a Class [C] misdemeanor.

**Article 6114 Unlawful Begging**

(a) *Offense Defined.* A person commits an offense if the person:

(1) requests an immediate donation of goods or money,

(2) in a public place, and

(3) in the course of the request:

(A) touches another person without consent; or

(B) blocks the path of passersby; or

(C) follows the target after he or she has declined to make a donation.

(b) *Grading.* The offense is a Class [D] misdemeanor.

(c) *Defined Term.* “Deceives” has the meaning given in Section (b) of Article 4209.

**Article 6115. Refusal to Accept Legal Tender**

(a) *Offense Defined.* A person commits an offense if:

(1) in a transaction conducted within the State,

(2) the person refuses to receive legal tender for its value,

(3) the receipt of which does not inconvenience the seller, such as by requiring him or her to give or receive unreasonably large amounts of change.

(b) *Grading.* The offense is a violation.

**Article 6116. Failure to Render Assistance**

(a) *Offense Defined.* A person commits an offense if:

(1) the person:

(A) encounters another whom the person knows is:

(i) exposed to serious bodily injury; or

(ii) abandoned or lost, and is:

(aa) a child under the age of 10; or

(bb) a person incapable of looking after him or herself; and

(B) could render assistance without exposing him or herself to danger or interfering with important duties owed to others, and

(C) does not give reasonable assistance to the person exposed or abandoned, and

(2) another person is not already providing assistance.

(b) *Limit to Civil Liability for Assistance.* A person who provides reasonable assistance in compliance with Section (a) shall not be liable for civil damages, unless:

- (1) the person's actions constituted gross negligence; or
- (2) the person expected to receive remuneration for his or her services.

(c) *Grading.* The offense is:

- (1) a Class [B] misdemeanor if:
  - (A) the exposed or abandoned person dies, and
  - (B) the assistance the person could have rendered would have prevented the death; or
- (2) a Class [C] misdemeanor in all other cases.<sup>20</sup>

#### **Article 6117. Definitions**

(a) "Alcohol-based product" means any substance with a legal use that has any alcohol content that can be used as an intoxicating agent. Alcohol-based products include, but are not limited to: rubbing alcohol, cologne, mouthwash, and cough syrup.

(b) "Alcoholic beverage" means any beverage whose alcohol content exceeds three percent. Alcoholic beverages include, but are not limited to: liquor, beer, wine, alcoholic mixers or cocktails, alcoholic cider, and cordials.

(c) "Catastrophic agent" means any explosive or incendiary device, including any timing or detonation mechanism for such a device; poison or poisonous gas; deadly biological or chemical agent; or a radioactive substance.

(d) A "controlled drug" is a drug that is listed on [the Somali classified drug list]<sup>21</sup>.

(e) "Obstructs" means to render impassable without unreasonable inconvenience or hazard.

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<sup>20</sup> **Query:** Consider whether these penalties are too severe, and whether the offense conduct should be narrowed. This issue was deferred at the Nairobi meetings.

<sup>21</sup> See footnote 30.

## Chapter 6200. Public Indecency and Obscenity Offenses

Article 6201	Indecent Exposure
Article 6202	Engaging in Prostitution
Article 6203	Promoting Prostitution
Article 6204	Distribution and Possession of Obscene Material and Child Pornography
Article 6205	Obscene Performance
Article 6206	Abuse of a Corpse
Article 6207	Bestiality
Article 6208	Definitions

### Article 6201. Indecent Exposure

- (a) *Offense Defined.* A person commits an offense if the person:
- (1) exposes his or her sex organs in a public place,
  - (2) under circumstances likely to cause affront or alarm.
- (b) *Grading.* The offense is a Class [B] misdemeanor.
- (c) *Defined Term.* “Sex organs” has the meaning given in Section (e) of Article 6208.

### Article 6202. Engaging in Prostitution

- (a) *Offense Defined.* A person commits an offense if the person engages in sexual intercourse or sexual contact in exchange for anything of value.
- (b) *Grading.* The offense is a Class [F] felony.
- (c) *Defined Terms.*
- (1) “Sexual contact” has the meaning given in Section (b) of Article 3303.
  - (2) “Sexual intercourse” has the meaning given in Section (j) of Article 508.

### Article 6203. Promoting Prostitution

- (a) *Offense Defined.* A person commits an offense if, to obtain anything of value, the person:
- (1) compels another to engage in an act of prostitution; or
  - (2) encourages, arranges, or otherwise facilitates an act of prostitution; or
  - (3) allows the use of a place, over which he or she exercises control, for an act of prostitution.
- (b) *Grading.* The offense is:
- (1) a Class [D] felony if committed through the use or threat of force; or
  - (2) a Class [E] felony if:
    - (A) the prostitution promoted is:
      - (i) that of a minor; or
      - (ii) that of someone who is incapable of giving consent; or
    - (B) the defendant is an ascendant, spouse, sibling, or guardian of the person prostituted; or
    - (C) the defendant was entrusted to care for, educate, or supervise the person prostituted; or
  - (3) a Class [F] felony in all other cases.
- (c) *Defined Terms.*



- (1) “Ascendant” has the meaning given in Section (b) of Article 6208.
- (2) “Guardian” has the meaning given in Section (a) of Article 3303.
- (3) “Minor” has the meaning given in Section (c) of Article 6208.

**Article 6204. Distribution and Possession of Obscene Material and Child Pornography**

(a) *Offense Defined.* A person commits an offense if the person:

(1) sells, delivers, provides, or offers to sell, deliver, or provide obscene material;  
or

(2) possesses obscene material for purposes of sale or other commercial dissemination; or

(3) sells, advertises, publishes, exhibits, or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene.

(b) *Exception: Special Purpose.* A person does not commit an offense under this Article if the distribution is only to an institution or an individual having scientific or other special justification for possession of such material.

(c) *Grading.* The offense is:

- (1) a Class [A] misdemeanor if the obscene material involves a minor; or
- (2) a [violation] in all other cases.

(d) *Defined Terms.*

- (1) “Minor” has the meaning given in Section (c) of Article 6208.
- (2) “Obscene” has the meaning given in Section (d) of Article 6208.

**Article 6205. Obscene Performance**

(a) *Offense Defined: Obscene Acts.* A person commits an offense if the person presents or directs an obscene play, dance, or performance, or participates in the portion of the performance that makes it obscene.

(b) *Offense Defined: Obscene Language.* A person commits an offense if the person uses obscene language in public.

(c) *Grading.*

- (1) The offense under Section (a) is:
  - (A) a Class [E] felony if it involves a minor; or
  - (B) a Class [F] felony in all other cases.
- (2) The offense under Section (b) is a [violation].

(d) *Defined Term.*

- (1) “Minor” has the meaning given in Section (c) of Article 6208.
- (2) “Obscene” has the meaning given in Section (d) of Article 6208.

**Article 6206. Abuse of a Corpse**

(a) *Offense Defined.* A person commits an offense if, knowing that the person does not have legal authority to do so, the person:

(1) disfigures, mutilates, or commits acts of obscenity or brutality upon a corpse;  
or

(2) destroys, removes, or conceals a corpse or any part thereof in a manner that would violate ordinary family sensibilities.

(b) *Grading.* The offense is:

(1) a Class [A] misdemeanor if the person dissects or uses a corpse for a scientific or medical purpose without legal authorization; or

(2) a Class [F] felony in all other cases.

(c) *Defined Term.* “Obscene” has the meaning given in Section (d) of Article 6208.

**Article 6207. Bestiality**

(a) *Offense Defined.* A person commits an offense if the person engages in sexual contact or sexual intercourse with an animal.

(b) *Grading.* The offense is a Class [D] felony.

(c) *Defined Terms.* “Animal” has the meaning given in Section (a) of Article 6208.

**Article 6208. Definitions**

(a) “Animal” means a living thing that is not a human being or plant.

(b) “Ascendant” means a person from whom another person is descended, including parents, grandparents, and great-grandparents.

(c) “Minor” means a person under the age of 18.

(d) “Obscene” means appealing to a prurient interest in nudity, sex, or excretion, and going substantially beyond customary limits of candor in describing or representing such matters.

(e) “Sex organs” includes female and male genitalia, the anus, and female breasts.

## Chapter 6300. Invasion of Privacy Offenses

Article 6301 Unlawful Eavesdropping or Surveillance

Article 6302 Voyeurism

Article 6303 Unlawful Use or Disclosure of Private of Information

Article 6304 Unlawful Access to Private Information

Article 6305 Definitions

### Article 6301. Unlawful Eavesdropping or Surveillance

(a) *Offense Defined.* Except as authorized by law, a person commits an offense if the person knowingly and without consent or acquiescence:

(1) enters on real property with intent to subject anyone in a private place to eavesdropping or other surveillance; or

(2) installs or uses in a private place, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events occurring in that place; or

(3) installs or uses outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the private place that would not ordinarily be audible or comprehensible outside that place; or

(4) installs a location tracking device in or on the property of another.

(b) *Exception: Whistleblower.* A person does not commit an offense under this Article if, being a party to the communication, the person:

(1) intercepts or records a communication that the person reasonably believes constitutes evidence of an offense, and

(2) acts with the sole motivation of exposing wrongdoing.

(c) *Grading.*

(1) The offense is a Class [E] felony if:

(A) the subject of the surveillance is a person who is nude, partially nude, or engaging in sexual contact or sexual intercourse; or

(B) the conduct constituting an offense is undertaken with the intent to provide sexual gratification to any person.

(2) Otherwise, the offense is a Class [F] felony.

(d) *Defined Terms.*

(1) “Acquiescence” has the meaning given in Section (a) of Article 6305.

(2) “Communication” has the meaning given in Section (b) of Article 6305.

(3) “Private place” has the meaning given in Section (e) of Article 6305.

(4) “Sexual contact” has the meaning given in Section (b) of Article 3303.

(5) “Sexual intercourse” has the meaning given in Section (j) of Article 508.

### Article 6302. Voyeurism

(a) *Offense Defined.* A person commits an offense if the person, knowingly and without consent, observes another:

(1) in the process of getting dressed or undressed; or

(2) under or through the person’s clothes; or

(3) who is nude, partially nude, or engaging in sexual contact or sexual intercourse.

- (b) *Familial Exception.* The offense does not apply if the observation:
  - (1) was made by a parent observing his or her minor child, and
  - (2) was not made with intent to provide sexual gratification to any person.
- (c) *Grading.* The offense is a Class [A] misdemeanor.
- (d) *Defined Terms.*
  - (1) “Minor” has the meaning given in Section (c) of Article 6208.
  - (2) “Sexual contact” has the meaning given in Section (b) of Article 3303.
  - (3) “Sexual intercourse” has the meaning given in Section (j) of Article 508.

**Article 6303. Unlawful Use or Disclosure of Private Information**

(a) *Unlawful Use or Disclosure of Information: Offense Defined.* A person commits an offense if the person knowingly:

- (1) discloses or uses information or a recording that the person knows was obtained in a manner prohibited by Article 6301 (Unlawful Eavesdropping or Surveillance) or Article 6302 (Voyeurism); or
- (2) discloses information that is required by law to be kept confidential.

(b) *Grading.*

(1) The offense under Section (a) is:

(A) a Class [F] felony if committed by a person employed in the postal, telegraph, or telephone services industry acting in the scope of his or her duties; or

(B) a Class [A] misdemeanor in all other cases.

(2) The offense under Section (b) is a Class [B] misdemeanor.

(c) *Defined Term.* “Data” has the meaning given in Section (d) of Article 6305.

**Article 6304. Unlawful Access to Private Information**

(a) *Offense Defined.* A person commits an offense if:

- (1) knowing the person is not authorized to do so,
- (2) the person accesses, or causes to be accessed, information, electronic programs, or data.

(b) *Grading.* The offense is a Class [C] misdemeanor.

(c) *Defined Term.* “Data” has the meaning given in Section (d) of Article 6305.

**Article 6305. Definitions**

(a) “Acquiescence” occurs when a person continues communicating after receiving notice that his or her communication is subject to interception or recording, and subsequent communication falls within the scope of the notice.

(b) “Communication” means a sound, image, writing, signal, or datum transmitted by any medium.

(d) “Data” means information of any kind in any form.

(e) “Private place” means a place where a person would reasonably expect to be safe from unauthorized intrusion or surveillance.

## Chapter 6400. Offenses Against the Family

- Article 6401 Unlawful Marriage
- Article 6402 Unlawful Sexual Intercourse
- Article 6403 Incest
- Article 6404 Endangering the Welfare of a Child
- Article 6405 Persistent Non-Support of a Family Member
- Article 6406 Definitions

### Article 6401. Unlawful Marriage

- (a) *Offense Defined.* A person commits an offense if the person:
  - (1) enters into a marriage with a close relative; or
  - (2) marries a person of the same sex; or
  - (3) is a husband who:
    - (A) being already married to four wives, marries again; or
    - (B) enters into a marriage during his wife's post-marital waiting period; or
  - (4) is a wife who, being already married, marries again.
- (b) *Grading.* The offense is a Class [F] felony.
- (c) *Defined Terms.*
  - (1) "Close relative" has the meaning given in Section (a) of Article 6406.
  - (2) "Post-marital waiting period" has the meaning given in Section (c) of Article 6406.

### Article 6402. Unlawful Sexual Intercourse

- (a) *Offense Defined.* A person commits an offense if the person:
  - (1) is lawfully married and engages in sexual intercourse with a person who is not his or her spouse; or
  - (2) is not lawfully married and engages in sexual intercourse with another person.
- (b) *Grading.* The offense is:
  - (1) a Class [F] felony if the person engages in same-sex sexual intercourse; or
  - (2) a Class [A] misdemeanor in all other cases.<sup>22</sup>
- (c) *Adultery Prosecutions.*
  - (1) *Initiating Prosecution.* Prosecution for the offense under Section (a)(1) must be initiated by the injured spouse.
  - (2) *Proof Requires Four Witnesses.* A conviction under Section (a)(1) requires four eyewitnesses.
- (d) *Defined Term.* "Sexual intercourse" has the meaning given in Section (j) of Article 508.

### Article 6403. Incest

- (a) *Offense Defined.* A person commits an offense if he or she engages in sexual intercourse with a person he or she knows is a close relative.
  - (b) *Grading.* The offense is:
- 

<sup>22</sup> Should the grading for this offense be altered to the death penalty?

- (1) a Class [E] felony if the person is a parent, grandparent, or great-grandparent of the close relative; or
- (2) a Class [F] felony in all other cases.

(c) *Defined Terms.*

- (1) “Close relative” has the meaning given in Section (a) of Article 6406.
- (3) “Sexual intercourse” has the meaning given in Section (j) of Article 508.

**Article 6404. Endangering the Welfare of a Child.**

(a) *Offense Defined.* A person commits an offense if, being a parent, guardian, or having physical custody or control of a child under 14 years of age, the person:

- (1) leaves, abandons, or allows the child to be in circumstances that unreasonably endanger the child’s physical health, safety, or welfare; or
- (2) fails to take reasonable measures to prevent the commission of a violent offense under this Code against the child, knowing that the offense is likely to occur.

(b) *Grading.* The offense is:

- (1) a Class [D] felony if the conduct results in the child’s death; or
- (2) a Class [E] felony if the conduct results in serious bodily injury to the child; or
- (3) a Class [A] misdemeanor in all other cases.

(c) *Defined Term.* “Serious bodily injury” has the meaning given in Section (i) of Article 508.

**Article 6405. Persistent Non-Support of Family Members.**

(a) *Offense Defined.* A person commits an offense if, having the ability to provide financial support, the person knowingly:

- (1) fails to provide for the financial support of his or her:
  - (A) child who is under 14 years old; or
  - (B) parent who is at least 50 years old or incapacitated; or
  - (C) spouse who is incapacitated;
- (2) and:
  - (A) that family member is in need of financial support; or
  - (B) a support payment is required under a court or administrative order of support, and the required support payment has remained unpaid for more than 6 months.

(b) *Grading.*

- (1) The offense under Section (a)(2)(B) is a Class [A] misdemeanor if a full and timely payment has not been made for a period of at least 8 months.
- (2) The offense is a Class [B] misdemeanor in all other cases.

(c) *Defined Term.* “Incapacitated” has the meaning given in Section (b) of Article 6406.

**Article 6406. Definitions.**

(a) “Close relative” means:

- (1) a parent, grandparent, or great-grandparent; or
- (2) a child, grandchild, or great-grandchild; or
- (3) a sibling; or
- (4) an aunt, great-aunt, uncle, great-uncle, nephew, or niece; or
- (5) a person who was nursed by the same woman; or

(6) a person who, by virtue of a current marriage, has become a relation specified in Sections (a)(1) through (a)(4).

(b) “Incapacitated” means physically or mentally unable to support oneself by working.

(c) “Post-marital waiting period” means:

(1) the period of 4 months and 10 days following the death of or divorce from a woman’s husband; or

(2) if the woman is pregnant, the period until the pregnancy ends by birth or lawful termination; or

(3) if the woman’s husband disappears, a period of 1 year unless the husband returns.

## Chapter 6500. Crimes Against Religion

Article 6501 Apostasy

Article 6502 Disparaging Islam

Article 6503 Propagating a Religion Other than Islam

### Article 6501. Apostasy

(a) *Offense Defined.* A person commits an offense if the person:

(1) is a Muslim, and

(2) publicly declares that the person has adopted any religion other than Islam.

(b) *Exception: Recantation.* A person who has committed an offense under Section (a) is excused from liability if the person recants the declaration at any time before or after conviction and sentencing.

(c) *Grading.* The offense is a Class [A] felony.<sup>23</sup>

### Article 6502. Disparaging Islam

(a) *Offense Defined.* A person commits an offense if, being reckless<sup>24</sup> as to whether the person's conduct will disparage the fundamental tenants of Islam,<sup>25</sup> the person:

(1) engages in offensive religious oration, or criticizes the fundamental tenets of Islam; or

(2) produces, sells, distributes, or offers material criticizing the fundamental tenets of Islam; or

(3) impedes or disturbs the exercise of Islamic functions, ceremonies, or practices:

(A) in a place intended for religious purposes; or

(B) in a public place.

(b) *Grading.* The offense is a Class [B] felony.<sup>26</sup>

### Article 6503. Propagating a Religion Other than Islam

(a) *Offense Defined.* A person commits an offense if the person:

(1) is within the territory of the Somali State, and

(2) with intent to convert a Muslim to another religion:

(A) contacts a Muslim, and

(B) persuades the Muslim to convert to another religion.

(b) *Grading.* The offense is a Class [B] felony.<sup>27</sup>

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<sup>23</sup> **Query:** Should this offense be a capital Class A offense, a Class A offense, or an offense of a different grade? There is some disagreement within the Working Group about the appropriate grade of this offense.

<sup>24</sup> **Query:** Should this offense require intentionality, rather than recklessness as to whether the conduct is disparaging? There is no Sharia justification for the expansion of this provision to cover private conduct done recklessly. The state's jurisdiction with regard to private homes is very limited and often only gets triggered when the private conduct is impacting the public. Moreover, Muslim jurists generally support free debate within Islamic society. MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM (Islamic Texts Society, 1997); AL-RISALA MONTHLY (Al-Risala Forum International) (<http://www.alrisala.org/Chapters/islam/expression.htm>).

<sup>25</sup> **Query:** Should this offense apply to public, rather than private and public, conduct?

<sup>26</sup> **Query:** Should this offense be a Class B felony? There is some disagreement in the Working Group as to the appropriate punishment.

<sup>27</sup> **Query:** Should this offense be a Class B felony? There is some disagreement in the Working Group as to the appropriate punishment.





## Chapter 7100. Weapons Offenses

Article 7101	Use of a Dangerous Weapon During an Offense
Article 7102	Trafficking, Manufacture, Sale, or Possession of Firearms
Article 7103	Trafficking, Manufacture, Sale, or Possession of Catastrophic Agents
Article 7104	Unlawful Discharge or Detonation
Article 7105	Failure to Declare Explosives
Article 7106	Definitions

### Article 7101. Use of a Dangerous Weapon During an Offense

(a) *Offense Defined.* A person commits an offense if the person uses or displays a dangerous weapon in the course of committing an offense.

(b) *Grading.* The offense is:

- (1) a Class [C] felony if the person discharges a firearm; or
- (2) a Class [D] felony in all other cases.

(3) *Grade Adjustment for Automatic and Semiautomatic Firearms.* The grade of the offense shall be increased by one grade if the person uses an automatic or semiautomatic firearm.

(c) *Relation to Other Offenses.* A person may not be charged with this offense if the use of a weapon during the commission of an offense has already been accounted for as an aggravating factor in the grading of another offense with which the person has been charged.

(d) *Definitions.*

- (1) "Automatic firearm" has the meaning given in Section (a) of Article 7106.
- (2) "Dangerous weapon" has the meaning given in Article 3208.
- (3) "Firearm" has the meaning given in Section (d) of Article 4209.
- (4) "Semiautomatic firearm" has the meaning given in Section (c) of Article

7106.

### Article 7102. Trafficking, Manufacture, Sale, or Possession of Firearms

(a) *Offense Defined.* A person commits an offense if, without a license or express approval of the government, the person knowingly:

- (1) sells a firearm for resale by the purchaser; or
- (2) possesses a firearm with the intent to sell it for resale by a purchaser; or
- (3) manufactures a firearm; or
- (4) sells or transfers a firearm to another person; or
- (5) possesses a firearm.

(b) *Grading.* The offense:

- (1) under Section (a)(1) is a Class [C] felony; or
- (2) under Section (a)(2) or (a)(3) is a Class [D] felony; or
- (3) under Section (a)(4) is:

(A) a Class [D] felony if the individual to whom the firearm is sold or transferred is:

- (i) under the age of 14; or
- (ii) an individual prohibited by law from obtaining or possessing a firearm; or

(B) a Class [E] felony in all other cases; or

(4) under Section (a)(5) is:

(A) a Class [A] misdemeanor if the weapon is loaded and carried in a public place; or

(B) a Class [B] misdemeanor in all other cases.

(5) *Aggravating Factor.* The grade of the offense shall be increased by one grade if the offense involves an automatic firearm or semiautomatic firearm.

(c) *Defined Terms.*

(1) “Automatic firearm” has the meaning given in Section (a) of Article 7106.

(2) “Firearm” has the meaning given in Section (d) of Article 4209.

(3) “Semiautomatic firearm” has the meaning given in Section (c) of Article 7106.

### **Article 7103. Trafficking, Manufacture, Sale, or Possession of Catastrophic Agents**

(a) *Offense Defined.* A person commits an offense if, without a license or express approval of the government, the person knowingly:

(1) sells a catastrophic agent for resale by the purchaser; or

(2) possesses a catastrophic agent with the intent to sell it for resale by a purchaser; or

(3) manufactures a catastrophic agent; or

(4) sells or transfers a catastrophic agent to another person; or

(5) possesses a catastrophic agent.

(b) *Grading.* The offense:

(1) under Section (a)(1) is a Class [C] felony; or

(2) under Section (a)(2) or (a)(3) is a Class [D] felony; or

(3) under Section (a)(4) is a Class [E] felony; or

(4) under Section (a)(5) is a Class [B] misdemeanor.

(c) *Definitions.* “Catastrophic agent” has the meaning given in Section (c) of Article 6117.

### **Article 7104. Unlawful Discharge or Detonation**

(a) *Offense Defined.* A person commits an offense if the person recklessly:

(1) discharges a firearm; or

(2) detonates explosives.

(b) *Grading.* The offense is:

(1) a Class [E] felony if committed in a public place; or

(2) a Class [A] misdemeanor in all other cases.

(c) *Definitions.*

(1) “Explosives” has the meaning given in Section (b) of Article 7106.

(2) “Firearm” has the meaning given in Section (d) of Article 4209.

### **Article 7105. Failure to Declare Explosives**

(a) *Offense Defined.* A person commits an offense if the person knowingly:

(1) fails to inform a law enforcement officer, when asked, that:

(A) he is in possession of explosives; or

(B) explosives are being stored in a place inhabited by him; or

(2) fails to abide by existing regulations related to the storage of explosives.

(b) *Grading.* The offense is a Class [A] misdemeanor.

(c) *Definitions.*

(1) “Explosives” has the meaning given in Section (b) of Article 7106.

(2) “Law enforcement officer” has the meaning given in Section (g) of Article 508.

**Article 7106. Definitions**

(a) “Automatic firearm” means a firearm that has a mechanism by which ammunition is automatically entered into the firing chamber and will fire continuously while the trigger is depressed.

(b) “Explosives” means any substance that can explode and is prohibited from general use or requires a government permit.

(c) “Semiautomatic firearm” means a firearm that has a mechanism by which ammunition is automatically entered into the firing chamber but which only fires once per trigger pull.

## Chapter 7200. Drugs and Related Offenses

Article 7201	Drug Trafficking
Article 7202	Drug Sale
Article 7203	Drug Use or Possession
Article 7204	Definition

### Article 7201. Drug Trafficking

(a) *Offense Defined.* Except as authorized by law, a person commits an offense if the person knowingly:

- (1) sells a controlled drug for resale by the purchaser; or
- (2) possesses a controlled drug with the intention of selling it for resale by a purchaser; or
- (3) manufactures a controlled drug.

(b) *Rebuttable Presumption.* Intent to sell a controlled drug for resale by another shall be presumed, subject to rebuttal, if a person possesses more than [50]<sup>28</sup> doses of a controlled drug.

(c) *Grading.* The offense:

- (1) under Section (a)(2) is a Class [D] felony; or
- (2) is a Class [C] felony in all other cases.

(d) *Defined Terms.*

- (1) “Controlled drug” has the meaning given in Section (d) of Article 6117.
- (2) “Dose” has the meaning given in Article 7204.

### Article 7202. Drug Sale

(a) *Offense Defined.* Except as authorized by law, a person commits an offense if the person knowingly:

- (1) transfers a controlled drug to another person in exchange for something of value; or
- (2) possesses a controlled drug with the intent to transfer it to another person in exchange for something of value.

(b) *Rebuttable Presumption.* Intent to transfer a controlled drug to another person in exchange for something of value shall be presumed, subject to rebuttal, if a person possesses more than [20]<sup>29</sup> doses of a controlled drug.

(c) *Grading.* The offense:

- (1) under Section (a)(1) is:
  - (A) a Class [D] felony if:
    - (i) the recipient is a minor or suffers from a mental disease or defect; or
    - (ii) the person knows the recipient is addicted to the controlled drug; or
  - (B) a Class [E] felony in all other cases; or
- (2) under Section (a)(2) is:

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<sup>28</sup> **Query:** Is 50 the appropriate quantity here?

<sup>29</sup> **Query:** Is 20 the appropriate quantity here?

(A) a Class [E] felony if:

(i) the recipient is a minor or suffers from a mental disease or defect; or

(ii) the person knows the recipient is addicted to the controlled drug; or

(B) a Class [F] felony in all other cases; or

(d) *Defined Terms.*

(1) “Controlled drug” has the meaning given in Section (d) of Article 6117.

(2) “Dose” has the meaning given in Article 7204.

(3) “Mental disease or defect” has the meaning given in Section (c) of Article 208.

(4) “Minor” has the meaning give in Section (c) of Article 6208.

**Article 7203. Drug Use or Possession**

(a) *Offense Defined.* Except as authorized by law, a person commits an offense if the person knowingly uses or possesses a controlled drug.

(b) *Grading.* The offense is a Class [B] misdemeanor.

(c) *Defined Terms.* “Controlled drug” has the meaning given in Section (d) of Article 6117.

**Article 7204. Definition**

“Dose” means the quantity of a particular controlled drug that constitutes a dose according to the [Somali classified drug list]<sup>30</sup>.

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<sup>30</sup> **Query:** Is there a current list that the Code can reference?

## Chapter 7300. Terrorism

Article 7301	Participating in Terrorist Acts
Article 7302	Providing or Receiving Terrorist Training
Article 7303	Use of Explosive Devices or Weapons of Mass Destruction
Article 7304	Definitions

### Article 7301. Participating in Terrorist Acts

(a) *Committing a Terrorist Act: Offense Defined.* A person commits an offense if:

(1) the person commits one or more of the following acts inside or outside the territory of the Somali State:

- (A) causes death or seriously bodily injury; or
- (B) endangers a person's life; or
- (C) seizes or detains and threatens to kill, injure, or continue to detain another person or persons; or
- (D) creates a serious public health or public safety risk; or
- (E) causes or threatens serious damage to public or private spaces or facilities; or
- (F) seizes and threatens to hold or damage an aircraft, ship, vessel, or vehicle of any type; or
- (G) uses firearms or explosives; or
- (H) releases into the environment or threatens to release into the environment any toxic chemical, biological agent, or other harmful substance; or
- (I) interrupts the provision of government, communication, financial, transportation, or other essential services; or
- (J) disrupts police, civil defense, medical, airport facilities, or other emergency services; or
- (K) disrupts military operations; and

(2) thereby intends to:

- (A) intimidate the public; or
- (B) compel the government or an international organization to act or refrain from acting; or
- (C) undermine the stability of Somalia.

(b) *Supporting a Terrorist Group: Offense Defined.* A person commits an offense if the person solicits, promotes, funds, recruits members for, or gives material support to a terrorist group.

(c) *Possession of Material for a Terrorist Act: Offense Defined.* A person commits an offense if the person:

- (1) knowingly possesses materials tailored for the commission of terroristic acts
- (2) with the intent to commit an offense under Section (a) of this Article.

(d) *Collection of Information to Support a Terrorist Act: Offense Defined.* A person commits an offense if the person collects, records, or possesses information in preparation for commission of an offense under Section (a) of this Article.

(e) *Grading.* The offense:

- (1) under Section (a) is:

- (A) a Class [A] felony if the person directs or leads the act; or
  - (B) a Class [B] felony in all other cases; or
  - (2) under Section (b) or (c) is a Class [C] felony; or
  - (3) under Section (d) is a Class [D] felony.
- (f) *Defined Term.* “Terrorist group” has the meaning given in Section (b) of Article 7304.

**Article 7302. Providing or Receiving Terrorist Training**

- (a) *Offense Defined.* A person commits an offense if:
- (1) the person knowingly provides or receives:
    - (A) instruction in creating or using an explosive or noxious device; or
    - (B) military or combat training; or
    - (C) any other training; and
  - (2) the training is in preparation for commission of an offense under Article 7301.
- (b) *Grading.* The offense is a Class [B] felony.

**Article 7303. Use of Explosive Devices or Weapons of Mass Destruction**

- (a) *Offense Defined.* A person commits an offense if the person uses an explosive or lethal device or a weapon of mass destruction against any person or property.
- (b) *Grading.* The offense is:
- (1) A Class [A] felony punishable by death if a person uses a weapon of mass destruction; or
  - (2) A Class [B] felony in all other cases.
- (c) *Defined Terms.*
- (1) “Explosive or lethal device” has the meaning given in Section (a) of Article 7304.
  - (2) “Weapon of mass destruction” has the meaning give in Section (c) of Article 7304.

**Article 7304. Definitions**

- (a) “Explosive or lethal device” means an explosive or incendiary weapon or device designed to cause or with the capability to cause death, serious bodily injury, or substantial damage to property.
- (b) “Terrorist group” means an entity whose activities and purposes include the commission of or facilitation of commission of a terrorist act as defined by Section (a) of Article 7301.
- (c) “Weapon of mass destruction” means atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future that have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above.



## Chapter 7400. Organized Crime

Article 7401 Participation in a Criminal Organization

Article 7402 Money Laundering

Article 7403 Running a Gambling Enterprise

Article 7404 Piracy

Article 7405 Definitions

### Article 7401. Participation in a Criminal Organization

(a) *Offense Defined.* A person commits an offense if the person:

(1) directs or controls the activity of a criminal organization in any way; or  
(2) participates in or recruits a person to participate in the operation of a criminal organization; or

(3) provides financial or material support to a criminal organization; or

(4) uses or invests the proceeds from the activities of a criminal organization.

(b) *Grading.* The offense:

(1) under Section (a)(1) is:

(A) a Class [B] felony if the person knows that the organization is a criminal organization; or

(B) a Class [C] felony in all other cases; or

(2) under Section (a)(2), (a)(3), or (a)(4) is:

(A) a Class [C] felony if the person knows that the organization is a criminal organization; or

(B) a Class [D] felony in all other cases.

(c) *Defined Terms.*

(1) "Criminal organization" has the meaning given in Section (b) of Article 7405.

(2) "Material support" has the meaning given in Section (e) of Article 7405.

(3) "Proceeds" has the meaning given in Section (f) of Article 7405.

### Article 7402. Money Laundering

(a) *Money Laundering: Offense Defined.* A person commits an offense if the person knowingly:

(1) conceals, possesses, transfers, transports, acquires, or maintains an interest in the proceeds of criminal activity; or

(2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity; or

(3) invests, expends, receives, or offers to invest, expend, or receive the proceeds of criminal activity; or

(4) uses or invests funds that are intended to further the commission of criminal activity; or

(5) engages in a transaction involving the proceeds of criminal activity intended, in whole or in part, to avoid a currency transaction reporting requirement.

(b) *Grading.* The offense is a Class [D] felony.

(c) *Knowledge of Specific Criminal Activity Not Required.* Knowledge of the specific nature of the criminal activity giving rise to the proceeds is not required to establish liability

under this Article.

(d) *Defined Term.* “Proceeds” has the meaning given in Section (f) of Article 7405.

### **Article 7403. Gambling**

(a) *Running a Gambling Place: Offense Defined.* A person commits an offense if the person knowingly:

(1) establishes a place where people meet for the purpose of playing games of chance; or

(2) uses a place to facilitate games of chance; or

(3) allows another to use land or a building under the person’s control to facilitate games of chance.

(b) *Running a Lottery: Offense Defined.* A person commits an offense if the person knowingly:

(1) operates a scheme or procedure by which one or more prizes are distributed by chance,

(2) among persons who have paid or promised consideration for a chance to win anything of value.

(c) *Bookmaking: Offense Defined.* A person commits an offense if the person knowingly:

(1) receives and records wagers or offers to wager on the result of a contest of skill or game of chance, and

(2) receives more than [5]<sup>31</sup> wagers or a total of SOS [50,000] or more in one day.

(d) *Participating in Gambling: Offense Defined.* A person commits an offense if the person knowingly:

(1) participates in a game of chance; or

(2) pays or promises consideration in a lottery; or

(3) wagers on the result of a contest of skill or game of chance.

(e) *Grading.* The offense:

(1) under Section (a), (b), or (c) is:

(A) a Class [F] felony if:

(i) it occurs in a public place; or

(ii) persons under 14 years of age are found participating; or

(ii) the game, scheme, or wager involves stakes higher than SOS

[1,000,000]; or

(B) a Class [A] misdemeanor in all other cases; or

(2) under Section (d) is a Class [B] misdemeanor.

(f) *Defined Terms.*

(1) “Contest of skill” has the meaning given in Section (a) of Article 7405.

(2) “Game of chance” has the meaning given in Section (d) of Article 7405.

### **Article 7404. Piracy**

(a) *Offense Defined.* A person commits an offense if the person:

(1) knowingly and without consent of the owner:

(A) commits an act or threatens to commit an act of violence, detention, or deprivation,

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<sup>31</sup> **Query:** Is 5 the appropriate number here?

- (B) against a ship, aircraft, or person or property on a ship or aircraft,
- (C) on the high seas or in a place outside the jurisdiction of any state; or
- (2) participates voluntarily in the operation of what the person knows to be a ship or aircraft detained under Section (a)(1).
- (b) *Grading.* The offense is a Class [C] felony.
- (c) *Defined Terms.*
  - (1) “Deprivation” has the meaning given in Section (c) of Article 7405.
  - (2) “Violence” has the meaning given in Section (g) of Article 7405.

**Article 7405. Definitions**

- (a) “Contest of skill” means a game, competition, test, match, or fight where the outcome is predominantly dependent on skill.
- (b) “Criminal organization” means:
  - (1) a body whose membership acts or unites for a common purpose, and has:
    - (A) through its members or other associates, committed two or more acts:
      - (i) involving violence, catastrophe, or a threat of either as part of an ongoing plan or purpose; or
      - (ii) constituting drug trafficking; or
    - (B) publicly announced or acknowledged that its plan or purpose includes the commission or threat of such offenses; or
  - (2) a group designated as a criminal or terrorist organization by the Somali government or the United Nations.
- (c) “Deprivation” means denying access to any necessity.
- (d) “Game of chance” means a game, contest, or scheme where:
  - (1) a person stakes or risks something of value for the opportunity to win something of value, and
  - (2) success or failure is predominantly dependent on chance.
- (e) “Material support”:
  - (1) includes, but is not limited to, financial services, lodging, training, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, transportation, or any other physical assets; but
  - (2) does not include medicine or religious materials.
- (f) “Proceeds” means funds acquired or derived directly or indirectly from, produced through, or realized through an act.
- (g) “Violence” means an act involving the use of physical force or the threat of force to damage or injure someone or something.

## APPENDIX A: MILESTONE GRADING TABLE

<b>Class A Felonies Punishable by Death – (maximum sentence: death)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
intentionally causing death of another person (murder in the first degree)	3101
<b>Class A Felonies – (maximum sentence: life imprisonment)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
taking up arms against the state or causing the loss of control of territory of the state	1101
<b>Class B Felonies – (maximum sentence: 25 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing death of another person with depraved indifference to human life (murder in the second degree)	3102
<b>Class C Felonies – (maximum sentence: 15 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing death of another person (manslaughter)	3103
unlawful restraint for reward, etc.; victim released alive, unharmed (kidnapping)	3401
<b>Class D Felonies – (maximum sentence: 8 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
negligently causing the death of another person (negligent homicide)	3104
Knowingly causing serious physical injury to another person (aggravated assault)	3202
theft of or property destruction equal to [SOS500,000,000] or more	4201
<b>Class E Felonies – (maximum sentence: 4 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing serious physical injury to another person (reckless serious injuring)	3202
theft of or property destruction equal to [SOS50,000,000] or more	4201
<b>Class F Felonies – (maximum sentence: 2 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
Knowingly causing (non-serious) physical injury to another person (assault)	3202
recklessly engaging in conduct creating a substantial risk of death to another person (reckless endangerment)	3204
theft of or property destruction equal to [SOS5,000,000] or more	4201
<b>Class A Misdemeanors – (maximum sentence: 1 year)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing (non-serious) physical injury to another person (reckless injuring)	3202
threat to commit a crime likely to result in death or serious injury to person or property (terroristic threats)	3205
theft of or property destruction equal to [SOS1,000,000] or more	4201
<b>Class B Misdemeanors – (maximum sentence: 6 months)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>

recklessly causing damage to another's property, valued from [SOS1,000,000] (reckless damaging)	4102
theft of or property destruction equal to [SOS50,000]	4201
<b>Class C Misdemeanors</b> – (maximum sentence: 3 months)	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
offensive touching, no injury (minor assault)	3202
theft of or property destruction equal to less than [SOS50,000]	4201
<b>Class D Misdemeanors</b> – (maximum sentence: 30 days)	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
intentionally placing another person in fear of imminent physical injury (menacing)	3202
knowingly harassing another person (harassment)	6103
<b>Violations</b> – (no imprisonment authorized)	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
engaging in disorderly conduct to cause or risk inconvenience, annoyance, or alarm (disorderly conduct)	6102

## APPENDIX B: SUMMARY GRADING TABLE

<b>Summary of Draft Code Offense Grades</b>	
<p>The following table includes all offenses and suboffenses contained in the following chapters: Chapters 1100 [Crimes Against the State], 2100 [Genocide and Human Trafficking], 3100 [Homicide Offenses], 3200 [Robbery, Assault, Endangerment, and Threat Offenses], 3300 [Sexual Offenses], 3400 [Kidnapping, Restraint, Coercion, and Related Offenses], 4100 [Property Damage and Trespass Offenses], 4200 [Theft and Related Offenses], 4300 [Forgery and Fraudulent Practices], 5100 [Bribery, Improper Influence, and Official Misconduct], 5200 [Official Falsification Offenses], 5300 [Obstruction of Government Operations; Escape], 6100 [Public Order and Safety Offenses], 6200 [Public Indecency and Obscenity Offenses], 6300 [Invasion of Privacy Offenses], 6400 [Offenses Against the Family], 6500 [Crimes Against Religion], 7100 [Weapons Offenses], 7200 [Drugs and Related Offenses], 7300 [Terrorism] and 7400 [Organized Crime]</p>	
<p>The gray-filled boxes indicate "milestone grading offenses" that are included for comparison purposes.</p>	
<p><b>Class A Felonies Punishable by Death</b> – (maximum sentence: death)</p>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
intentionally causing the death (murder in the first degree)	3101(b)
committing genocide	2101(b)
using a weapon of mass destruction against any person or property	7303(b)(1)
<p><b>Class A Felonies</b> – (maximum sentence: life imprisonment)</p>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
taking up arms against the state or causing the loss of control of territory of the state	1101(b)
committing a hostile act against a foreign state intending that war result during a time of war, obtaining, delivering, communicating, or receiving political or military information knowing the information may be used to the disadvantage of the state	1106(b)(1)
causing a person under 14 to commit suicide by force, duress or deception	3105(c)(1)(A)
hijacking an airplane	3201(b)(1)(A)
apostasy	6501(c)
leading or directing an act that causes death or serious injury or places the public at risk with the intention to intimidate the public or government, or to undermine the stability of Somalia (committing a terrorist act)	7301(e)(1)(A)
<p><b>Class B Felonies</b> – (maximum sentence: 25 years)</p>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing death with depraved indifference (murder in the second degree)	3102(c)
Disclosing classified information where doing so causes another's death or exposes the stability of the State.	1108(b)(1)

recruiting, transporting, transferring, harboring, or receiving a person for purpose of exploitation	2102(b)
causing a person to commit suicide by force, duress or deception	3105(c)(1)(B)
aiding or soliciting another to attempt suicide or attempting suicide	3105(c)(2)
knowingly causing potentially widespread injury or damage (causing catastrophe)	3203(d)(1)(A)
unlawful restraint for reward, etc.; victim not released alive, unharmed prior to trial (kidnapping)	3401(b)(1)
knowingly holding another in a condition of involuntary servitude	3402(c)(1)
recklessly criticizing the fundamental tenants of Islam; offering material that criticizes; or impeding Islamic functions.	6502(b)
propagating a religion other than Islam	6503(b)
committing an act that causes death or serious injury or places the public at risk with the intention to intimidate the public or government, or to undermine the stability of Somalia (committing a terrorist act)	7301(e)(1)(B)
providing or receiving training in explosives, military instruction, or any other training to prepare to commit a terrorist act	7302(b)
using an explosive device against any person or property	7303(b)(2)
directing or controlling the activity of an organization that the person knows is a criminal organization	7401(b)(1)(A)
<b>Class C Felonies – (maximum sentence: 15 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing death (manslaughter)	3103(c)
unlawful restraint for reward, etc.; victim released alive, unharmed (kidnapping)	3401(b)(2)
aiding the enemy during a time of war	1102(b)(1)
committing a hostile act against a foreign state that disturbs relations with a foreign government or exposes the state to retaliation	1106(b)(2)
obtaining, delivering, communicating, or receiving political or military information knowing the information may be used to the disadvantage of the state	1107(b)(2)
unauthorized disclosure of classified information	1108(b)(2)
unauthorized use of classified information	1109(b)
hijacking a public transportation vehicle that is not an airplane	3201(b)(1)(B)
committing a theft while threatening or inflicting serious bodily injury with a weapon, disguise, or multiple people (robbery)	3201(b)(2)
recklessly causing potentially widespread injury or damage (causing catastrophe)	3203(d)(1)(B)
causing another person to have sexual intercourse through coercive circumstances (rape)	3301(d)(1)
sexual intercourse with a minor or incapacitated person	3302(b)(1)
violence or threat of violence against an air navigation facility	4102(b)(1)(A)
written false statements made to mislead public officers or law enforcement	5202(e)

importing firearms, catastrophic agents, or controlled drugs without a license	6110(b)(1)
discharge of a weapon in the course of committing an offense	7101(b)(1)
sale of a firearm or possession of a firearm with the purpose of resale	7102(b)(1)
sale of a catastrophic agent for resale or possession of a catastrophic agent with purpose of resale	7103(b)(1)
drug trafficking	7201(c)(2)
supporting a terrorist act or possessing material for a terrorist act	7301(e)(2)
directing or controlling the activity of a criminal organization	7401(b)(1)(B)
participating in, recruiting for, or providing material support for a criminal organization, or using or investing the proceeds from a criminal organization, if the person knows the organization is a criminal organization	7401(b)(2)(A)
committing or threatening violence against a ship or aircraft outside the jurisdiction of a state, or participating in piracy on a ship or aircraft (piracy)	7404(b)
<b>Class D Felonies – (maximum sentence: 8 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
negligently causing the death of another person (negligent homicide)	3104(b)
Knowingly causing serious physical injury to another person (aggravated assault)	3202(b)(1)(A)
theft of or property destruction equal to [SOS500,000,000] or more	4201(c)(1)
aiding the enemy	1102(b)(2)
rendering unserviceable a military work or works that service the armed forces during a time of war	1104(b)(1)
abortion performed without valid consent from the mother	3106(b)(1)
carjacking	3201(b)(1)(C)
committing a theft while threatening or inflicting serious bodily injury (robbery)	3201(b)(3)
knowingly risking causing potentially widespread injury or damage (risking catastrophe)	3203(d)(2)(A)
sexual contact with a minor or incapacitated person	3302(b)(2)
restraining another in a way that risks serious bodily injury or for more than 24 hours	3402(c)(2)(A)(i)
restricting another's freedom in violation of a legal duty	3404(c)(2)(A)(ii)
causing another to perform or omit to perform any act by threatening to commit a felony or to cause the other person to commit a felony; or committing the offense in a group (criminal coercion)	3404(c)(1)
knowingly starting a fire to destroy an occupied structure or to collect insurance (criminal destruction)	4101(d)(1)
knowingly receiving stolen property equal to [SOS 500,000,000] or more	4201(c)(1)
distributing protected works without authorization equal to [SOS 500,000,000] or more	4201(c)(1)
forgery by a public officer in the performance of his duties	4301(c)(3)



soliciting, accepting, offering, conferring, or paying a commercial bribe, or breaching a duty to act disinterestedly commercial bribery and breach of duty to act disinterestedly)	4305(d)
knowingly rigging or violating the rules of a publicly exhibited contest or bid	4306(c)(1)
defrauding secured investors when/where harm equivalent to [SOS 500,000,000] or more	4307(b)
knowingly committing fraud while insolvent when/where harm equivalent to [SOS 500,000,000] or more	4308(c)(1)
knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 500,000,000] or more	4309(b)(1)
through the use or threat of force, either: compelling a person to engage in prostitution; or encouraging, arranging, or otherwise facilitating an act of prostitution; or allowing the use of a place over which one exercises control for an act of prostitution	6203(b)(1)
engaging in sexual intercourse or sexual contact with an animal	6207(b)
endangering the welfare of a child if the conduct results in the death of the child	6404(b)(1)
use or display of a weapon in the course of committing an offense	7101(b)(2)
manufacture of a firearm	7102(c)(2)
sale or transfer of a firearm to a person under 14 or a person prohibited by law from obtaining a firearm	7102(b)(3)(A)
manufacture of a catastrophic agent	7103(b)(2)
possessing a drug with the intent to sell it for resale	7201(c)(1)
drug sale to a minor or mentally impaired individual	7202(c)(1)(A)
collection of information for preparation or commission of a terrorist act	7301(e)(3)
participating in, recruiting for, or providing material support for a criminal organization, or using or investing the proceeds from a criminal organization	7401(b)(2)(B)
knowingly engaging in a transaction involving the proceeds of a criminal organization (money laundering)	7402(b)
<b>Class E Felonies – (maximum sentence: 4 years)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing serious physical injury to another person (reckless serious injuring)	3202(b)(1)(B)
theft of or property destruction equal to [SOS 50,000,000] or more	4201(c)(2)
failing to execute a contract for the supply of goods or services necessary to the war effort during wartime	1103(b)
risking causing potentially widespread injury or damage (risking catastrophe)	3203(d)(2)(B)
causing sexual contact to another person through coercive circumstances (sexual assault)	3301(d)(2)
unlawful restraint in order to marry the person	3401(b)(3)

taking a child from custody of a guardian if person is not of close relation to child or acted with disregard for child's safety (improper custody of children)	3403(d)(1)
recklessly employing or threatening violence while engaging in conduct that risks harm equivalent to [SOS 500,000,000]	4102(b)(1)(B)
knowingly receiving stolen property equal to [SOS50,000,000] or more	4201(c)(2)
distributing protected works without authorization equal to [SOS 50,000,000] or more	4201(c)(2)
forgery with the effect of devaluing the national currency	4301(c)(2)
knowingly participating in a public contest or exhibition knowing it is not conducted in accordance with the rules (rigging publicly exhibited contest or public bid)	4306(c)(2)
defrauding secured investors when/where harm equivalent to [SOS 50,000,000] or more	4307(b)
knowingly committing fraud while insolvent when/where harm equivalent to [SOS 50,000,000] or more	4308(c)(2)
knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 50,000,000] or more	4309(b)(2)
knowingly offering a bribe to a public officer, officer, or witness	5101(c)
accepting a bribe as a public officer, officer, or witness	5101(c)
organizing others to intentionally impairing government function by force, breach of official duty, or unlawful act	5302(b)(1)
failure to report information related to the commission of a felony under Chapter 7300 (Terrorism)	5303(f)(1)
resisting arrest or preventing a law enforcement officer from discharging a duty by using force or threat	5305(c)(1)
escaping from or failing to return to official detention if using a dangerous weapon, detained for a felony, or following conviction of any crime	5306(c)(1)
engaging in disorderly conduct that causes serious bodily injury or death with two or more other people (injurious rioting)	6101(c)(1)
promoting prostitution if: the prostitution being promoted is that of a minor or someone incapable of giving consent; or if done by one's ascendant, spouse, sibling, guardian, or someone entrusted with the care, education, and supervision of another	6203(b)(2)
presenting or directing obscene entertainment that involves minors	6205(c)(1)(A)
presenting, directing, or participating in an obscene performance that involves minors	6205(c)(2)
unauthorized eavesdropping or surveillance of a person in the nude, engaging in sexual contact, or for sexual gratification (unlawful eavesdropping or surveillance)	6301(c)(1)
engaging in sexual intercourse or oral or object penetration with a person the person knows is a close relative, if the suspect is a parent, grandparent, or great-grandparent of the close relative	6403(b)(1)
endangering the welfare of a child if the conduct results in the serious bodily injury to the child	6404(b)(2)

sale or transfer of a firearm	7102(b)(3)(B)
sale or transfer of a catastrophic agent to another	7103(b)(3)
discharge of a firearm or explosive in a public place	7104(b)(1)
sale of drugs	7202(c)(1)(B)
possessing drugs with the intent to transfer them to a minor a person who is addicted in exchange for value	7202(c)(2)(A)
<b>Class F Felonies – (maximum sentence: 2 years)</b>	
<b>Offense Description</b>	<b>Article</b>
Knowingly causing (non-serious) physical injury to another person (assault)	3202(b)(2)(A)
recklessly engaging in conduct creating a substantial risk of death to another person (reckless endangerment)	3204(b)
theft of or property destruction equal to [SOS 5,000,000] or more	4201(c)(3)(A)
rendering unserviceable a military work or works that service the armed forces	1104(b)(2)
promoting, organizing, or directing an organization whose purpose is to harm national unity	1105(b)
administering a drug to another without his or her consent	3206(b)
causing a person under 16 or who is legally incompetent to commit indecent public exposure likely to cause alarm with intent to cause sexual arousal in any person	3303(c)(2)(A)
recklessly causing a fire or explosion placing a person in danger of injury or a building in danger of damage (reckless burning or exploding)	4101(d)(2)
causing pecuniary loss by using deception, threat, or tampering with another's property (criminal mischief)	4103(b)(1)
Deflecting a public watercourse with intent to obtain wrongful gain	4103(b)(2)
entering or remaining in a dwelling or secured premise, or altering boundaries of another's dwelling or secured premise without privilege to do so (criminal trespass)	4104(c)(1)(A)
knowingly receiving stolen property equal to SOS [5,000,000] or more	4201(c)(3)(A)
distributing protected works without authorization equal to [SOS 5,000,000] or more	4201(c)(3)(A)
theft of a firearm	4201(c)(3)(B)
theft of an automobile, airplane, motorcycle, motor boat, or other motor vehicle	4201(c)(3)(C)
theft of 3 or more cattle, bovine, or equine animals	4201(c)(3)(D)
forgery of an object or writing	4301(c)(4)
tampering with a writing record or device without authority to do so	4302(b)
with respect to a public officer, reckless impersonation or reckless exhibition of unearned titles or awards (identity fraud)	4303(c)(1)
defrauding secured investors when/where harm equivalent to [SOS 5,000,000] or more	4307(b)
knowingly committing fraud while insolvent when/where harm equivalent to [SOS 5,000,000] or more	4308(c)(3)

knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 5,000,000] or more	4309(b)(3)
using to coercion to influence a public officer, officer, voter, or witness (improper influence)	5102(b)
using authority as a public officer to intentionally obtain personal benefit or to harm another (official misconduct)	5103(c)(1)
knowingly altering or harming a public record in order to conceal wrongdoing or deceive (tampering with public records)	5203(b)
destroying, altering, concealing, falsifying, or suppressing evidence, producing or offering false evidence, or obstructing investigation or prosecution of a felony, with intent to impede bringing a person to justice	5301(c)(1)(A)-(B)
usurping a public function while intentionally impairing government function by force, breach of official duty, or unlawful act	5302(b)(2)
failure by a public officer to report the commission of a Class A felony that is a crime against the state under Chapter 1100 (Crimes Against the State)	5303(f)(2)
escaping from or failing to return to official detention if the person employs force or threatens violence	5306(c)(2)
if employed as a public officer, intentionally permitting a person to escape from official detention	5306(c)(3)
failure to appear at specified place and time if at liberty by court order and appearance was for a felony, disposition of any such charge, or person took flight to avoid appearance (bail jumping)	5308(b)(1)(A)-(B)
engaging in disorderly conduct with two or more other people (rioting)	6101(c)(2)
defaming a judge during a hearing, or a legislative, executive, administrative, or judicial body	6105(c)(1)
desecrating venerated objects knowing that doing so will outrage people (desecration of venerated objects)	6108(b)
engaging in sexual intercourse or sexual contact, outside of marriage, in exchange for anything of value	6202(b)
compelling, allowing, or facilitating a person to engage in prostitution	6203(b)(3)
presenting or directing obscene entertainment	6205(c)(1)(B)
abuse of a corpse	6206(b)(2)
unauthorized eavesdropping or surveillance of another person (unlawful eavesdropping or surveillance)	6301(c)(2)
knowingly using or disclosing unlawfully obtained information if acting in the scope of his or her duties as a postal, telegraph, or telephone employee	6303(c)(1)
presenting, directing, or participating in an obscene performance that does not involve minors	6304(c)(1)
committing an act of brutality or obscenity on a corpse, or handling a corpse in any manner that violates ordinary family sensibilities	6305(b)(2)
unlawful marriage (in the case of a husband, marrying more than four wives; in the case of a wife, marrying a second husband; or entering	6401(b)

into marriage with a close relative, or during the wife's post-marital waiting period, or with someone of the same sex).	
same sex intercourse	6402(b)(1)
engaging in sexual intercourse or oral or object penetration with a person the person knows is a close relative, if the suspect is someone other than a parent, grandparent, or great-grandparent of the close relative	6403(b)(2)
possessing a drug with the intent to transfer it to another for value	7202(c)(2)(B)
unauthorized prescription writing by a practitioner	7205(c)
operating a place to facilitate games of chance, a scheme where prizes are distributed by chance, or a scheme that receives wagers for games of skill or chance, if: in a public place, if a person younger than 14 participates, or if the stakes are higher than [SOS 1,000,000]	7403(e)(1)(A)
<b>Class A Misdemeanors – (maximum sentence: 1 year)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing (non-serious) physical injury to another person (reckless injuring)	3202(b)(2)(B)
threat to commit a crime likely to result in death or serious injury to person or property (terroristic threats)	3205(b)
theft of or property destruction equal to [SOS 1,000,000] or more	4201(c)(4)
using force, threat, or deception to hinder the political rights of a citizen	1109(b)
abortion with consent of the mother	3106(b)(2)
failing to prevent catastrophe if a person contributed to the catastrophe or has a legal duty to prevent the catastrophe	3203(d)(3)
intentionally performing an act that causes a person to become impotent to procreate	3207(b)
causing a person to commit indecent public exposure likely to cause alarm with intent to cause sexual arousal in any person	3303(c)(2)(B)
restraining another in a violation of a legal duty	3402(c)(2)(B)
taking a child or committed person from lawful custody	3403(d)(2)
causing another to perform or omit to perform any act by threatening harm to the victim of a third person (criminal coercion)	3404(c)(3)
recklessly employing or threatening violence while engaging in conduct that risks harm equivalent to [SOS 5000,000], or that affects a transportation device, 3 or more large animals, property that is part of a system of irrigation, property with a governmental or religious purpose, agricultural property, or property damaged by lockouts and strikes	4102(b)(1)(D)(i)-(vii)
entering or remaining in place or altering boundaries of another's place enclosed to exclude intruders without privilege to do so (criminal trespass)	4104(c)(1)(B)
knowingly receiving stolen property equal to SOS [1,000,000] or more	4201(c)(4)
distributing protected works without authorization equal to [SOS 1,000,000] or more	4201(c)(4)
forgery of a stamp or public transit ticket	4301(c)(1)
reckless impersonation or reckless exhibition of unearned titles or awards (identity fraud)	4303(c)(2)

recklessly supplying deceptive information or knowingly deceiving by acting counter to commercial practice (deceptive practices)	4304(b)
defrauding secured investors when/where harm equivalent to [SOS 1,000,000] or more	4307(b)
knowingly committing fraud while insolvent when/where harm equivalent to [SOS 1,000,000] or more	4308(c)
knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 1,000,000] or more	4409(b)(4)
using a position as a public officer to profit unfairly (profiteering)	5103(c)(2)
making a false statement under oath in an official proceeding (perjury)	5201(b)
providing assistance to a person with intent to impede bringing the person to justice, or soliciting or accepting a benefit to refrain from criminal prosecution	5301(c)(2)
intentionally impairing government function by force, breach of official duty, or unlawful act	5302(b)(3)
failure to report the commission of a Class A felony that is a crime against the state under Chapter 1100	5303(f)(1)
failure by a public officer to promptly report information about the commission of felony obtained in the course of professional duties	5303(f)(3)
permitting a person to escape from official detention	5306(c)(4)
failure to appear at specified place and time if at liberty by court order (bail jumping)	5308(b)(2)
knowingly circulating a false warning of a fire or other disaster	6104(b)
defamation attributing a specific act, directed at a person's identity, or is made in a publicly accessible writing	6105(c)(2)
importing, manufacturing, or possessing for the purpose of manufacture, alcoholic beverages or alcohol-based products	6111(b)(1)
distributing or possessing obscene material, if the obscene material involves minors	6204(c)(1)
dissecting or using a corpse for any scientific or medical purpose without authorization	6206(b)(1)
knowingly observing another person who is in the process of dressing, nude, or engaging in sexual contact or intercourse	6302(c)
knowingly using or disclosing unlawfully obtained information	6303(c)(2)
engaging in sexual intercourse with someone other than one's spouse	6402(b)(2)
endangering the welfare of a child if the conduct does not result in death or serious bodily injury to the child	6404(b)(3)
persistent non-support of a family member if full and timely payment has not been made for a period of at least 8 months	6405(b)(1)
possession of a loaded firearm in a public place	7102(b)(4)(A)
discharge of a firearm or explosive	7104(b)(2)
failure to inform a law enforcement officer of possession of explosives	7105(b)
unlawful prescribing of drugs	7205(b)
operating a place or scheme to facilitate games of chance or receiving wagers for games of skill or chance	7403(e)(1)(B)

<b>Class B Misdemeanors – (maximum sentence: 6 months)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
recklessly causing damage to another's property, valued over [SOS 1,000,000] (reckless damaging)	4102(b)(1)(E)
theft of or property destruction equal to [SOS 50,000]	4201(c)(5)
indecent public exposure likely to cause alarm with intent to cause sexual arousal in any person	3303(c)(1)
failure to take reasonable measure to put out or control a fire by a person with a duty, control, or custody if the fire endangers life or property (failure to control or report a dangerous fire)	4101(d)(3)
recklessly employing or threatening violence if harm is equivalent is equal to [SOS1,000,000] or more, or where animals are taken onto another's property for grazing	4102(b)(1)(E)(i)-(ii)
entering or remaining in place, or altering boundaries of another's property without privilege to do so (criminal trespass)	4104(c)(1)(C)
knowingly receiving stolen property equal to [SOS50,000] or more	4201(c)(5)
distributing protected works without authorization equal to [SOS 50,000] or more	4201(c)(5)
possession of forged or counterfeit writings	4301(c)(5)
recklessly manufacturing, transferring, purchasing, or selling another person's identification information (identity trafficking)	4303(c)(3)
defrauding secured investors when/where harm equivalent to [SOS 250,000] or more	4407(b)
knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 250,000] or more	4309(b)
making a false written statement to mislead a public official (written falsification)	5202(e)
making a false statement to a public official (false statements)	5202(e)
unlawfully discharging a committed person	5306(c)(5)
providing an inmate with a tool for escape that the person knows is unlawful for the inmate to possess	5307(c)(1)
as an inmate, possessing anything that may be useful for escape	5307(c)(1)
failing to disperse when asked by a public officer or when likely to cause inconvenience or alarm (failure to disperse)	6101(c)(3)
defamation	6105(c)(3)
operating a regulated business or importing without a license	6110(b)(2)
selling or distributing alcoholic beverages or alcohol-based products in public and to persons who are under the age of 14, mentally disabled, or manifestly intoxicated	6111(b)(2)(A)
consuming or acquiring an alcoholic beverage	6112(b)(1)
public intoxication that endangers persons or property or causes annoyance more than two times in one year (repeat public intoxication)	6113(b)(1)
repeated public intoxication within one year	6113(b)(1)
failing to provide assistance to a person in danger if the person dies and assistance could have prevented death	6116(c)(1)

exposing sexual organs in public (indecent exposure)	6201(b)
knowingly causing unauthorized display of or tampering with computer data (misuse of computer information)	6303(c)(3)
persistent non-support of a family member if full and timely payment has not been made for a period of less than 8 months	6405(b)(2)
possession of a firearm	7102(c)(6)
possession of a catastrophic agent	7103(b)(4)(B)
drug use or possession	7203(b)
participating in a game of chance, paying into a lottery, or wagering in a game of skill or chance	7403(e)(2)
<b>Class C Misdemeanors – (maximum sentence: 3 months)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
intentional offensive touching, no injury (minor assault)	3202(b)(3)
theft of or property destruction less than [SOS 50,000]	4201(c)(6)
recklessly employing or threatening violence while engaging in conduct that risks harm equivalent to [SOS 5000]	4102(b)(1)(F)
knowingly receiving stolen property less than [SOS50,000]	4201(c)(6)
distributing protected works without authorization less than [SOS 50,000]	4201(c)(6)
operating another person's vehicle without authorization	4309(c)
knowingly receiving deposits in a failing financial institution when/where harm equivalent to [SOS 50,000] or more	4309(b)
resisting arrest, preventing a public officer from discharging a duty, or refusing to assist a law enforcement officer with malintent	5305(c)(2)
providing an inmate with contraband or possessing contraband as an inmate	5307(c)(2)
intentionally preventing or disrupting a lawful meeting (disrupting meeting and processions)	6107(b)
selling or distributing alcoholic beverages or alcohol-based products with the knowledge that the purchaser or recipient intends to use the product for its intoxicating effect	6111(b)(2)(B)
consuming or acquiring an alcohol-based product for the purpose of intoxication	6112(b)(2)
public intoxication that endangers persons or property or causes annoyance (public drunkenness; drug incapacitation)	6113(b)(2)
failure to render assistance to a person in danger	6116(c)(2)
knowingly accessing information without proper authorization	6304(b)
<b>Class D Misdemeanors – (maximum sentence: 30 days)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
intentionally placing another person in fear of imminent physical injury (menacing)	3202(b)(3)
knowingly harassing another person (harassment)	6103(b)
recklessly employing or threatening violence while engaging in conduct that risks harm worth less than [SOS 5000]	4102(b)(1)(G)



refusal to give a public officer in the course of his or her duties requested identifying information	5304(b)
engaging in disorderly conduct to cause or risk serious inconvenience, annoyance, or alarm, or failure to cease disorderly conduct when warned	6102(b)(1)
obstructing a highway or public passage and persisting when warned by a law officer (obstructing highways or other public passages)	6106(d)(1)
mistreating or neglecting an animal if the animal is for game or show (aggravated animal cruelty)	6109(b)(1)
begging in a public place	6114(b)
unlawful possession, use of prescription drugs	7205(a)(1)
<b>Violations – (no imprisonment authorized)</b>	
<b><u>Offense Description</u></b>	<b><u>Article</u></b>
engaging in disorderly conduct to cause or risk inconvenience, annoyance, or alarm (disorderly conduct)	6102(b)(2)
failure by a medical professional to promptly report information about a felony obtained in the exercise of his or her duties which would not endanger the patient	5303(f)(4)
knowingly failing to give notice to the authorities of a committed person's unlawful departure from custody	5306(c)(6)
obstructing a highway or public passage (obstructing highways or other public passages)	6106(d)(2)
mistreating or neglecting an animal (animal cruelty)	6108(b)(2)
unreasonable refusal of legal tender	6115(b)
distribution or possession of obscene material	6204(c)(2)
using obscene language in public	6205(c)(2)

## APPENDIX C: CONVERSION TABLE: DRAFT CODE TO CURRENT LAW

Draft Code Provisions	Current Law Provision
101	Penal Code (1962) 2
102	None
103	Penal Code (1962) 1
103	Penal Code (1962) 14
104	None
105	Penal Code (1962) 3
105	Penal Code (1962) 4
105	Penal Code (1962) 6
105	Penal Code (1962) 7
105	Penal Code (1962) 8
105	Penal Code (1962) 11
106	None
107	Penal Code (1962) 64
107	Penal Code (1962) 65
107	Penal Code (1962) 66
107	Penal Code (1962) 67
201	Penal Code (1962) 16
202	Penal Code (1962) 41
203	Penal Code (1962) 22
203	Penal Code (1962) 23
203	Penal Code (1962) 24
204	Penal Code (1962) 5
204	Penal Code (1962) 25
204	Penal Code (1962) 28
204	Penal Code (1962) 29
205	Penal Code (1962) 47
206	Penal Code (1962) 20
207	Penal Code (1962) 16
207	Penal Code (1962) 20
207	Penal Code (1962) 21
207	Penal Code (1962) 26
208	None
301	Penal Code (1962) 16
301	Penal Code (1962) 75
301	Penal Code (1962) 238

302	Penal Code (1962)	32
303	Penal Code (1962)	13
303	Penal Code (1962)	44
303	Penal Code (1962)	45
303	Penal Code (1962)	46
304		None
401	Penal Code (1962)	29
401	Penal Code (1962)	48
401	Penal Code (1962)	71
401	Penal Code (1962)	72
401	Penal Code (1962)	73
401	Penal Code (1962)	74
401	Penal Code (1962)	75
401	Penal Code (1962)	76
401	Penal Code (1962)	77
401	Penal Code (1962)	78
401	Penal Code (1962)	79
401	Penal Code (1962)	80
402	Penal Code (1962)	54
402	Penal Code (1962)	55
402	Penal Code (1962)	56
402	Penal Code (1962)	57
403	Penal Code (1962)	22
403	Penal Code (1962)	30
403	Penal Code (1962)	31
404	Penal Code (1962)	19
404	Penal Code (1962)	28
405		None
501	Penal Code (1962)	36
501	Penal Code (1962)	303
502	Penal Code (1962)	33
503	Penal Code (1962)	35
504		None
505	Penal Code (1962)	34
506	Penal Code (1962)	34
507		None
508	Penal Code (1962)	440
601	Penal Code (1962)	26
601	Penal Code (1962)	27
602	Penal Code (1962)	50
602	Penal Code (1962)	51

602	Penal Code (1962)	58
603	Penal Code (1962)	53
604	Penal Code (1962)	59
604	Penal Code (1962)	60
605		None
606		None
607		None
608		None
609	Penal Code (1962)	33
609	Penal Code (1962)	34
609	Penal Code (1962)	35
609	Penal Code (1962)	36
609	Penal Code (1962)	37
609	Penal Code (1962)	38
610	Penal Code (1962)	49
610	Penal Code (1962)	52
611		None
701	Penal Code (1962)	12
702		None
703		None
704	Penal Code (1962)	9
705		None
706		None
707		None
708		None
709	Penal Code (1962)	240
801		None
802	Penal Code (1962)	33
803		None
901	Penal Code (1962)	17
901	Penal Code (1962)	19
902	Penal Code (1962)	71
902	Penal Code (1962)	74
902	Penal Code (1962)	230
902	Penal Code (1962)	231
902	Penal Code (1962)	320
902	Penal Code (1962)	321
903	Penal Code (1962)	76
903	Penal Code (1962)	232
903	Penal Code (1962)	233
903	Penal Code (1962)	235

903	Penal Code (1962)	236
903	Penal Code (1962)	322
904	Penal Code (1962)	72
905		None
906	Penal Code (1962)	18
907	Penal Code (1962)	18
908	Penal Code (1962)	546
1001	Penal Code (1962)	15
1002		None
1003	Penal Code (1962)	61
1003	Penal Code (1962)	62
1003	Penal Code (1962)	63
1003	Penal Code (1962)	70
1003	Penal Code (1962)	94
1003	Penal Code (1962)	95
1003	Penal Code (1962)	96
1003	Penal Code (1962)	124
1004	Penal Code (1962)	90
1004	Penal Code (1962)	97
1004	Penal Code (1962)	120
1005	Penal Code (1962)	1
1006	Penal Code (1962)	61
1006	Penal Code (1962)	67
1006	Penal Code (1962)	124
1007		None
1008	Penal Code (1962)	64
1008	Penal Code (1962)	65
1008	Penal Code (1962)	66
1008	Penal Code (1962)	67
1101	Penal Code (1962)	184
1101	Penal Code (1962)	185
1101	Penal Code (1962)	217
1101	Penal Code (1962)	218
1101	Penal Code (1962)	221
1101	Penal Code (1962)	222
1101	Penal Code (1962)	223
1101	Penal Code (1962)	224
1102	Penal Code (1962)	191
1102	Penal Code (1962)	192
1102	Penal Code (1962)	193
1102	Penal Code (1962)	225

1103	Penal Code (1962)	194
1103	Penal Code (1962)	195
1103	Penal Code (1962)	280
1104	Penal Code (1962)	196
1104	Penal Code (1962)	197
1105	Penal Code (1962)	208
1105	Penal Code (1962)	209
1105	Penal Code (1962)	210
1105	Penal Code (1962)	212
1105	Penal Code (1962)	213
1105	Penal Code (1962)	214
1105	Penal Code (1962)	215
1105	Penal Code (1962)	219
1105	Penal Code (1962)	234
1105	Penal Code (1962)	254
1105	Penal Code (1962)	508
1105	Penal Code (1962)	509
1105	Penal Code (1962)	510
1106	Penal Code (1962)	187
1106	Penal Code (1962)	211
1106	Penal Code (1962)	227
1106	Penal Code (1962)	228
1106	Penal Code (1962)	229
1107	Penal Code (1962)	186
1107	Penal Code (1962)	188
1107	Penal Code (1962)	189
1107	Penal Code (1962)	190
1107	Penal Code (1962)	198
1107	Penal Code (1962)	199
1107	Penal Code (1962)	200
1107	Penal Code (1962)	201
1107	Penal Code (1962)	202
1107	Penal Code (1962)	203
1107	Penal Code (1962)	216
1108	Penal Code (1962)	204
1108	Penal Code (1962)	205
1108	Penal Code (1962)	206
1108	Penal Code (1962)	253
1109	Penal Code (1962)	226
1110	Penal Code (1962)	237
2101		None

2102	Penal Code (1962)	456
2102	Penal Code (1962)	457
2102	Penal Code (1962)	458
2102	Penal Code (1962)	459
3101	Penal Code (1962)	329
3101	Penal Code (1962)	434
3101	Penal Code (1962)	442
3102	Penal Code (1962)	434
3102	Penal Code (1962)	441
3102	Penal Code (1962)	442
3102	Penal Code (1962)	447
3103	Penal Code (1962)	434
3103	Penal Code (1962)	435
3103	Penal Code (1962)	441
3103	Penal Code (1962)	442
3103	Penal Code (1962)	443
3103	Penal Code (1962)	447
3104	Penal Code (1962)	445
3105	Penal Code (1962)	436
3105	Penal Code (1962)	437
3105	Penal Code (1962)	438
3106	Penal Code (1962)	418
3106	Penal Code (1962)	419
3106	Penal Code (1962)	420
3106	Penal Code (1962)	421
3106	Penal Code (1962)	422
3106	Penal Code (1962)	424
3107		None
3201	Penal Code (1962)	484
3202	Penal Code (1962)	312
3202	Penal Code (1962)	329
3202	Penal Code (1962)	439
3202	Penal Code (1962)	440
3202	Penal Code (1962)	442
3202	Penal Code (1962)	443
3202	Penal Code (1962)	446
3202	Penal Code (1962)	447
3203	Penal Code (1962)	324
3203	Penal Code (1962)	330
3203	Penal Code (1962)	331
3203	Penal Code (1962)	333

3203	Penal Code (1962)	334
3203	Penal Code (1962)	335
3203	Penal Code (1962)	336
3203	Penal Code (1962)	338
3203	Penal Code (1962)	345
3203	Penal Code (1962)	347
3203	Penal Code (1962)	528
3203	Penal Code (1962)	529
3204	Penal Code (1962)	332
3204	Penal Code (1962)	337
3204	Penal Code (1962)	339
3204	Penal Code (1962)	340
3204	Penal Code (1962)	341
3204	Penal Code (1962)	346
3204	Penal Code (1962)	524
3204	Penal Code (1962)	563
3205	Penal Code (1962)	266
3205	Penal Code (1962)	325
3205	Penal Code (1962)	326
3205	Penal Code (1962)	468
3206	Penal Code (1962)	469
3207	Penal Code (1962)	423
3208	Penal Code (1962)	541
3301	Penal Code (1962)	398
3301	Penal Code (1962)	399
3301	Penal Code (1962)	400
3302		None
3303		None
3401	Penal Code (1962)	401
3401	Penal Code (1962)	486
3402	Penal Code (1962)	455
3402	Penal Code (1962)	458
3402	Penal Code (1962)	460
3402	Penal Code (1962)	461
3402	Penal Code (1962)	464
3403	Penal Code (1962)	433
3403	Penal Code (1962)	549
3403	Penal Code (1962)	550
3404	Penal Code (1962)	263
3404	Penal Code (1962)	265
3404	Penal Code (1962)	312



3404	Penal Code (1962)	465
3404	Penal Code (1962)	466
3404	Penal Code (1962)	467
3405		None
4101	Penal Code (1962)	344
4102	Penal Code (1962)	387
4102	Penal Code (1962)	388
4102	Penal Code (1962)	490
4102	Penal Code (1962)	491
4102	Penal Code (1962)	492
4102	Penal Code (1962)	494
4102	Penal Code (1962)	495
4102	Penal Code (1962)	499
4102	Penal Code (1962)	517
4103	Penal Code (1962)	488
4104	Penal Code (1962)	391
4104	Penal Code (1962)	487
4104	Penal Code (1962)	489
4104	Penal Code (1962)	493
4104	Penal Code (1962)	534
4104	Penal Code (1962)	547
4106		None
4201	Penal Code (1962)	480
4201	Penal Code (1962)	481
4201	Penal Code (1962)	502
4201	Penal Code (1962)	503
4201	Penal Code (1962)	543
4201	Penal Code (1962)	544
4202	Penal Code (1962)	480
4202	Penal Code (1962)	482
4202	Penal Code (1962)	483
4202	Penal Code (1962)	500
4203	Penal Code (1962)	272
4203	Penal Code (1962)	301
4203	Penal Code (1962)	480
4203	Penal Code (1962)	481
4203	Penal Code (1962)	496
4204	Penal Code (1962)	244
4204	Penal Code (1962)	480
4204	Penal Code (1962)	481
4204	Penal Code (1962)	485

4205	Penal Code (1962)	543
4205	Penal Code (1962)	544
4206		None
4207	Penal Code (1962)	504
4207	Penal Code (1962)	545
4207	Penal Code (1962)	548
4208		None
4209		None
4301	Penal Code (1962)	348
4301	Penal Code (1962)	349
4301	Penal Code (1962)	350
4301	Penal Code (1962)	351
4301	Penal Code (1962)	352
4301	Penal Code (1962)	353
4301	Penal Code (1962)	354
4301	Penal Code (1962)	355
4301	Penal Code (1962)	356
4301	Penal Code (1962)	357
4301	Penal Code (1962)	358
4301	Penal Code (1962)	359
4301	Penal Code (1962)	360
4301	Penal Code (1962)	361
4301	Penal Code (1962)	362
4301	Penal Code (1962)	363
4301	Penal Code (1962)	364
4301	Penal Code (1962)	365
4301	Penal Code (1962)	366
4301	Penal Code (1962)	367
4301	Penal Code (1962)	368
4301	Penal Code (1962)	369
4301	Penal Code (1962)	370
4301	Penal Code (1962)	371
4301	Penal Code (1962)	372
4301	Penal Code (1962)	373
4301	Penal Code (1962)	374
4301	Penal Code (1962)	375
4301	Penal Code (1962)	376
4301	Penal Code (1962)	377
4301	Penal Code (1962)	378
4301	Penal Code (1962)	379
4301	Penal Code (1962)	380

4301	Penal Code (1962)	381
4301	Penal Code (1962)	382
4301	Penal Code (1962)	537
4302	Penal Code (1962)	275
4302	Penal Code (1962)	276
4302	Penal Code (1962)	379
4302	Penal Code (1962)	428
4302	Penal Code (1962)	429
4303	Penal Code (1962)	383
4303	Penal Code (1962)	384
4303	Penal Code (1962)	386
4304	Penal Code (1962)	279
4304	Penal Code (1962)	281
4304	Penal Code (1962)	364
4304	Penal Code (1962)	376
4304	Penal Code (1962)	378
4304	Penal Code (1962)	389
4304	Penal Code (1962)	393
4304	Penal Code (1962)	394
4304	Penal Code (1962)	395
4304	Penal Code (1962)	396
4304	Penal Code (1962)	397
4304	Penal Code (1962)	535
4305	Penal Code (1962)	245
4305	Penal Code (1962)	246
4305	Penal Code (1962)	247
4305	Penal Code (1962)	248
4305	Penal Code (1962)	249
4305	Penal Code (1962)	250
4305	Penal Code (1962)	251
4305	Penal Code (1962)	274
4306	Penal Code (1962)	245
4306	Penal Code (1962)	246
4306	Penal Code (1962)	247
4306	Penal Code (1962)	248
4306	Penal Code (1962)	249
4306	Penal Code (1962)	250
4306	Penal Code (1962)	251
4306	Penal Code (1962)	279
4306	Penal Code (1962)	281
4307	Penal Code (1962)	497

4307	Penal Code (1962)	498
4307	Penal Code (1962)	501
4308	Penal Code (1962)	497
4309		None
4310		None
5101	Penal Code (1962)	245
5101	Penal Code (1962)	246
5101	Penal Code (1962)	247
5101	Penal Code (1962)	248
5101	Penal Code (1962)	249
5101	Penal Code (1962)	250
5102	Penal Code (1962)	299
5102	Penal Code (1962)	300
5102	Penal Code (1962)	301
5103	Penal Code (1962)	207
5103	Penal Code (1962)	241
5103	Penal Code (1962)	242
5103	Penal Code (1962)	243
5103	Penal Code (1962)	251
5103	Penal Code (1962)	252
5103	Penal Code (1962)	255
5103	Penal Code (1962)	256
5103	Penal Code (1962)	257
5103	Penal Code (1962)	258
5103	Penal Code (1962)	259
5103	Penal Code (1962)	260
5103	Penal Code (1962)	261
5103	Penal Code (1962)	262
5103	Penal Code (1962)	285
5103	Penal Code (1962)	462
5103	Penal Code (1962)	463
5104		None
5201	Penal Code (1962)	290
5201	Penal Code (1962)	303
5202	Penal Code (1962)	286
5202	Penal Code (1962)	287
5202	Penal Code (1962)	288
5202	Penal Code (1962)	289
5202	Penal Code (1962)	291
5202	Penal Code (1962)	292
5202	Penal Code (1962)	295

5203	Penal Code (1962)	275
5204		None
5301	Penal Code (1962)	277
5301	Penal Code (1962)	293
5301	Penal Code (1962)	294
5301	Penal Code (1962)	296
5301	Penal Code (1962)	297
5301	Penal Code (1962)	306
5301	Penal Code (1962)	308
5301	Penal Code (1962)	310
5301	Penal Code (1962)	311
5302	Penal Code (1962)	273
5302	Penal Code (1962)	538
5303	Penal Code (1962)	282
5303	Penal Code (1962)	283
5303	Penal Code (1962)	284
5303	Penal Code (1962)	552
5304	Penal Code (1962)	506
5305	Penal Code (1962)	264
5305	Penal Code (1962)	505
5305	Penal Code (1962)	507
5306	Penal Code (1962)	305
5306	Penal Code (1962)	307
5306	Penal Code (1962)	549
5306	Penal Code (1962)	551
5307		None
5308		None
5309		None
6101	Penal Code (1962)	444
6102	Penal Code (1962)	402
6102	Penal Code (1962)	268
6102	Penal Code (1962)	269
6102	Penal Code (1962)	270
6102	Penal Code (1962)	271
6102	Penal Code (1962)	402
6102	Penal Code (1962)	403
6102	Penal Code (1962)	513
6102	Penal Code (1962)	514
6102	Penal Code (1962)	526
6102	Penal Code (1962)	527
6103	Penal Code (1962)	268

6103	Penal Code (1962)	269
6103	Penal Code (1962)	451
6103	Penal Code (1962)	513
6104	Penal Code (1962)	327
6105	Penal Code (1962)	220
6105	Penal Code (1962)	269
6105	Penal Code (1962)	270
6105	Penal Code (1962)	271
6105	Penal Code (1962)	328
6105	Penal Code (1962)	451
6105	Penal Code (1962)	452
6105	Penal Code (1962)	453
6105	Penal Code (1962)	454
6106	Penal Code (1962)	267
6107	Penal Code (1962)	314
6107	Penal Code (1962)	511
6107	Penal Code (1962)	512
6107	Penal Code (1962)	513
6108	Penal Code (1962)	316
6109	Penal Code (1962)	562
6110	Penal Code (1962)	518
6110	Penal Code (1962)	533
6111	Penal Code (1962)	411
6111	Penal Code (1962)	412
6111	Penal Code (1962)	414
6111	Penal Code (1962)	415
6111	Penal Code (1962)	416
6112	Penal Code (1962)	412
6113	Penal Code (1962)	413
6114	Penal Code (1962)	523
6115	Penal Code (1962)	536
6116	Penal Code (1962)	450
6117	Penal Code (1962)	417
6201	Penal Code (1962)	406
6201	Penal Code (1962)	402
6201	Penal Code (1962)	406
6202	Penal Code (1962)	405
6203	Penal Code (1962)	407
6203	Penal Code (1962)	408
6204	Penal Code (1962)	560
6205	Penal Code (1962)	402

6205	Penal Code (1962)	403
6205	Penal Code (1962)	404
6205	Penal Code (1962)	561
6206	Penal Code (1962)	317
6206	Penal Code (1962)	318
6206	Penal Code (1962)	319
6207		None
6208		None
6301	Penal Code (1962)	470
6301	Penal Code (1962)	471
6302		None
6303	Penal Code (1962)	474
6303	Penal Code (1962)	476
6303	Penal Code (1962)	477
6303	Penal Code (1962)	478
6303	Penal Code (1962)	479
6304	Penal Code (1962)	472
6304	Penal Code (1962)	473
6304	Penal Code (1962)	475
6305		None
6401	Penal Code (1962)	425
6402	Penal Code (1962)	409
6402	Penal Code (1962)	426
6403	Penal Code (1962)	427
6404	Penal Code (1962)	431
6404	Penal Code (1962)	432
6404	Penal Code (1962)	448
6404	Penal Code (1962)	449
6405	Penal Code (1962)	430
6406	Penal Code (1962)	304
6501		None
6502	Penal Code (1962)	313
6502	Penal Code (1962)	314
6502	Penal Code (1962)	315
6502	Penal Code (1962)	417
6502	Penal Code (1962)	559
6503		None
7101		None
7102	Penal Code (1962)	532
7102	Penal Code (1962)	539
7103	Penal Code (1962)	530

7103	Penal Code (1962)	541
7104	Penal Code (1962)	540
7105	Penal Code (1962)	531
7106		None
7201	Penal Code (1962)	342
7202	Penal Code (1962)	565
7203	Penal Code (1962)	343
7203	Penal Code (1962)	564
7204		None
7301		None
7302		None
7303		None
7304	Penal Code (1962)	325
7401		None
7402	Penal Code (1962)	298
7403	Penal Code (1962)	553
7403	Penal Code (1962)	554
7403	Penal Code (1962)	555
7403	Penal Code (1962)	556
7403	Penal Code (1962)	558
7404		None
7405		None



## APPENDIX D: CONVERSION TABLE: CURRENT LAW TO DRAFT CODE

Current Law Provision		Draft Code Provisions
Penal Code (1962)	1	103
Penal Code (1962)	1	1005
Penal Code (1962)	2	101
Penal Code (1962)	3	105
Penal Code (1962)	4	105
Penal Code (1962)	5	204
Penal Code (1962)	6	105
Penal Code (1962)	7	105
Penal Code (1962)	8	105
Penal Code (1962)	9	704
Penal Code (1962)	11	105
Penal Code (1962)	11	Procedural
Penal Code (1962)	12	701
Penal Code (1962)	12	Procedural
Penal Code (1962)	13	303
Penal Code (1962)	14	103
Penal Code (1962)	15	1001
Penal Code (1962)	16	201
Penal Code (1962)	16	207
Penal Code (1962)	16	301
Penal Code (1962)	17	901
Penal Code (1962)	18	906
Penal Code (1962)	18	907
Penal Code (1962)	19	404
Penal Code (1962)	19	901
Penal Code (1962)	20	206
Penal Code (1962)	20	207
Penal Code (1962)	21	207
Penal Code (1962)	22	203
Penal Code (1962)	22	403
Penal Code (1962)	23	203
Penal Code (1962)	24	203
Penal Code (1962)	25	204
Penal Code (1962)	26	207

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	26	601
Penal Code (1962)	27	601
Penal Code (1962)	28	204
Penal Code (1962)	28	404
Penal Code (1962)	29	204
Penal Code (1962)	29	401
Penal Code (1962)	30	403
Penal Code (1962)	31	403
Penal Code (1962)	32	302
Penal Code (1962)	33	502
Penal Code (1962)	33	609
Penal Code (1962)	33	802
Penal Code (1962)	34	505
Penal Code (1962)	34	506
Penal Code (1962)	34	609
Penal Code (1962)	35	503
Penal Code (1962)	35	609
Penal Code (1962)	36	501
Penal Code (1962)	36	609
Penal Code (1962)	37	609
Penal Code (1962)	38	609
Penal Code (1962)	39	Sentencing
Penal Code (1962)	40	Sentencing
Penal Code (1962)	41	202
Penal Code (1962)	42	Sentencing
Penal Code (1962)	43	Sentencing
Penal Code (1962)	44	303
Penal Code (1962)	45	303
Penal Code (1962)	46	303
Penal Code (1962)	47	205
Penal Code (1962)	48	401
Penal Code (1962)	49	610
Penal Code (1962)	50	602
Penal Code (1962)	51	602
Penal Code (1962)	52	610
Penal Code (1962)	53	603
Penal Code (1962)	54	402
Penal Code (1962)	55	402
Penal Code (1962)	56	402

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	57	402
Penal Code (1962)	58	602
Penal Code (1962)	59	604
Penal Code (1962)	60	604
Penal Code (1962)	61	1003
Penal Code (1962)	61	1006
Penal Code (1962)	62	1003
Penal Code (1962)	63	1003
Penal Code (1962)	64	107
Penal Code (1962)	64	1008
Penal Code (1962)	65	107
Penal Code (1962)	65	1008
Penal Code (1962)	66	107
Penal Code (1962)	66	1008
Penal Code (1962)	67	107
Penal Code (1962)	67	1006
Penal Code (1962)	67	1008
Penal Code (1962)	68	Sentencing
Penal Code (1962)	69	Sentencing
Penal Code (1962)	70	1003
Penal Code (1962)	71	401
Penal Code (1962)	71	902
Penal Code (1962)	72	401
Penal Code (1962)	72	904
Penal Code (1962)	73	401
Penal Code (1962)	74	401
Penal Code (1962)	74	902
Penal Code (1962)	75	301
Penal Code (1962)	75	401
Penal Code (1962)	76	401
Penal Code (1962)	76	903
Penal Code (1962)	77	401
Penal Code (1962)	78	401
Penal Code (1962)	79	401
Penal Code (1962)	80	401
Penal Code (1962)	81	Procedural
Penal Code (1962)	82	Procedural
Penal Code (1962)	83	Procedural
Penal Code (1962)	84	Procedural

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	85	Procedural
Penal Code (1962)	86	Procedural
Penal Code (1962)	87	Procedural
Penal Code (1962)	88	Procedural
Penal Code (1962)	89	Procedural
Penal Code (1962)	90	1004
Penal Code (1962)	91	Procedural
Penal Code (1962)	92	Procedural
Penal Code (1962)	93	Procedural
Penal Code (1962)	94	1003
Penal Code (1962)	95	1003
Penal Code (1962)	96	1003
Penal Code (1962)	97	1004
Penal Code (1962)	98	Sentencing
Penal Code (1962)	99	Sentencing
Penal Code (1962)	100	Sentencing
Penal Code (1962)	101	Sentencing
Penal Code (1962)	102	Sentencing
Penal Code (1962)	103	Sentencing
Penal Code (1962)	104	Sentencing
Penal Code (1962)	105	Sentencing
Penal Code (1962)	106	Sentencing
Penal Code (1962)	107	Sentencing
Penal Code (1962)	108	Sentencing
Penal Code (1962)	109	Sentencing
Penal Code (1962)	110	Sentencing
Penal Code (1962)	111	Sentencing
Penal Code (1962)	112	Sentencing
Penal Code (1962)	113	Sentencing
Penal Code (1962)	114	Sentencing
Penal Code (1962)	115	Sentencing
Penal Code (1962)	116	Sentencing
Penal Code (1962)	117	Sentencing
Penal Code (1962)	118	Sentencing
Penal Code (1962)	119	Sentencing
Penal Code (1962)	120	1004
Penal Code (1962)	121	Sentencing
Penal Code (1962)	122	Sentencing
Penal Code (1962)	123	Sentencing

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	124	1003
Penal Code (1962)	124	1006
Penal Code (1962)	125	Sentencing
Penal Code (1962)	126	Sentencing
Penal Code (1962)	127	Sentencing
Penal Code (1962)	128	Sentencing
Penal Code (1962)	129	Sentencing
Penal Code (1962)	130	Sentencing
Penal Code (1962)	131	Sentencing
Penal Code (1962)	132	Sentencing
Penal Code (1962)	133	Sentencing
Penal Code (1962)	134	Sentencing
Penal Code (1962)	135	Sentencing
Penal Code (1962)	136	Sentencing
Penal Code (1962)	137	Sentencing
Penal Code (1962)	138	Sentencing
Penal Code (1962)	139	Sentencing
Penal Code (1962)	140	Sentencing
Penal Code (1962)	141	Sentencing
Penal Code (1962)	142	Sentencing
Penal Code (1962)	143	Procedural
Penal Code (1962)	144	Procedural
Penal Code (1962)	145	Procedural
Penal Code (1962)	146	Procedural
Penal Code (1962)	147	Sentencing
Penal Code (1962)	148	Procedural
Penal Code (1962)	149	Procedural
Penal Code (1962)	150	Sentencing
Penal Code (1962)	151	Sentencing
Penal Code (1962)	152	Sentencing
Penal Code (1962)	153	Sentencing
Penal Code (1962)	154	Sentencing
Penal Code (1962)	155	Sentencing
Penal Code (1962)	156	Procedural
Penal Code (1962)	157	Procedural
Penal Code (1962)	158	Sentencing
Penal Code (1962)	159	Sentencing
Penal Code (1962)	160	Sentencing
Penal Code (1962)	161	Procedural

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	162	Procedural
Penal Code (1962)	163	Procedural
Penal Code (1962)	164	Procedural
Penal Code (1962)	165	Sentencing
Penal Code (1962)	166	Sentencing
Penal Code (1962)	167	Procedural
Penal Code (1962)	168	Procedural
Penal Code (1962)	169	Procedural
Penal Code (1962)	170	Procedural
Penal Code (1962)	171	Procedural
Penal Code (1962)	172	Sentencing
Penal Code (1962)	173	Sentencing
Penal Code (1962)	174	Sentencing
Penal Code (1962)	175	Sentencing
Penal Code (1962)	176	Sentencing
Penal Code (1962)	177	Sentencing
Penal Code (1962)	178	Procedural
Penal Code (1962)	179	Procedural
Penal Code (1962)	180	Sentencing
Penal Code (1962)	181	Sentencing
Penal Code (1962)	182	Sentencing
Penal Code (1962)	183	Sentencing
Penal Code (1962)	184	1101
Penal Code (1962)	185	1101
Penal Code (1962)	186	1107
Penal Code (1962)	187	1106
Penal Code (1962)	188	1107
Penal Code (1962)	189	1107
Penal Code (1962)	190	1107
Penal Code (1962)	191	1102
Penal Code (1962)	192	1102
Penal Code (1962)	193	1102
Penal Code (1962)	194	1103
Penal Code (1962)	195	1103
Penal Code (1962)	196	1104
Penal Code (1962)	197	1104
Penal Code (1962)	198	1107
Penal Code (1962)	199	1107
Penal Code (1962)	200	1107

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	201	1107
Penal Code (1962)	202	1107
Penal Code (1962)	203	1107
Penal Code (1962)	204	1108
Penal Code (1962)	205	1108
Penal Code (1962)	206	1108
Penal Code (1962)	207	5103
Penal Code (1962)	208	1105
Penal Code (1962)	209	1105
Penal Code (1962)	210	1105
Penal Code (1962)	211	1106
Penal Code (1962)	212	1105
Penal Code (1962)	213	1105
Penal Code (1962)	214	1105
Penal Code (1962)	215	1105
Penal Code (1962)	216	1107
Penal Code (1962)	217	1101
Penal Code (1962)	218	1101
Penal Code (1962)	219	1105
Penal Code (1962)	220	6105
Penal Code (1962)	221	1101
Penal Code (1962)	222	1101
Penal Code (1962)	223	1101
Penal Code (1962)	224	1101
Penal Code (1962)	225	1102
Penal Code (1962)	226	1109
Penal Code (1962)	227	1106
Penal Code (1962)	228	1106
Penal Code (1962)	229	1106
Penal Code (1962)	230	902
Penal Code (1962)	231	902
Penal Code (1962)	232	903
Penal Code (1962)	233	903
Penal Code (1962)	234	1105
Penal Code (1962)	235	903
Penal Code (1962)	236	903
Penal Code (1962)	237	1110
Penal Code (1962)	238	301
Penal Code (1962)	239	Sentencing

Current Law Provision		Draft Code Provisions
Penal Code (1962)	240	709
Penal Code (1962)	241	5103
Penal Code (1962)	242	5103
Penal Code (1962)	243	5103
Penal Code (1962)	244	4204
Penal Code (1962)	245	4305
Penal Code (1962)	245	4306
Penal Code (1962)	245	5101
Penal Code (1962)	246	4305
Penal Code (1962)	246	4306
Penal Code (1962)	246	5101
Penal Code (1962)	247	4305
Penal Code (1962)	247	4306
Penal Code (1962)	247	5101
Penal Code (1962)	248	4305
Penal Code (1962)	248	4306
Penal Code (1962)	248	5101
Penal Code (1962)	249	4305
Penal Code (1962)	249	4306
Penal Code (1962)	249	5101
Penal Code (1962)	250	4305
Penal Code (1962)	250	4306
Penal Code (1962)	250	5101
Penal Code (1962)	251	4305
Penal Code (1962)	251	4306
Penal Code (1962)	251	5103
Penal Code (1962)	252	5103
Penal Code (1962)	253	1108
Penal Code (1962)	254	1105
Penal Code (1962)	255	5103
Penal Code (1962)	256	5103
Penal Code (1962)	257	5103
Penal Code (1962)	258	5103
Penal Code (1962)	259	5103
Penal Code (1962)	260	5103
Penal Code (1962)	261	5103
Penal Code (1962)	262	5103
Penal Code (1962)	263	3404
Penal Code (1962)	264	5305



<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	265	3404
Penal Code (1962)	266	3205
Penal Code (1962)	267	6106
Penal Code (1962)	268	6102
Penal Code (1962)	268	6103
Penal Code (1962)	269	6102
Penal Code (1962)	269	6103
Penal Code (1962)	269	6105
Penal Code (1962)	270	6102
Penal Code (1962)	270	6105
Penal Code (1962)	271	6102
Penal Code (1962)	271	6105
Penal Code (1962)	272	4203
Penal Code (1962)	273	5302
Penal Code (1962)	274	4305
Penal Code (1962)	275	4302
Penal Code (1962)	275	5203
Penal Code (1962)	276	4302
Penal Code (1962)	277	5301
Penal Code (1962)	278	Removed due to conflict with Provisional Constitution (2012) Art. 18
Penal Code (1962)	279	4304
Penal Code (1962)	279	4306
Penal Code (1962)	280	1103
Penal Code (1962)	281	4304
Penal Code (1962)	281	4306
Penal Code (1962)	282	5303
Penal Code (1962)	283	5303
Penal Code (1962)	284	5303
Penal Code (1962)	285	5103
Penal Code (1962)	286	5202
Penal Code (1962)	287	5202
Penal Code (1962)	288	5202
Penal Code (1962)	289	5202
Penal Code (1962)	290	5201
Penal Code (1962)	291	5202
Penal Code (1962)	292	5202
Penal Code (1962)	293	5301
Penal Code (1962)	294	5301

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	295	5202
Penal Code (1962)	296	5301
Penal Code (1962)	297	5301
Penal Code (1962)	298	7402
Penal Code (1962)	299	5102
Penal Code (1962)	300	5102
Penal Code (1962)	301	4203
Penal Code (1962)	301	5102
Penal Code (1962)	302	Sentencing
Penal Code (1962)	303	501
Penal Code (1962)	303	5201
Penal Code (1962)	304	6406
Penal Code (1962)	305	5306
Penal Code (1962)	306	5301
Penal Code (1962)	307	5306
Penal Code (1962)	308	5301
Penal Code (1962)	309	Sentencing
Penal Code (1962)	310	5301
Penal Code (1962)	311	5301
Penal Code (1962)	312	3202
Penal Code (1962)	312	3404
Penal Code (1962)	313	6502
Penal Code (1962)	314	6107
Penal Code (1962)	314	6502
Penal Code (1962)	315	6502
Penal Code (1962)	316	6108
Penal Code (1962)	317	6206
Penal Code (1962)	318	6206
Penal Code (1962)	319	6206
Penal Code (1962)	320	902
Penal Code (1962)	321	902
Penal Code (1962)	322	903
Penal Code (1962)	323	Sentencing
Penal Code (1962)	324	3203
Penal Code (1962)	325	3205
Penal Code (1962)	325	7304
Penal Code (1962)	326	3205
Penal Code (1962)	327	6104
Penal Code (1962)	328	6105

Current Law Provision		Draft Code Provisions
Penal Code (1962)	329	3101
Penal Code (1962)	329	3202
Penal Code (1962)	330	3203
Penal Code (1962)	331	3203
Penal Code (1962)	332	3204
Penal Code (1962)	333	3203
Penal Code (1962)	334	3203
Penal Code (1962)	335	3203
Penal Code (1962)	336	3203
Penal Code (1962)	337	3204
Penal Code (1962)	338	3203
Penal Code (1962)	339	3204
Penal Code (1962)	340	3204
Penal Code (1962)	341	3204
Penal Code (1962)	342	7201
Penal Code (1962)	343	7203
Penal Code (1962)	344	4101
Penal Code (1962)	345	3203
Penal Code (1962)	346	3204
Penal Code (1962)	347	3203
Penal Code (1962)	348	4301
Penal Code (1962)	349	4301
Penal Code (1962)	350	4301
Penal Code (1962)	351	4301
Penal Code (1962)	352	4301
Penal Code (1962)	353	4301
Penal Code (1962)	354	4301
Penal Code (1962)	355	4301
Penal Code (1962)	356	4301
Penal Code (1962)	357	4301
Penal Code (1962)	358	4301
Penal Code (1962)	359	4301
Penal Code (1962)	360	4301
Penal Code (1962)	361	4301
Penal Code (1962)	362	4301
Penal Code (1962)	363	4301
Penal Code (1962)	364	4301
Penal Code (1962)	364	4304
Penal Code (1962)	365	4301

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	366	4301
Penal Code (1962)	367	4301
Penal Code (1962)	368	4301
Penal Code (1962)	369	4301
Penal Code (1962)	370	4301
Penal Code (1962)	371	4301
Penal Code (1962)	372	4301
Penal Code (1962)	373	4301
Penal Code (1962)	374	4301
Penal Code (1962)	375	4301
Penal Code (1962)	376	4301
Penal Code (1962)	376	4304
Penal Code (1962)	377	4301
Penal Code (1962)	378	4301
Penal Code (1962)	378	4304
Penal Code (1962)	379	4301
Penal Code (1962)	379	4302
Penal Code (1962)	380	4301
Penal Code (1962)	381	4301
Penal Code (1962)	382	4301
Penal Code (1962)	383	4303
Penal Code (1962)	384	4303
Penal Code (1962)	386	4303
Penal Code (1962)	387	4102
Penal Code (1962)	388	4102
Penal Code (1962)	389	4304
Penal Code (1962)	390	Removed due to conflict with Provisional Constitution (2012) Art. 24
Penal Code (1962)	391	4104
Penal Code (1962)	392	Sentencing
Penal Code (1962)	393	4304
Penal Code (1962)	394	4304
Penal Code (1962)	395	4304
Penal Code (1962)	396	4304
Penal Code (1962)	397	4304
Penal Code (1962)	398	3301
Penal Code (1962)	399	3301
Penal Code (1962)	400	3301
Penal Code (1962)	401	3401

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	402	6102
Penal Code (1962)	402	6102
Penal Code (1962)	402	6201
Penal Code (1962)	402	6205
Penal Code (1962)	403	6102
Penal Code (1962)	403	6205
Penal Code (1962)	404	6205
Penal Code (1962)	405	6202
Penal Code (1962)	406	6201
Penal Code (1962)	406	6201
Penal Code (1962)	407	6203
Penal Code (1962)	408	6203
Penal Code (1962)	409	6402
Penal Code (1962)	410	Sentencing
Penal Code (1962)	411	6111
Penal Code (1962)	412	6111
Penal Code (1962)	412	6112
Penal Code (1962)	413	6113
Penal Code (1962)	414	6111
Penal Code (1962)	415	6111
Penal Code (1962)	416	6111
Penal Code (1962)	417	6117
Penal Code (1962)	417	6502
Penal Code (1962)	418	3106
Penal Code (1962)	419	3106
Penal Code (1962)	420	3106
Penal Code (1962)	421	3106
Penal Code (1962)	422	3106
Penal Code (1962)	423	3207
Penal Code (1962)	424	3106
Penal Code (1962)	425	6401
Penal Code (1962)	426	6402
Penal Code (1962)	427	6403
Penal Code (1962)	428	4302
Penal Code (1962)	429	4302
Penal Code (1962)	430	6405
Penal Code (1962)	431	6404
Penal Code (1962)	432	6404
Penal Code (1962)	433	3403

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	434	3101
Penal Code (1962)	434	3102
Penal Code (1962)	434	3103
Penal Code (1962)	435	3103
Penal Code (1962)	436	3105
Penal Code (1962)	437	3105
Penal Code (1962)	438	3105
Penal Code (1962)	439	3202
Penal Code (1962)	440	508
Penal Code (1962)	440	3202
Penal Code (1962)	441	3102
Penal Code (1962)	441	3103
Penal Code (1962)	442	3101
Penal Code (1962)	442	3102
Penal Code (1962)	442	3103
Penal Code (1962)	442	3202
Penal Code (1962)	443	3103
Penal Code (1962)	443	3202
Penal Code (1962)	444	6101
Penal Code (1962)	445	3104
Penal Code (1962)	446	3202
Penal Code (1962)	447	3102
Penal Code (1962)	447	3103
Penal Code (1962)	447	3202
Penal Code (1962)	448	6404
Penal Code (1962)	449	6404
Penal Code (1962)	450	6116
Penal Code (1962)	451	6103
Penal Code (1962)	451	6105
Penal Code (1962)	452	6105
Penal Code (1962)	453	6105
Penal Code (1962)	454	6105
Penal Code (1962)	455	3402
Penal Code (1962)	456	2102
Penal Code (1962)	457	2102
Penal Code (1962)	458	2102
Penal Code (1962)	458	3402
Penal Code (1962)	459	2102
Penal Code (1962)	460	3402

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	461	3402
Penal Code (1962)	462	5103
Penal Code (1962)	463	5103
Penal Code (1962)	464	3402
Penal Code (1962)	465	3404
Penal Code (1962)	466	3404
Penal Code (1962)	467	3404
Penal Code (1962)	468	3205
Penal Code (1962)	469	3206
Penal Code (1962)	470	6301
Penal Code (1962)	471	6301
Penal Code (1962)	472	6304
Penal Code (1962)	473	6304
Penal Code (1962)	474	6303
Penal Code (1962)	475	6304
Penal Code (1962)	476	6303
Penal Code (1962)	477	6303
Penal Code (1962)	478	6303
Penal Code (1962)	479	6303
Penal Code (1962)	480	4201
Penal Code (1962)	480	4202
Penal Code (1962)	480	4203
Penal Code (1962)	480	4204
Penal Code (1962)	481	4201
Penal Code (1962)	481	4203
Penal Code (1962)	481	4204
Penal Code (1962)	482	4202
Penal Code (1962)	483	4202
Penal Code (1962)	484	3201
Penal Code (1962)	485	4204
Penal Code (1962)	486	3401
Penal Code (1962)	487	4104
Penal Code (1962)	488	4103
Penal Code (1962)	489	4104
Penal Code (1962)	490	4102
Penal Code (1962)	491	4102
Penal Code (1962)	492	4102
Penal Code (1962)	493	4104
Penal Code (1962)	494	4102

<b>Current Law Provision</b>		<b>Draft Code Provisions</b>
Penal Code (1962)	495	4102
Penal Code (1962)	496	4203
Penal Code (1962)	497	4307
Penal Code (1962)	497	4308
Penal Code (1962)	498	4307
Penal Code (1962)	499	4102
Penal Code (1962)	500	4202
Penal Code (1962)	501	4307
Penal Code (1962)	502	4201
Penal Code (1962)	503	4201
Penal Code (1962)	504	4207
Penal Code (1962)	505	5305
Penal Code (1962)	506	5304
Penal Code (1962)	507	5305
Penal Code (1962)	508	1105
Penal Code (1962)	509	1105
Penal Code (1962)	510	1105
Penal Code (1962)	511	6107
Penal Code (1962)	512	6107
Penal Code (1962)	513	6102
Penal Code (1962)	513	6103
Penal Code (1962)	513	6107
Penal Code (1962)	514	6102
Penal Code (1962)	515	Removed due to conflict with Provisional Constitution (2012) Art. 18
Penal Code (1962)	516	Removed due to conflict with Provisional Constitution (2012) Art. 18
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Penal Code (1962)	518	6110
Penal Code (1962)	519	Removed due to conflict with Provisional Constitution (2012) Art. 18
Penal Code (1962)	520	Removed due to conflict with Provisional Constitution (2012) Art. 18
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**DRAFT REPORT OF THE  
SOMALI CRIMINAL LAW  
RECODIFICATION INITIATIVE**

**Volume 2  
Commentary of Draft Code**

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## **PREFACE**

# **PART I: THE GENERAL PART**

## **PRELIMINARY PROVISIONS**

### **Chapter 100. Preliminary Provisions**

#### **Introduction. Chapter 100**

This Chapter outlines the framework for this Penal Code. In addition to laying out the title and effective date, it addresses general principles such as the purposes, objectives, and jurisdiction of this code. The last two Articles in this chapter focus on definitions: Article 107 defines key terms in this Chapter of the Code and Article 108 serves as an index to all the definitions used in the Code.

#### **Comment on Article 101. Short Title and Effective Date**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 2 (Time at which Penal Laws Take Effect)

#### **Comment:**

*Generally.* This Article outlines the name of the draft Code and when it is to take effect. Section (a) states that the Code shall be titled “Somali Penal Code.” Sections (b) and (c) prevent retroactive application of new standards to offenses committed prior to the enactment of the draft Code. The current Penal Code (1962) will be applied to a crime if the crime is committed before the date specified in Sections (b) and (c). Section (c) also states that any new defenses and mitigations in this draft Code that are more favorable to the defendant than the current Penal Code (1962) will apply to the crime even if it was committed before the specified date as long as the case is pending on or commenced after the specified date.

*Relation to Current Law.* Article 101 is consistent with Art. 2 of the current Penal Code (1962). Specifically, Section 1 of Art. 2 states that no one should be punished for an act that was not an offense at the time the act was committed, and this draft Article is consonant with that principle. Section 3 of Art. 2 states that when the applicable law changes after an offense is committed, the law to be applied is that which is more favorable to the accused. Section (c) of the draft Article incorporates this principle by applying defenses and mitigations in the new Code if they are more favorable to the defendant. If an offense in the current Penal Code (1962) is no longer an offense in the draft Code, the Government has discretion whether to prosecute the offense.

*Relation to Sharia Law.* This draft Article is consistent with the Sharia law concept of *taklif*, which requires, among other things, “knowledge of the person under legal obligation about the command.”<sup>1</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>1</sup> AHMED HASAN, PRINCIPLES OF JURISPRUDENCE: THE COMMAND OF SHARI’AH AND JURIDICAL NORM 295 (Islamic Research Institute Islamabad 1993).

## **Comment on Article 102. Principle of Construction; General Purposes**

**Corresponding Current Provision(s):** None

### **Comment:**

*Generally.* This Article describes the general purposes of the draft Code and provides guidance as to how provisions should be construed. Section (a) states that provisions should first be construed according to the fair import of their terms. If confusion or ambiguity remains, however, the provisions should be read in a way that supports the purposes of the Code enumerated in Section (b). Section (c) provides that the Commentary shall be used as an aid to interpretation of the draft Code. Section (d) states that the headings provided in the draft Code are not intended to affect the meaning of any provision—these headings are merely provided as helpful summaries to the reader. Lastly, Section (e) provides a general rule for repeals. The repeal of any particular provision of this Code shall not affect any other provision of the Code unless explicitly stated by the repealing act. It also will not affect any penalties incurred or prosecution under the repealed provision unless the repealing act expressly provides for it.

*Relation to Current Law.* There are no provisions related to Article 102 in the current Penal Code (1962). However, the purposes of the Code expressed in this draft Article are consistent with the Founding Principles articulated in Art. 3 of the Provisional Constitution (2012).

*Relation to Sharia Law.* The general purpose of the draft Code is similar to the purpose of Sharia law, that is, to protect “religion, life, lineage, mind, and property.”<sup>2</sup> In Section (b)(2)(B), the notion of “fair warning” finds support among Islamic jurists who state that “the accused must first be given the opportunity to know the law, and thus no punishment shall be imposed without prior law.”<sup>3</sup> The Qur’an supports this principle: “And nor shall we be punishing until we had sent them an Apostle.”<sup>4</sup> This passage is interpreted to proclaim that with the Apostle comes the “law,” which people were unfamiliar with prior to his arrival.

Section (b)(2)(D)’s stated goal of creating “penalties that are proportionate to the seriousness of the offense and to the degree of blameworthiness of the offender” is derived from the opinion of Muslim jurists that “the evildoer must be punished in proportion to the evil created; the Qu’ran states that the recompense of an evil is a like evil.”<sup>5</sup> Under Islamic law, jurists have ruled that the punishment must be proportional to the crime and cannot cause “more pain or injury.” In the traditional system of corporal punishment, adequate expertise was required by the individual administering the punishment so as to avoid torture.<sup>6</sup> The Caliph Ali visited prisons to ensure proper treatment of prisoners, and the jurist Abu Yusuf noted that prisoners must be provided the “basic necessities of life.” Jurists are in agreement that there

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<sup>2</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 114 (American Trust Publications 2000).

<sup>3</sup> M. CHERIF BASSIOUNI, THE SHARI’A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE 126 (Cambridge University Press 2014).

<sup>4</sup> Qur’an 17:15; M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 25 (M. Cherif Bassiouni, ed. 1982)

<sup>5</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 98 (American Trust Publications 2000).

<sup>6</sup> Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 232 (M. Cherif Bassiouni, ed. 1982).

should be no violation of the integrity of the prisoner’s “beliefs, mind, body and dignity.”<sup>7</sup> Ibn Qayyīn al-Jawziyya notes that prisoners should not be confined to “narrow places,” but simply prevented from “inflicting harm on others.”<sup>8</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 103. Abolition of Non-Statutory Offenses; Applicability**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 1 (Offences and Punishment to Be Expressly Provided by Law), and 14 (Special Penal Laws)

#### **Comment:**

*Generally.* This provision prohibits common law offenses by requiring that offenses be defined either in the Penal Code or another statute. The purpose of this Article is to establish this Code as a comprehensive and easily referenced source of law. The Code allows for the public to have fair notice of the laws that apply to them and to be confident that the laws will be applied uniformly regardless of the judge presiding over the case. This ensures that the public is better able to understand criminal statutes and thus abide by the law. In addition, although this draft Code is comprehensive, the Parliament has the power to add crimes to the Code through the legislative process. At the same time, the provision recognizes and preserves the courts’ inherent powers to punish for contempt and to enforce orders and civil judgments. Section (b) also provides that Part I of the draft Code—the General Part—applies to offenses defined by statutes other than the Code, unless the statute expressly provides otherwise.

*Relation to Current Law.* Article 103 incorporates Arts. 1 and 14 of the current Penal Code (1962). Art. 1 forbids punishing a person for an act that is not expressly made an offense. This principle is reflected in the draft Article’s requirement that offenses are defined by statutes, whether in this Code or by another statute. Art. 14 of the current Penal Code (1962) is reflected in Section (b), which applies the General Part of this draft Code to other statutes.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 104. Civil Remedies Preserved; No Merger with Civil Injury**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This provision makes clear that the Code does not affect rights or liabilities in civil actions related to conduct that triggers criminal liability under the Code, nor do civil actions affect or bar criminal liability under the Code for the same prohibited conduct.

*Relation to Current Law.* While there are no provisions in the current Penal Code (1962) corresponding to Article 104, there is a public policy reason for distinguishing between civil

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<sup>7</sup> Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 235 (M. Cherif Bassiouni, ed. 1982).

<sup>8</sup> Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 236 (M. Cherif Bassiouni, ed. 1982).

remedies and criminal punishment. Civil suits allow injured persons to pursue damages and restoration for the harms that they have incurred. These suits arise out of their status as victims and should not depend on whether the State decides to prosecute the defendant. Criminal cases are brought against the defendant by the State. These suits arise because the defendant is accused of breaking the law as set out in the Penal Code, thereby threatening the peace and order of the State. Criminal cases may be prosecuted regardless of whether the victim decides to pursue a civil remedy because the prohibited harm is not against the victim alone, but against society as well.

*Relation to Sharia Law.* Sharia law separates remedies by categorizing punishment into that deserving either physical retaliation or monetary compensation.<sup>9</sup> This roughly corresponds to the distinction between criminal and civil remedies, respectively.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 105. Jurisdiction**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 3 (Persons to Whom the Penal Law Is Applicable), 4 (Somali Citizen – Territory of the State), 6 (Offences Committed in the Territory of the state), 7 (Offences Committed Abroad Punishable Without Exception), 8 (Offences Committed Abroad Punishable Under Certain Conditions), and 11 (Extradition)

#### **Comment:**

*Generally.* This Article outlines the criminal jurisdiction of the Federal Republic of Somalia when prosecuting a crime under this draft Code. This Article addresses both conduct within Somalia and conduct of Somali citizens outside of the country. The Article distinguishes between conduct and offense: conduct is any type of activity, while an offense must be one defined by this Code.

Sections (a)(1) and (a)(2) detail the basic territorial jurisdiction of the draft Code for both substantive and inchoate—or incomplete—offenses. Section (b) further clarifies what it means for an offense to be committed within the State under (a)(1). Under Section (b)(1), an offense is committed within the State if any conduct that is an element of the offense occurs within the State, or if the result occurs within the State, regardless of where the conduct constituting the offense took place. Consider a situation where persons outside Somalia who are neither Somali citizens nor domiciled in Somalia conspire to kidnap a child who is also neither Somali nor living in Somalia. If these persons conduct an overt act in furtherance of the conspiracy *in* Somalia, even though all other elements of the offense occur outside Somalia, under Section (b)(1), the offense has been committed within the State. Under Section (b)(2), an offense has also occurred within the State if the offense involved phone, electronic, or digital information, or any other communications data stored or received by a computer or facility within the State.

Section (a)(3) extends jurisdiction to all offenses committed in cooperation with a Somali citizen or resident irrespective of location or other concerns. Section (a)(4) extends jurisdiction

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<sup>9</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 586-7 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“whenever someone who is entitled to exact retaliation decides instead to forgive the offender and take an indemnity from him, then retaliation is no longer call[ed] for and the deserving person is entitled to indemnity.”).



where there was an attempt to commit an offense within the State even though the conduct took place outside the State. Section (a)(5) also extends jurisdiction when the conduct takes place within the State, but the attempted offense will be committed outside the State. Sections (a)(6) and (a)(7) recognize universal jurisdiction over national security issues and gross violations of international law, issues which are the obligation of many nations, including Somalia.

*Relation to Current Law.* Article 105 incorporates Art. 3 (Persons to Whom the Penal Law is Applicable) in Section (a). This Article also incorporates Arts. 6, 7, and 8 and uses more general language to capture the principles underlying those provisions. Instead of focusing on specific crimes such as counterfeiting, Article 105 gives jurisdiction over any activity that involves conduct or a result in the State, conduct outside the State that constitutes an attempt within the State, or conduct that threatens the national security of the State.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.<sup>10</sup>

### **Comment on Article 106. Burdens of Proof**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article explains the burden that each party carries in a criminal prosecution and establishes the basic principle that all defendants will be presumed innocent until the offenses with which they have been charged has been proven by the prosecution. The prosecution must prove each element of an offense beyond a reasonable doubt. No requirement of proof beyond those defined in this Code may be imposed. “Beyond a reasonable doubt” is the most demanding standard of proof, requiring that the court be virtually certain of the proposition’s truth.

*Relation to Current Law.* There is no provision in the current Penal Code (1962) corresponding to Article 106.

*Relation to Sharia Law.* The presumption of innocence is similar to and consistent with the view of Muslim jurists that all elements of a crime must be proved in order to obtain a conviction. In support of this important principle, many jurists cite the prophetic tradition, “[a]void condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs, it is better that he errs in favor of innocence than in favor of guilt.” Additionally, they cite a Prophetic tradition that encourages avoiding “circumstantial evidence in *Hudud*.”<sup>11</sup> Finally, it is a “well-established principle in *Qisas* crimes that circumstantial evidence favorable to the accused is to be relied upon, while if unfavorable to him it is to be disregarded.”<sup>12</sup> This “presumption of innocence applies to lesser *Ta’zir* offenses as well.”<sup>13</sup>

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<sup>10</sup> See, Am. Soc’y Int’l L., “Jurisdictional, Preliminary, and Procedural Concerns,” in Benchbook on International Law § II.A (Diane Marie Amann ed., 2014) (discussing the bases of jurisdiction in international law) (internal citations omitted), available at [www.asil.org/benchbook/jurisdiction.pdf](http://www.asil.org/benchbook/jurisdiction.pdf).

<sup>11</sup> M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 26 (M. Cherif Bassiouni, ed. 1982).

<sup>12</sup> M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 26 (M. Cherif Bassiouni, ed. 1982).

<sup>13</sup> *Ibid.*

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 107. Definitions**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Arts. 7 (The Territory of the Federal Republic of Somalia), and 8 (The People and the Citizenship); Penal Code (1962) Arts. 4 (Somali Citizen – Territory of the State)

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

Section (b) defines “citizen.” The Provisional Constitution (2012) Art. 8 (The People and the Citizenship) Section 2 provides that the Parliament will enact a special law defining citizenship in the State. This draft Article provides a definition of citizenship only for the purposes of the application of this draft Code. It corresponds to Art. 4 of the Penal Code (1962) (Somali Citizen – Territory of the State).

Section (f) defines “State.” This definition corresponds to the definition in the Provisional Constitution (2012) Art. 7 (The Territory of the Federal Republic of Somalia) Section 1. The definition of “exclusive economic zone” in this section is derived from the United Nations Convention on the Law of the Sea.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Requirements of Offense Liability**

### **Chapter 200. Offense Requirements**

#### **Introduction: Chapter 200**

This Chapter outlines the basic requirements for liability and the necessary elements of an offense. Article 203 (Culpability Requirements) outlines the possible mental attitudes a person may have in relation to the elements of an offense, and which are themselves elements that must be proven to establish liability for an offense. These are based on modern criminal scholarship and have been adopted by Muslim countries.<sup>14</sup> Article 206 (Requirement of a Voluntary Act; Omission Liability; Possession Liability) states the general rule that the criminal law only punishes acts, not thoughts. Article 207 (Causal Relationship Between Conduct and Result) describes the relationship between conduct and result, which bears relation to Sharia law. Articles 204 (Ignorance or Mistake Negating Required Culpability) and 205 (Mental Disease or Defect Negating Required Culpability) outline factors that can negate culpability.

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<sup>14</sup> Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, 98 (Advanced Legal Studies Institute 2000).

## **Comment on Article 201. Basis of Liability**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 16 (Offences Committed)

### **Comment:**

*Generally.* Article 201 establishes the basic requirements for liability for an offense under this Code. The principle underlying this Article is that no one may be prosecuted for a crime if he has not fulfilled all the elements of the offense as defined in the Code or if they are eligible for an exception, defense, or bar to liability provided for in the Code. This Article operates to bar criminal prosecution for conduct that is not explicitly prohibited by the Code, as well as to bar acquittal for reasons not explicitly provided for in the Code. Section (a) provides that an actor may be liable for an offense only if all of the elements of the offense are satisfied, except where a provision in Chapter 400 (Imputing Offense Elements) imputes a missing element.

The following example illustrates a situation where all elements of the offense are not satisfied:

*Example 1:* X causes the death of Y, but does so without acting recklessly. Article 3103 (Manslaughter) sets forth the requirements for manslaughter. Manslaughter has two elements: (1) the act resulted in another's death, and (2) the act was performed with reckless culpability. X would not be liable for Y's death under Section (a) because he does not satisfy the culpability element of the offense, having acted without recklessness.

The following example illustrates a situation where some elements of an offense are imputed:

*Example 2:* X, who is voluntarily intoxicated, causes the death of B by engaging in substantially risky activity, although X was unaware of the risk of causing death because of his intoxication. In these circumstances, the culpability element of recklessness may be imputed under Article 402 (Voluntary Intoxication): even though the element of recklessness is absent, it would be imputed because of X's voluntary intoxication. X may meet the requirements for liability for B's death under Section (a) because the missing element of the offense (recklessness) has been legally attributed to him.

Section (b) provides that a person will not be liable for an offense if he or she is exempted from liability by [a provision in Chapter 900 (Inchoate Offenses) or] a specific exception in an offense definition in Part II of the Code. Articles 905 (Defense for Victims and for Conduct Inevitably Incident) and 906 (Defense for Renunciation Preventing Commission of the Offense) provide general exceptions to certain types of liability for victims and, in certain circumstances, for persons who renounce their intent to commit a crime before it has been committed. The following example illustrates an exception to liability under Chapter 900:

*Example 3:* C purchases a steel pipe for D to aid D in assaulting an unknown person. D subsequently uses the steel pipe to assault C. Article 905 (Defense for Victims and for Conduct Inevitably Incident) exempts victims from liability for conspiracy offenses under Article 902 (Criminal Solicitation). Even though C purchased the steel pipe for D to

attack someone, since C is the victim of D’s crime, he would be exempted from liability for conspiracy to commit assault. As such, he would not be liable under Section (b) of this Article.

Additionally, Section (b) provides that a person is not liable for an offense if he or she satisfies a bar to liability contained in the provision. These bars to liability are specific to the offense.

Section (c) provides that any general defense provided in the General Part will preclude liability even though all of an offense’s elements are satisfied or imputed. Such defenses—found in Chapters 500, 600, and 700—differ from the exceptions covered by Section (b) in that they present non-specific defenses (and thus apply to any offense, rather than to a particular offense or group of offenses).

The principles expressed in Article 201 codify the prior understanding of the basis of criminal liability and summarize the structure of this draft Code. For discussion of the concepts in section (a), reference the commentary for Articles 202 through 207. For discussion of the concepts in section (c), reference the commentary for Chapters 500 (Justification Defenses), 600 (Excuse Defenses) and 700 (Nonexculpatory Defenses).

*Relation to Current Law.* This draft article is consistent with Penal Code (1962) Art. 16 (Offences Committed).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 202. Offense Elements Defined**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 41 (Objective and Subjective Circumstances)

### **Comment:**

*Generally.* Article 202 categorizes and defines offense elements in terms of conduct, circumstances, results, and culpability requirements. Defining offense elements in this manner enables a systematic and clear approach to offense definition. Specifically, the offense element definitions aid in defining culpability requirements, which can be more precisely elaborated by reference to their application to each type of offense element. Although every offense defined in Part II of the draft Code—the Special Part—will have some of these elements, not every offense will have all of these elements. For example, Article 3104 (Negligent Homicide) contains result elements and culpability requirements but does not contain conduct or circumstance elements.

Offense elements may appear not only in the offense definition itself, but also in the provisions that define the offense grade or otherwise specify a level of liability that will attach to the offense. For example, although the offense definition in Article 3202 (Assault) does not contain result elements, the grading section differentiates the various grades of assault based on results (e.g. causing bodily injury or serious bodily injury).

Section (b) specifically defines each element. Section (b)(1) defines a “conduct element” as that part of an offense definition requiring a person’s act or failure to act. Examples of conduct elements are touching a person (Article 3202 - Assault), confining or restricting another’s movement for a period of time (Article 3402 - Unlawful Restraint), and taking or

exerting unauthorized control over the property of another (Article 4202 - Theft by Taking or Disposition). Conduct can be distinguished from result elements in that a specific harm need not result. For example, a person commits the offense of assault if they touch a person without his or her consent, regardless of what type of harm results from the touching.

Section (b)(2) defines a “result element” as that part of an offense definition requiring any change of circumstances caused by the person’s conduct. Unlike a conduct element, a result element does not depend on the type of conduct that brings about that result. For example, knowingly “damaging the property of another” (Art. 4100 – Criminal Damage) is a result element because the element is fulfilled so long as property is damaged, regardless of the conduct that causes the damage.

Section (b)(3) defines a “circumstance element” as that part of an offense definition requiring an objective element other than a conduct or result element. Many offenses will have one or more circumstance elements that define the requisite conditions that must accompany a given act and result in order to generate criminal liability. For example, in Article 6106 (Desecration of Venerated Objects), the circumstance element is that the general community respects the object being desecrated. Often, circumstance elements are used in grading provisions. For example, the grade of Article 4104 (Criminal Trespass) depends on whether the place entered or remained in is a dwelling, secured building, or inhabited structure.

The only elements of a crime that are not objective elements are culpability requirements. Culpability requirements are defined in Article 203.

*Relation to Current Law.* All Somali crimes in current law contain conduct, result, circumstance, or culpability requirements. This draft Article is consistent with Penal Code (1962) Art. 41 (Objective and Subjective Circumstances), and merely substitutes the terms “subjective circumstances” with “culpability requirements.”

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 203. Culpability Requirements**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 22 (Offences Punishable Subject to Existence of a Condition), 23 (Psychological Element), 24 (Offences Committed with Criminal Intent, Preterintentionally or with Culpa)

#### **Comment:**

*Generally.* Draft Article 203 defines four culpability requirements—intent, knowledge, recklessness, and negligence—and governs their application to objective elements. The culpability requirements do not exist in the abstract; they apply to the objective elements of an offense definition.

Section (a) specifies that some level of culpability is normally required as to each objective element of an offense, and Section (b) requires that the culpability exist at the time of the conduct that satisfies the objective element to which the culpability applies. For example, Article 3104 (Negligent Homicide) has only one objective element (causing the death of another) and assigns the culpability level of negligence to that element. This culpability must exist at the time of the act causing the death, even if it has changed by the time death actually occurs.

Many offenses, however, have a default culpability requirement for some objective

element, as explained in Sections (h) and (j). For example, Article 4104 (Criminal Trespass) provides a culpability requirement of knowledge that one has no authority or license to enter a place, but does not specify whether a person must negligently, recklessly, knowingly, or purposefully enter or remain in the place. Thus, a culpability element of recklessness is required by default under Section (h).

Section (c)(1) defines “intent” as to conduct and result elements, and Section (c)(2) defines “intent” as to circumstance elements. Section (c)(3) clarifies that conditional intent satisfies the intent requirement unless the condition eliminates the harm or wrong sought to be prevented by the offense. This conditional intent provision makes clear that a person whose intent is predicated on a future factual situation (for example, the thief who intends to steal from the premises, but only if he finds something valuable inside) will satisfy a culpability requirement of intent.

Section (d)(1) defines “knowledge” as to a conduct element; Section (d)(2) defines “knowledge” as to a circumstance element; and Section (d)(3) defines “knowledge” as to a result element. Knowledge requires a significantly higher level of certainty than recklessness: rather than a substantial risk, knowledge requires that an element be highly probable as to a circumstance element or practically certain as to a result element. Knowledge differs from intent in that the person acting knowingly may be practically certain that his actions will have a certain result, but he may not actually intend that the result occurs.

Section (e) defines recklessness as to all objective elements. Recklessness is distinguished from negligence in that recklessness involves consciously disregarding a substantial risk of which the person is aware, whereas negligence is the failure to be aware of a substantial risk. Thus the key distinction is awareness of the risk. If the person is aware of the risk that a particular result will occur due to his conduct but ignores that risk and continues with the conduct, then he is acting recklessly. If he fails to be aware of the risk, he is acting negligently if a reasonable person would have been aware of the risk.

Section (f) defines “negligence” as to all objective elements. Section (f)(2) requires that the person’s failure to be aware of the risk he takes be a “gross deviation” from the ordinary standard of care. This requirement distinguishes criminal negligence from ordinary negligence applying in civil cases, and ensures that an actor’s failure to be aware of something is sufficiently blameworthy to warrant the criminal law’s condemnation. By comparison, ordinary negligence would simply be conduct that a reasonable person would not undertake under the circumstances.

Section (g) specifies that proof of a more culpable mental state will satisfy an offense’s requirement of a less serious one. For example, proof of intent or knowledge will suffice when the offense requires only recklessness as to an objective element. Without this defined hierarchy of criminal mental states, applying offense definitions would either lead to absurd results or the Code would be required to define multiple culpability requirements for each objective element, thus becoming awkward and unwieldy.

Section (h) establishes recklessness as the default culpability requirement for offense elements that otherwise have no specified culpability requirement. Setting a default culpability level keeps offense definitions readable and ensures that strict liability is avoided where it is not intended. Recklessness is set as the default level because it is the minimum level of culpability normally considered appropriate for criminal liability.

Section (i)(2) requires a clear indication of legislative purpose to impose strict liability to ensure that strict liability is limited to situations for which it is specifically intended, and is not allowed in situations in which recklessness is to be “read in” under Section (h). Strict liability

punishes actions regardless whether the actor has a culpable mental state. Therefore, strict liability punishes not only actors who did not intend to commit an offense, but also those whose conduct was not even negligent as to possibly causing a prohibited result. For this reason strict liability offenses should be strictly limited, since punishing people for wholly reasonable actions goes against most theories of criminal law.

The requirement of clearly indicating intent to create a strict liability offense can be satisfied by employing the phrase “in fact” in place of a culpability requirement for a specific element of an offense. Section (i) makes clear that it applies only to those objective elements for which a culpability requirement is not stated, rather than to entire offenses. Otherwise, any offense satisfying the criteria for strict liability might be read to impose strict liability as to all elements, even those for which a culpability requirement is stated.

*Relation to Current Law.* Current Somali law does not contain a detailed, hierarchical scheme of standard defined culpability terms. Art. 24 (Offences Committed with Criminal Intent, Preterintentionally or with Culpa) of the current Penal Code (1962) merely distinguishes between purposeful crimes and results and crimes committed without purpose. Furthermore, Art. 23 (Psychological Element) of Penal Code (1962) sets the default culpability at knowingly or willingly, whereas this draft sets the default at recklessness to ensure blameworthy conduct is not accidentally left unpunished by the failure to state a culpability requirement in an offense definition. This Article keeps the rule under Art. 22 (Offences Punishable Subject to Existence of a Condition) of the current Penal Code (1962) that where a condition is required for an act to be punished, an offender is responsible for an offense even if he does not desire the consequence which is the necessary condition for rendering the act punishable.

This Article preserves the concept of culpable states of mind that appear throughout current Somali law. Additionally, it allows for consistent application of culpability requirements through the exclusive use of the four defined culpable states of mind: intent, knowledge, recklessness, and negligence. These four culpability requirements are standard for a modern penal code. This Article provides a consistent and precise structure for defining the culpability requirements for each offense.

*Relation to Sharia Law.* Sharia law, like this draft Article, recognizes gradations as to an actor’s intent, and, according to some scholars, can be broadly divided into general intent, specific intent, and mistake.<sup>15</sup> Sharia law classifies “negligence” under its broad category of mistake (*khata*).<sup>16</sup> In addition, homicide and assault offenses under Sharia law are categorized according to levels of culpability, namely intent (*‘amd*), quasi-intent (*shibh al-‘amd*), and mistake (*khata*).<sup>17</sup> This draft Article includes an additional level of culpability to provide greater distinction between the types of culpability that already exist within Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 204. Ignorance or Mistake Negating Required Culpability**

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<sup>15</sup> Ahmed Fathi Bahnassi, “Criminal Responsibility in Islamic Law,” 177.

<sup>16</sup> Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, 102.

<sup>17</sup> Ibn Rushd, *The Distinguished Jurist’s Primer (Bidayat al-mujtahid)*, volume 2, at 481 (translated by Imran Ahsan Khan Nyazee, Garnet Publishing, 1994).

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 5 (Ignorance of Penal Law), 25 (Acts Erroneously Thought to Be Offences), 28 (Mistake of Fact), 29 (Mistake Caused by Deceit of Another)

**Comment:**

*Generally.* This Article provides that ignorance or mistake as to a matter of fact or law is admissible to negate culpability for an offense. However, this does not mean that ignorance or mistake is necessarily or generally a defense to an offense; rather, these circumstances will be quite limited. Specifically, the mistake must negate the culpability requirement for an offense.

The following example illustrates a situation where a mistake negates a culpability requirement because it is a mistake of an objective element:

*Example 1:* A prepares dinner for his friend B using some vegetables he picked from his garden. Unbeknownst to A, the vegetables have been sprayed with an insecticide that is particularly fatal when consumed. A does not wash the vegetables and serves them to B, who consumes them and dies as a result. With respect to murder, under Article [3101] (Murder in the First Degree), A's ignorance as to the fact of the lethality of the vegetables would be a defense because it negates the culpability requirement of "knowingly" causing the death of another. However, if he was reckless or negligent as to the insecticide's toxicity, he would be liable under Article 3103 (Manslaughter) or Article 3104 (Negligent Homicide).

The following example illustrates a situation where ignorance does not negate a culpability requirement, because it is ignorance with respect to the law, which is not an objective element of the offense:

*Example 2:* C alters a piece of art so that it purports to be an original when in fact it is a copy. C does not know that this is an offense punishable by law. Article [4301] (Forgery and Counterfeiting) makes it an offense to alter an object so that it purports to have an authorship that it does not. Knowledge of the illegality of C's conduct is not part of the offense definition in Article 4301 (Forgery and Counterfeiting), so C's ignorance does not negate the level of culpability for the offense. C would not have a defense to liability under this Article.

The following example also illustrates a situation where a mistake does not negate a culpability requirement, because although it negates knowledge, it does not negate recklessness:

*Example 3:* D serves seafood to his friend E. The seafood is taken from an area commonly known to have problems with marine toxins. Although D is aware that fish from that area are commonly affected with these marine toxins, he does not actually know if the specific fish he is serving is so affected. The fish is in fact affected, and E dies as a result of consuming it. While D did not serve the affected fish knowingly, he was aware of a substantial risk and ignored it, making him reckless. D would not have a defense to reckless homicide under this Article because his ignorance would not negate the recklessness of his conduct.



*Relation to Current Law.* Article 204 does not allow one to allege ignorance of the law as an excuse, but rather only in limited circumstances to negate culpability, thereby remaining consistent with Penal Code (1962) Art. 5 (Ignorance of Penal Law). This Article is also consistent with Penal Code (1962) Art. 25 (Acts Erroneously Thought to Be Offences) by not punishing a person's conduct merely because he or she believes it to be criminalized. This Article is consistent with Penal Code (1962) Arts. 28 (Mistake of Fact) and 29 (Mistake Caused by Deceit of Another) in so far as this Article's subject matter touches upon those topics.

*Relation to Sharia Law.* Sharia law recognizes that a mistake as to law or fact may or may not be exculpatory. Ahmad b. Naqib al-Misri, for example, holds that intentional crimes ('amd) should be differentiated from those that are mistaken (*khata*) and also from those that are mistaken but intentional ('amd *khata*).<sup>18</sup> The factor in both the draft Code and prior Somali law that determines culpability is the state of mind of the accused.

*Relation to International Law.* Nothing in this article is inconsistent with international law.

### **Comment on Article 205. Mental Disease or Defect Negating Required Culpability**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 47 (Capacity of Understanding and at Volition)

#### **Comment:**

*Generally.* This Article recognizes that a mental disease or defect may negate an offense's culpability requirement. Article 208 provides a definition of mental disease or defect to clarify the limits of its application. Article 205 makes clear that evidence of mental disease or defect may be relevant in contexts other than those covered by the Code's excuse defense for insanity and non-exculpatory defense for persons unfit to stand trial. [See Articles 602 (Insanity) and 703 (Unfitness to Plead, Stand Trial, or Be Sentenced) and corresponding commentary].

For example, the insanity defense provides a freestanding excuse in cases where a person satisfies all culpability requirements of the offense but merits exoneration because he could not control his conduct or could not understand the criminal nature of his act. This Article, on the other hand, would apply in cases where the person's mental incapacity prevented him from satisfying the offense's elements in the first place, such as where an offense requires knowledge and the person's mental incapacity prevented him from "knowing" something a person of normal mental capabilities would know. In that case, the admissibility of evidence related to the defendant's mental disease or defect should not rest on his ability to present sufficient evidence to properly raise an insanity excuse under Article 602 (Insanity). This distinction is necessary because a person's mental disability may allow him to understand the gravity of his actions, but it may prevent him from meeting a culpability requirement such as acting intentionally or even knowingly.

The following examples illustrate situations where mental disease or defect negates a culpability requirement:

*Example 1:* A has a severe mental disorder. Because of this mental disorder, A enters the house of B, thinking that it is his own house. A's mental disorder negates the knowledge culpability requirement for trespass under Article 4104 (Criminal Trespass). Thus, A has

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<sup>18</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER ('Umdat al-Salik), 584-585.

the right under this Article to put forward evidence to show that his mental disease negated the culpability requirement of knowledge.

*Example 2:* C has a mental defect that reduces his ability to weigh the risk of his actions. He invites D onto a boat that bears a substantial risk of sinking. The boat sinks, and D dies as a result. C’s mental defect may negate the awareness of risk necessary to show the recklessness culpability requirement for manslaughter under Article 3103 (Manslaughter). As such, C has the right under this Article to bring in evidence to show that his mental defect negated the culpability requirement of recklessness.

The following example illustrates a situation where mental disease or defect does not negate a culpability requirement:

*Example 3:* E is severely depressed. E then decides to kill F and does so intentionally. E’s mental disease does not negate the culpability requirement of intent required for murder under Article 3101. As such, E may not bring in evidence of his mental defect to negate culpability under this Article because it is irrelevant as to whether or not he intentionally killed F.

*Relation to Current Law.* Article 205 draws on Penal Code (1962) Art. 47 (Capacity of Understanding and at Volition), which provides, in part, a defense for a person who does not “possess[] the capacity of understanding and of volition.” This Article clarifies this defense so that it applies specifically to the relationship between mental defect and culpability requirements.

*Relation to Sharia Law.* Exempting insane persons from criminal liability is strongly supported by Sharia law. According to a well-known hadith, insane persons lack legal capacity (*ahliyat al-ada*): “the pen has been lifted from three: for the sleeping person until he awakens, for the boy until he becomes a young man and for the mentally insane until he regains his sanity.”<sup>19</sup> In addition, in cases of homicide and assault, according to Ahmad b. Naqib al-Misri, retaliation (*qisas*) may not be applied to insane persons “under any circumstances.”<sup>20</sup> Similarly, Ibn-Duyan argues the law “does not permit punishment of one who is not in command of his mental faculties.”<sup>21</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 206. Requirement of a Voluntary Act; Omission Liability; Possession Liability**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 20 (Action and Event: Relation of Cause and Effect), and 26 (Accident or Force Majeure).

#### **Comment:**

*Generally.* This draft Article sets the minimum conduct requirements for criminal liability. A fundamental principle of criminal law holds that it is inappropriate to punish “mere

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<sup>19</sup> *Jami’ al-Tirmidhi*, No. 1423

<sup>20</sup> AHMAD B. NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* (‘UMDAT AL-SALIK), 583.

<sup>21</sup> IBN DUYAN, *CRIME AND PUNISHMENT UNDER HANBALI LAW* (MANAR AL-SABIL), 43-44.

thoughts” unaccompanied by a physical act or a failure to discharge a specified legal duty. Section (a) prohibits liability absent an overt act or a failure to perform an act that the person is physically capable of performing.

The following example illustrates a situation where an act occurs:

*Example 1:* X intentionally enters B’s house and takes B’s motorcycle off his property. X would be liable for the theft of B’s motorcycle under Article 4202 (Theft by Unlawful Taking or Disposition) and the trespass onto B’s property under Article 4104 (Criminal Trespass) because, under this Article, he has engaged in conduct that would constitute an act.

The following example illustrates a situation where an act does not occur:

*Example 2:* C contemplates stealing D’s motorcycle, and mentions to his friend E that he would like to steal D’s motorcycle. However, C abandons his plans and does not take any steps to actually steal the motorcycle. As such, C would not be liable for theft or trespass, or attempted theft or trespass, because he has not actually engaged in an act.

The following example illustrates a situation where an omission occurs without incurring liability:

*Example 3:* F contemplates stealing G’s motorcycle, and mentions to his friend H that he would like to steal G’s motorcycle. F does in fact steal G’s motorcycle, and H does nothing to stop him (nor to aid him). Since there is no duty imposed by law on H to prevent the theft of G’s property, H cannot be liable for failure to prevent the theft.

Section (a) also requires that the act be voluntary. If a person is not liable if the person performed an act involuntarily, or failed to perform an act he or she was incapable of performing.

Section (b) provides that, as a general matter, an offense’s conduct element may be satisfied by a failure to perform a legal duty. In order to incur liability for an omission, the omission must be a failure to act when a duty to act exists. Note that Section (b) only holds someone liable for omission where that person has a statutory duty to act. This creates an exception to the general rule that omissions do not create liability, with the exception predicated on the notion that people who are under a duty to protect others should be punished criminally for failing to meet those duties. Note also that such a duty is created when one who otherwise has no duty begins voluntarily assisting someone; therefore, once a volunteer takes steps to begin assisting someone, he must follow through with the assistance as long as it poses no danger to himself.

The following example illustrates a situation where a duty to intervene exists:

*Example 4:* X is a firefighter. A statute establishes a duty for firefighters to intervene to protect lives or property from fires. X fails to intervene during a fire and incurs criminal liability for failing to act in light of that duty.

Section (c) defines the circumstances under which possession is considered a “voluntary act” for the purposes of criminal liability. Section (c) applies to offenses that impose criminal

liability, or increase the grade of an offense, for the possession of certain prohibited objects. Section (c) requires either knowing procurement, or awareness that the person is in control of the object and a failure to end his possession within a sufficient amount of time. This means that a person who does not intend to receive a prohibited object, but knowingly receives it and fails to abandon it or turn it over to the proper authorities will incur criminal liability for his possession.

The following example illustrates a situation where voluntary possession occurs:

*Example 5:* J gives K a bag for safekeeping. K decides to open the bag and finds a prohibited weapon inside. K keeps the bag and fails to inform the authorities. Under section (c), K could be liable for possessing the prohibited weapon because, while he did not intend to receive or control a prohibited weapon, he did so knowingly after opening the bag.

The following example illustrates a situation where voluntary possession does not occur:

*Example 6:* L gives M a sealed box that, unbeknownst to M, contains a prohibited weapon. M does not open the box, and never becomes aware that a prohibited weapon is contained therein. Under Section (c), M cannot be liable for the prohibited weapon because while he has received it, he has not received it knowingly.

*Relation to Current Law.* An act requirement is implied in Penal Code (1962) Art. 20 (Action and Event: Relation of Cause and Effect), stating that one cannot be held liable if dangerousness of the offense “is not the consequence of his act or omission.” Article 206 refines that definition. This Article also codifies Penal Code (1962) Art. 26 (Accident or Force Majeure) in Section (a) by requiring that an act be voluntary.

*Relation to Sharia Law.* The act requirement of this Article is supported by principles of Sharia law, which indicate that punishment of a general omission is unsupportable. With regard to a situation in which it would be possible for a person to save another’s life, but that person fails to do so, Ibn Duyan states: “He is not responsible for him since he did not destroy him and was not the cause of his death, just as though he did not know him.”<sup>22</sup> Thus, unless the law positively imposes a punishment for failure to act, an omission should generally not be treated as giving rise to criminal liability.

It should be noted that in cases where a dependent relationship exists (i.e., physician and patient) or where an individual voluntarily begins to aid another, a duty is created. For example, Ibn al-Qasim is quoted as saying: “If someone falls into a well and asks you to lower a rope for him and you try to pull him up, but when it proves too much for you, you let him go and the man dies, then you are liable for his death.”<sup>23</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 207. Causal Relationship Between Conduct and Result**

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<sup>22</sup> Ibrahim b. Muhammad b. Salim Ibn Duyan, *Crime and Punishment Under Hanbali Law (Manar al-Sabil)*, 43 (translated by George M. Baroody, Dar al-Salam, 1958).

<sup>23</sup> Ahmed Fathi Bahnassi, “Criminal Responsibility in Islamic Law,” 184.

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 16 (Offences Committed), 20 (Action and Event: Relation of Cause and Effect), and 21 (Concurrence of Causes).

**Comment:**

*Generally.* This Article sets forth the requirements for determining when a person’s conduct causes a result.

Section (a) sets forth the two basic tests for when a person’s conduct causes a result. Section (a)(1) defines the “but-for” causation test: that the result would not have occurred but for the conduct.

The following example illustrates a situation where the “but-for” causation test would be satisfied:

*Example 1:* A puts fatal poison in B’s drink. B dies from the toxicity of the poison. The “but-for” causality test in Section (a)(1) is satisfied—B would not have died but for A putting poison in his drink.

The following example illustrates a situation where the “but-for” causation test would not be satisfied:

*Example 2:* Company X produces a drink. They produce a contaminated batch that causes certain death in ten minutes, even with minimal consumption. C purchases the contaminated drink, pours it into a glass, and takes a sip. C puts the glass down, at which time D, in an attempt to kill C, pours some poison into C’s glass. The poison takes several hours to take effect. C takes another sip, and dies. As long as it is determined that C’s imminent death was unpreventable once he drank the contaminated drink, the “but-for” causality test in Section (a)(1) would not be satisfied as to D, because C died from the contaminated drink, not D’s poison. Therefore, D is not guilty of any homicide offense since his actions did not cause C’s death. However, he would still be guilty of attempted murder.

Section (a)(2) defines the proximate causation test. This test requires that the prohibited result must not be so far removed from the defendant’s conduct that imposing liability would be unjust. This requirement is imposed so that people are not liable for exceptional or unusual accidents that may occur. Proximate causation turns heavily on the foreseeability of the result. If a result was somewhat foreseeable in a course of conduct by a reasonable person, the proximate causation test is likely to be met. However, if a result is almost completely unforeseeable, the proximate causation test may not be met. This test applies to result elements appearing in both the offense definition and grades.

The following examples illustrate situations where the proximate causation test would be satisfied:

*Example 3:* E intends to cause property damage to the exterior wall of a government power facility using an explosive device. Unbeknownst to E, a tank of heating oil is located next to the wall on the interior of the building. The explosive device detonates, causing the heating oil to catch fire, substantially impairing the function of the power facility. While E did not intend to substantially impair the function of the power facility,

it was a foreseeable result of using an explosive device. As such, under Section (a)(2), he would be liable for proximately causing property damage that substantially impairs a government facility.

*Example 4:* F intends to assault G by hitting him with a cricket bat. F hits G in the head with the bat, applying enough force so that G would be injured, but not killed. G, however, has a weak skull, and the relatively light blow from F causes G to die. F would be liable for G's death under Section (a)(2) because, although F did not expect G to die, the fact that death would result from being hit on the head by a cricket bat is sufficiently foreseeable.

The following example illustrates a situation where the proximate causation test would not be satisfied:

*Example 5:* H intends to assault J by throwing a brick at him. H throws the brick, which misses J, but hits a nearby car. Unbeknownst to H, the car has been rigged with a crude explosive device. The impact of the brick causes the device to explode, spraying shrapnel that kills J. H would not be liable for causing the death of J under Section (a)(2), because the result (death by shrapnel) is not foreseeable and is so far removed from the conduct (throwing a brick) that holding H liable would be unjust since the actor had no reason to imagine that his conduct would cause such a result. However, H may still be guilty of attempted assault.

Section (b) provides that in cases where more than one person contributes to a result and each person's conduct alone would have caused the result, each person is considered to have caused the result. This section prevents equally blameworthy persons from escaping liability due to the fortuity that someone else independently caused the prohibited result.

The following example illustrates a situation where more than one person contributes to a result and both would be liable:

*Example 6:* K and L intend to assault M by throwing rocks at him. K throws a large rock at M's head, causing fatal injuries to M's brain. L then throws a rock, which also hits M's head and causes fatal injuries to M's brain. M dies as a result of the injuries. Under Section (b), both K and L would be liable for M's death, even though the rock K threw would have caused M's death even if L had not been involved.

The following example illustrates a situation where more than one person contributes to a result and only one would be liable:

*Example 7:* N shoves O against a wall, causing O minor injuries that would not be foreseeably fatal. A few hours later, P beats O on his head with a cricket bat in a manner sufficient to kill him. However, N's minor injuries cause O to die faster than he otherwise would have. Under Section (b), P would be liable for O's death, but N would not, because N's conduct alone would not have caused O to die. N could be charged with assault.

*Relation to Current Law.* The principles expressed in Article 207 align with those in the current Penal Code (1962). Art. 16 (Offenses Committed) requires the offender’s act to have “caused the harmful or dangerous event”. Art. 20 (Action and Event: Relation of Cause and Effect) requires “the dangerous event upon which the existence of the offense depends” to be the “consequence of his act or omission” (emphasis added). Art. 21 (Concurrence of Causes) excludes one’s act as a cause of the offense only if a supervening cause “exclude[s] the relation of causality” between the person’s act and the offense. If the person’s act is by itself “sufficient to determine the event,” similar to this drafted Article’s multiple causes definition, a supervening cause does not destroy the causal link between the person’s act and the prohibited result.

Moreover, the “but-for causation test” is an important and intuitive component of many criminal laws and is consistent with general principles of fairness that dictate that one only be held responsible for results that he has directly caused. A similar construction exists in certain Muslim countries—for instance, in Pakistan.<sup>24</sup>

*Relation to Sharia Law.* “Proximate causation” is a concept with support in Sharia law. Sharia law holds a person responsible for the result of his actions whenever it is “possible to trace its source back to the act which leads up to it” and does not “require that the act of the assailant be the only cause that brings about the result.”<sup>25</sup> For example, Mohamed El-Awa differentiates between accidents (i.e., results that are not proximately caused by conduct because they are far removed from the actor’s conduct) and deliberate action.<sup>26</sup> Ahmad b. Naqib Al-Misri also differentiates between acts intended to cause an injury but that unintentionally cause death, and those that are intended to cause death.<sup>27</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 208. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 300. Principles of Offense Liability**

### **Introduction: Chapter 300**

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<sup>24</sup> IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN, 82.

<sup>25</sup> Ahmed Fathi Bahnassi, “Criminal Responsibility in Islamic Law,” in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, 172- 73 (M. Cherif Bassiouni, ed. 1982).

<sup>26</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY, 73.

<sup>27</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (‘UMDAT AL-SALIK), 584-585.

This Chapter defines the limits of offense definitions. It provides boundaries beyond which the offense definition does not apply, even where its definition technically reaches the conduct at issue. Article 301 provides that an offense is not committed when there is a customary license, a de minimus infraction, or conduct that the offense is not intended to punish. Article 302 defines when consent can preclude criminal liability, and Article 303 defines when conviction for a similar offense precludes conviction for another offense.

**Comment on Article 301. Customary License; De Minimus Infractions; Conduct Not Envisaged by Legislature as Prohibited by Offense**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 16 (Offenses Committed), 75 (Extenuating Circumstances), and 238 (Extenuating Circumstances Acts of Slight Importance).

**Comment:**

*Generally.* This Article sets out exemptions — modifications of the meaning of the underlying offense definitions — for persons whose conduct was within a customary license, was too insignificant to merit criminal punishment, or did not cause the harm contemplated by an offense’s existence. These provisions enable the court to dismiss prosecutions on these bases, creating an additional safeguard beyond reliance on prosecutorial discretion. These defenses are consistent with the commonsense rule of construction that a statute should not be interpreted to produce an absurd result. A court should consider and rule on the application of this provision when charges are brought, rather than submitting the question to a jury at trial.

Section (a)(1) provides that conduct may be exempt from liability if it is within a “customary license or tolerance.” For example, where a landowner had previously allowed his neighbors to use his yard as a shortcut, even though the yard was posted against trespassing, this Article would provide a liability exemption to the neighbors if the landowner unexpectedly decided to accuse them of trespassing. The exemption in this Article is not available, however, where a license has been “expressly negated by the person whose interest was infringed” or is inconsistent with the relevant offense.

Section (a)(2) recognizes an exemption for conduct that, although technically constituting an offense, is too trivial to warrant a criminal conviction. Similarly, Section (a)(3) provides an exemption where one did not actually cause the harm or wrong at which the offense is aimed. Both of these sections prevent criminal prosecutions where it would be inappropriate to inflict the condemnation of criminal punishment.

Section (b) places an important limitation on the exemptions in this Article to ensure that they are not abused by providing that the court may not dismiss a charge on the basis of an exemption set forth in this Article without filing a written statement of its reasons for doing so.

*Relation to Current Law.* Article 301 corresponds to Penal Code (1962) Art. 16 (Offenses Committed) by ensuring that an offense is only defined to have been committed when the actual harm sought to be prohibited has occurred. Furthermore, this draft Article reflects the principle in Penal Code (1962) Art. 75 (Extenuating Circumstances) that punishment should be reduced when a person aided an offense under draft Article 401 (Accountability for the Conduct of Another), but did so by playing “a minor part.”

In general, discretion by prosecutors and the court prevents imposing criminal punishment for conduct that does not warrant criminal condemnation. However, codifying the



situations in which conduct is not worthy of criminal condemnation and providing that the court shall dismiss offenses based on such conduct will ensure, in a uniform and consistent manner, that criminal punishment is imposed only in those situations where it is appropriate.

*Relation to Sharia Law.* The grounds for dismissal set forth in Article 301 are consistent with defenses under Sharia law. For example, Sharia law provides for a de minimis defense to theft (*nisab*). In addition, Muslim jurists have long recognized that where results in certain individual cases constitute technical infringements of the law, if those results are contrary to the overriding purposes of the law as a whole then the case should be overturned (*maqasid al-shari'ah*).

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 302. Consent**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 32 (Consent of the Injured Party)

#### **Comment:**

*Generally.* This Article governs when the consent of one who would otherwise be the victim of an offense precludes criminal liability.

Section (a) provides that a victim's consent will preclude liability if it negates either an offense element or the harm or wrong at which the offense is aimed. For example, several offenses in the draft Code explicitly include the absence of another's consent as an offense element. Rape, in Article 3301, is one such example. For these offenses, the prosecution bears the burden of proving the absence of consent, and the draft Code's culpability requirements apply to it as well.

Section (a) also provides a defense for situations where consent does not negate an explicit offense element, but nevertheless "precludes the infliction of the harm or wrong sought to be prohibited" by an offense. For example, Section (a)(1) of draft Article 4102 (Criminal Damage) criminalizes damaging the property of "another." A victim's consent to the destruction of his property does not negate any of the elements of the offense, but it does negate the harm at which the offense is aimed.

Section (b) creates special rules for consent to bodily injury in recognition that, in limited circumstances, consent to such injury should preclude criminal liability, even though it does not negate either an offense element or the harm the offense seeks to punish. Section (b)'s rules operate independently of Section (a)'s general rules regarding consent. A consent defense exists if either Section (a) or (b) is satisfied.

Section (b)(1) provides that consent to bodily injury is a defense where the bodily injury is not "serious." Therefore, consent does not preclude liability for offenses involving serious bodily injury. This is because the state has an interest in preventing serious bodily injury despite the victim's consent. Section (b)(2) recognizes consent as a defense where the bodily harm caused or threatened occurs in a lawful joint endeavor or athletic contest. This section recognizes that risky endeavors and athletic contests often result in injuries, but that these joint endeavors, when participated in voluntarily, are not the kind of conduct this Code seeks to punish.

Section (c) recognizes that a person's agreement will not always constitute valid legal consent (for example, where the person is incompetent or the "consent" is coerced) and ensures

that the draft Code is both clear in explaining when consent precludes liability and consistent in its treatment of consent from one offense to another. Section (c) recognizes four sets of circumstances under which a victim's assent will not constitute effective consent.

Section (c)(1) provides that a person's agreement will not provide a defense where he or she is legally incapable of authorizing the conduct constituting the offense. For example, permission to operate a motor vehicle by someone who merely knows the owner, but is not the owner himself, will not preclude liability for Unauthorized Use of Property or Facilities (see Article 4308) because the person giving consent for use of the motor vehicle is not legally capable of providing consent to using the vehicle.

An actor's mistake as to consent will ordinarily be immaterial where consent provides a defense only because it precludes the infliction of the harm sought to be prohibited, under Section (a)(2). If a person mistakenly believes the owner of property has consented to his destruction of that property, the actor's destruction of the property is an offense, and his mistaken belief in consent does not preclude liability.

Where the absence of consent is an offense element as to which culpability is required, however, a mistake as to consent may negate that requirement under Section (a)(1). For example, lack of consent is a required element of the Unauthorized Use of a Vehicle offense, and recklessness is the read-in culpability requirement as to the lack of consent. Although assent from a non-owner cannot constitute consent under section (c)(1), a reasonable mistaken belief that he was the owner could negate that recklessness requirement. A mistake as to consent may similarly negate offense elements other than the absence of "consent" per se, such as whether the actor had authority or was acting against another's will.

Section (c)(2) makes clear that consent will not preclude liability where the victim lacks the mental capacity to consent or is otherwise incompetent.

Section (c)(3) provides that assent does not constitute effective consent where it is given by one whose improvident consent the law seeks to protect against. For example, a minor's consent to sexual intercourse will not preclude liability for sexual assault against a minor precisely because that offense aims to prevent such improvident consent.

Finally, Section (c)(4) provides that consent is not a defense where it is induced by force, coercion, threats, or deception.

*Relation to Current Law.* Article 302 defines and further describes the defense of consent from Penal Code (1962) Art. 32 (Consent of the Injured Party). Art. 32 provides a general description that the consent of a person who can "legitimately dispose of it" removes liability. This wording is somewhat ambiguous as to who can legitimately dispose of which rights. This draft Article restates the same idea as those in Art. 32, but with greater specificity.

*Relation to Sharia Law.* Sharia law recognizes consent as a defense to certain offenses, such as theft.<sup>28</sup> This Article is generally consistent with this approach; thus, consent does not constitute a defense to crimes that involve serious bodily injury.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>28</sup> IBRAHIM IBN MUHAMMAD IBN SALIM IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW 100-101 (George M. Baroody, trans. Dar al-Salam, 1958) (Ibn Duyan explains that it must be made clear that property was taken without the victim's consent before punishment can be imposed.).

### **Comment on Article 303. Conviction When the Defendant Satisfies the Requirements of More than One Offense**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 13 (Matter Governed by More than One Penal Law or by More than One Provision of the Same Penal Law), 44 (More than One Breach of One or Various Provisions of Law by One or More Acts), 45 (Continuing Offense), and 46 (Complex Offense)

#### **Comment:**

*Generally.* This draft Article defines the circumstances under which the court may enter multiple convictions when a person's criminal conduct satisfies the requirements of more than one offense.

Section (a) provides the circumstances in which a court may not enter a judgment of conviction for both of two related offenses of which the defendant has been charged.

Section (a)(1)(A) deals with offense harms that are either entirely contained within each other, or that deal with different degrees of the same kind of harm. For example, the same conduct could constitute both an offense under Article 3401 (Kidnapping), as well as an offense under Article 3402 (Unlawful Restraint). Because the harm of the restraint is entirely accounted for by the kidnapping offense, the court should not enter conviction for unlawful restraint where it enters a conviction for kidnapping for the same conduct.

Section (a)(1)(B)(i) bars multiple convictions where two offenses differ only in that one prohibits a kind of conduct generally and the other criminalizes a specific subset of the same conduct. The proposed Article has been drafted to avoid overlap of this kind, but certain offenses maintain this kind of overlap, and therefore this provision is needed. For example, certain conduct may fall within both Article 2102 (Human Trafficking) and 3401 (Kidnapping). Section (a)(1)(B)(i) makes clear that convictions for both of these offenses, based on the same conduct, would be inappropriate, as human trafficking is a specific instance of kidnapping.

Section (a)(1)(B)(ii) provides that multiple liability may not be imposed where two offenses differ only in that "one requires a lesser kind of culpability than the other." For example, a person cannot be convicted for both murder in the first degree, under draft Article 3101, and murder in the second degree, under draft Article 3102.

Section (a)(1)(C) bars multiple liability where an offense is defined as a continuing course of conduct and the offender's conduct is uninterrupted. For example, the offense in draft Article 7102 (Trafficking, Manufacture, Sale, or Possession of Firearms) prohibits unlicensed persons from possessing a firearm. Section (a)(1)(C) prohibits multiple convictions under Article 7102 based upon a defendant's single, uninterrupted possession of the same gun. However, this draft section also allows the legislature to override this general rule against multiple convictions by expressly providing that specific periods of continuing conduct constitute separate offenses.

Section (a)(2)(A) bars convictions for both an inchoate offense and the completed target offense. Section (a)(2)(B) bars convictions for both an inchoate offense and any offense that relates to the inchoate offense's target offense, incorporating Section (a)(1). For example, Section (a)(2)(B) would preclude convictions (based upon the same conduct) for both murder in the first degree and attempted murder in the second degree, or attempted murder in the first degree and murder in the second degree.

Section (a)(3) bars convictions for multiple inchoate offenses toward a single substantive

offense. For example, a person could not be convicted for multiple counts of conspiracy to commit the same crime based on interactions with multiple people. Another example is that a person could not be convicted of both solicitation and an attempt to commit the same offense (the solicitation itself could otherwise be treated as a substantial step toward commission of the offense, satisfying a key element of attempt liability). As a matter of policy, a conviction of a single inchoate offense sufficiently punishes an offender for his or her incomplete efforts toward an offense. Assuming a court orders that sentences be served consecutively, Section (a)(3) is necessary to prevent the possibility of punishing an offender who does not complete an offense more severely than one who does.

Section (a)(4) codifies the rule that a person cannot be convicted of the same offense twice, where one conviction is based upon his own conduct, and the other is based upon his complicity with another's conduct involved in the same offense. Thus, where two people jointly commit the offense of criminal trespass (draft Article 4104), each may be convicted on one count of the offense, but not for another count based solely on each one's accountability for the other's conduct under the draft Article 401.

Section (a)(5) prohibits legally inconsistent simultaneous convictions.

Section (b) is a recommended addition to the scheme of multiple convictions that draws attention to the intentional structure of the proposed Code. In consolidating related or overlapping offenses from the Penal Code (1962), the proposed Code sometimes presents multiple related offenses within the same Article. This has been done intentionally to make clear that those offenses are related in such a way that they should be viewed as alternatives to each other—at least as far as multiple convictions are concerned. For example, both offenses for dissemination of child pornography and dissemination of pornography (obscenity) are grouped together under draft Article 6203. This grouping is intentional, and is meant to signal that, among other things, a single instance of disseminating child pornography should not also support a conviction for disseminating pornography. Section (b) of this draft Article makes the effect of these groupings explicit.

However, multiple offenses are sometimes grouped within the same Article for a completely different reason, such as offenses' common relationship with a regulatory requirement. Therefore, Section (b) is not an absolute rule, but rather a factor to be considered by the court when deciding whether multiple charges based on the same conduct ought to support multiple convictions.

Section (c) makes clear that where multiple convictions conflict and only one may be entered into judgment, the court must enter a conviction for the most serious of those offenses (or the more serious of two grades of the same offense).

*Relation to Current Law.* Penal Code (1962) Art. 13 (Matter Governed by More than One Penal Law or by More than One Provision of the Same Penal Law) provides that when there is a conflict between special and general laws, the special laws prevail. This draft Code is drafted so that such conflicts do not occur. However, any additional defenses in the special part necessarily are defenses available in addition to the defenses in the general part.

Penal Code (1962) Art. 44 (More than One Breach of One or Various Provisions of Law by One or More Acts) establishes a general principle that an offender can be punished for multiple violations of the same law, or for violating multiple laws through a single act. Draft Article 303 codifies the same principle in Section (a), which allows for punishment of "any offenses" for which the person "satisfies the requirements for liability."

Penal Code (1962) Art. 45 (Continuing Offence) allows for punishment of only the most serious offense when there is a continuing offense. Section (a)(1)(C) of this draft Article attempts to define more clearly the circumstances in which a person could be punished for multiple offenses based on a single course of conduct by requiring the law to describe that specific periods of conduct constitute separate offenses. The purpose of this provision is to limit the prosecution's ability to impose harsh sentences by dividing up a single course of conduct into multiple instances, which would create disproportionate punishments. For the same reason, the tripling of punishment for continuing offenses allowed in Penal Code (1962) Art. 45 is not prescribed here, but rather would be dealt with at the sentencing phase, where the length of time during which the defendant engaged in the offense would be considered.

Penal Code (1962) Art. 46 (Complex Offense) exempts punishment for each offense where some of the offenses are elements of another offense charged. This principle is implemented in this draft Article through Sections (a)(1)(A) and (a)(1)(B). However, these draft provisions are broader than the definition in Art. 46, as they forbid conviction not just when the offense is an element of another offense, but when the harm targeted is the same. This is an important expansion. Without it, for example, a person could be charged for both deceptive practices under draft Article 4404, and falsification under draft Article 5202, for the same conduct. Although both of these offense definitions share certain elements, neither offense is an element of the other offense, and therefore joint prosecution for these offenses would not fall into the exemption from multiple convictions in Penal Code (1962) Art. 46, but does fall into the exemption in this draft Article.

Penal Code (1962) Art. 46 (Complex Offense) also exempts punishment for each offense where the offense contains aggravating elements that are themselves offenses. This draft Article covers this exemption in Section (a)(1)(A)(i), as the harm in an offense that is an aggravating element of another offense would be "entirely accounted for by the other offense." However, generally the structure of this draft Code avoids opportunities for this issue to arise.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 304. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 400. Imputing Offense Elements**

## **Introduction: Chapter 400**

This Chapter describes the circumstances where certain elements of an offense can be imputed to the defendant. Article 401 describes situations where the conduct of another person is imputed to the conduct of the defendant. This is most common for accomplice liability, defined in Section (a)(2) of Article 401 (Accountability for the Conduct of Another). However, a person can be liable for the conduct of another where he causes that conduct, or when the law otherwise requires it.

Offense elements can also be imputed where the person has become voluntarily intoxicated (Article 402), or intended or believed conduct or circumstances to be different than they were (Articles 403 and 404). In some circumstances this will mean the defendant has satisfied elements of an offense that he did not actually commit; in other cases, it will mean the defendant did not have the requisite mental state to satisfy an element of the offense.

## **Comment on Article 401. Accountability for the Conduct of Another**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 35 (The Rights of the Accused); Penal Code (1962) Arts. 29 (Mistake Caused by Deceit of Another), 48 (Rendering a Person Incapable for the Purpose of Causing the Commission of an Offense), 71 (Punishment for Those Who Participate in an Offense), 72 (Causing a Person not Liable or not Punishable to Commit an Offense), 73 (Aggravating Circumstances), 74 (Participation in Crimes with Culpa), 75 (Extenuating Circumstances), 76 (Agreement to Commit an Offense: Instigation), 77 (Offense Different From That Intended by Any of the Persons Participating), 78 (Change in the Nature of the Offense in Respect of Any of the Persons Participating), 79 (Evaluation at Aggravating or Extenuating Circumstances), and 80 (Evaluation at Circumstances Excluding Punishment)

### **Comment:**

*Generally.* This draft Article sets out the circumstances in which one person may be held accountable for the conduct of another. For conduct giving rise to liability under draft Article 401, an accomplice may also be liable under draft Article 902 (Criminal Solicitation) or draft Article 903 (Criminal Conspiracy). Draft Article 907 (Grading of Criminal Attempt, Solicitation and Conspiracy) imposes reduced liability in recognition of the fact that the harm of the completed substantive offense does not occur in such situations.

Section (a) defines standards for accomplice liability. Section (a)(1) covers conduct that causes another person to commit an offense. This does not require a culpability requirement of intent. For example, a car owner might knowingly leave his keys within easy reach of his drunk friend (making him reckless as to the drunk friend's likelihood of driving). If the drunk friend then takes the keys and drives, crashing and killing another, is the car owner liable for recklessly causing the other's death? Under this draft Article, the answer would be yes, because the same culpability requirement that applies to the offense definition (in this case, manslaughter) applies to the conduct of the person causing the offense under this Article.

Section (a)(2) makes the defendant accountable if he or she is the accomplice of another person in the commission of an offense. The imputation of one person's conduct to another person does not alter the culpability level required by the offense. Rather, the person held accountable for another's conduct must satisfy the same culpability level for the underlying

offense.

Section (a)(3) applies where the offense element explicitly makes the defendant accountable for the conduct of another.

Section (b) precludes accountability for another's conduct in certain circumstances. Section (b)(1) prevents liability when a person aids a crime in which he or she is a victim. Section (b)(2) prevents liability for conduct that technically aids in the offense but is inevitably incidental to its commission. In other words, the accomplice knowingly aided the offense in such a way that was sure to be insignificant or of minor help in its commission. Section (b)(3) precludes accomplice liability in cases where the accomplice renounces his or her part in the commission of the offense. Not only must the accomplice terminate his or her assistance, but he or she must seek to either purge the assistance of all the value it has or will have to the commission of the offense (Section (b)(3)(A)), or actively foil the commission of the offense (Sections (b)(3)(B)-(C)). This is meant to provide an incentive for those involved in crimes to have a change of heart and seek to prevent commission of the offense. Section (b)(4) prevents multiple liability where conduct that would otherwise be sufficient to establish accomplice liability independently constitutes an offense.

Section (c) provides that a person is legally incapable of committing an offense may still be convicted of the offense based on his or her accountability for the conduct of another who commits the offense. This Section limits a person's legal incapacity—for example, diplomatic immunity—to his or her own conduct only; the person cannot seek to involve others in criminal activity without incurring liability. For example, if a person with a license is legally incapable of committing the crime in Article 6110 (Operating a Regulated Business or Importing Without a License), he or she may still be liable for complicity in an offense if he or she knowingly aids and facilitates another, who is unlicensed, in operating a similar business. Section (a) still requires the accomplice to have the culpability required by the underlying offense. Thus, the accomplice would still be able to assert any defense that negates his culpability as to the offense, as well as any general defense for which he qualifies.

Section (d) makes clear that the accomplice may be liable even if the principal is not held liable for the underlying offense. This ensures that the prosecution of accomplices is not hampered by the results of another trial. This Section still requires proof of the commission of the offense and the defendant's complicity. It is simply designed to insulate the prosecution of an accomplice from any procedural, evidentiary, or other mistakes that invalidates only the prosecution of the principal.

A person who is legally accountable for the conduct of another under Section (a)(2) is liable for the underlying offense, but the grade of the offense for which he is liable may be adjusted under Section (e) depending on his culpability.

Under Section (f), a person who would have been accountable for the conduct of another if the other had committed the offense is guilty of an attempt to commit the offense. Liability for an inchoate offense is appropriate for an accomplice where he satisfies the requirements of Section (a), but the person for whose conduct he would have been accountable does not commit the offense.

Section (g) applies "whether or not the offense is attempted or committed by the other person," thus clarifying that one is subject to liability for an unsuccessful attempt to aid another in the commission of an offense. Section (g) recognizes that inchoate efforts toward an offense should not be sanctioned as severely as completed efforts. Section (g) therefore reduces the liability for attempted complicity relative to actual complicity.

*Relation to Current Law.* In all cases, Article 401 should be interpreted to comply with Section 12 of the Provisional Constitution (2012) Art. 35 (The Rights of the Accused), which provides that “criminal liability is a personal matter and no person may be convicted of a criminal offense for an act committed by another person.” This draft Article is meant to allow persons to be convicted only for their own acts of complicity in another’s offense, in order to be consistent with Article 35.

Penal Code (1962) Art. 48 (Rendering a Person Incapable for the Purpose of Causing the Commission of an Offence) imposes liability on a person who incapacitates another with the purpose of making him commit an offense. Deceiving or incapacitating another would be a way to cause an irresponsible person to commit an offense, so that behavior is an instance covered by this draft Article. Penal Code (1962) Art. 29 (Mistake Caused by Deceit of Another) imposes liability on a person who deceives another into committing an offense, and Art. 72 (Causing a Person not Liable or not Punishable to Commit an Offence) imposes liability for causing an innocent person to commit a crime. Penal Code (1962) Art. 73(1)(c) and (d) also describe causing another to commit an offense. These provisions correspond to Section (a)(1) of this draft Article.

Section (a)(2) corresponds to Penal Code (1962) Art. 74 Section 1 (Participation in Crimes Committed with Culpa), those who aid in an offense are liable for the offense itself. The considerations in Penal Code (1962) Art. 71 (Punishment for Those Who Participate in an Offence) should be considered at sentencing, when relevant. They are not sufficiently grave considerations to require increasing the grade of the offense. In accordance with Art. 76 (Agreement to Commit an Offence: Instigation), aiding in the mere planning of an offense is not criminal complicity under this draft Article.

The provisions in Section (b) make the draft Code more complete and comprehensive. Section (b)(2) codifies Penal Code (1962) Art. 75 (Extenuating Circumstances). The other conduct described in Art. 75 is covered by draft Article 301 (Customary License; De Minimus Infractions; Conduct Not Envisaged by Legislature as Prohibited by the Offense). None of the provisions in Section (b) conflict with the current Penal Code (1962).

Section (c) describes the inverse of the situation described in Penal Code (1962) Art. 72 (Causing a Person not Liable or not Punishable to Commit an Offence), which punishes someone for causing a person who is not liable to commit an offense. This Section punishes someone who would otherwise not be liable had he committed the offense directly for complicity in another’s commission of the offense.

Section (d) corresponds to Section 2 of Penal Code (1962) Art. 73 (Aggravating Circumstances), which allows for punishment even when any others who participated in the offense are not liable.

Section (e) corresponds to Penal Code (1962) Section 2 of Arts. 77 (Offence Different From That Intended by Any of the Persons Participating), 78 (Change in the Nature of the Offense in Respect of Any of the Persons Participating), 79 (Evaluation at Aggravating or Extenuating Circumstances), and 80 (Evaluation at Circumstances Excluding Punishment) by requiring that culpability requirements be met for the defendant himself, while allowing that the other elements be imputed through the conduct of the principal.

Sections (f) and (g) explain how accomplice liability interacts with attempts. Penal Code (1962) Art. 76. (Agreement to Commit an Offence: Instigation) prescribes liability for attempts of conspiracy or solicitation, but not accomplice liability. However, Sections (f) and (g) are not inconsistent with the liability for inchoate offenses in current law.



*Relation to Sharia law.* There is general support for this Article in Sharia law, because Sharia law classifies an accomplice in the same terms as the one actually carrying out the act.<sup>29</sup> Muslim jurists have generally held an entire conspiring group equally responsible for the actions of one member.<sup>30</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 402. Voluntary Intoxication**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 54 (Voluntary of Culpable Drunkenness), 55 (Habitual Drunkenness), 56 (Drunkenness Caused by Narcotic Drugs), and 57 (Chronic Intoxication from Alcohol or Narcotic Drugs)

#### **Comment:**

*Generally.* This provision governs the imputation of culpability to a person who engages in offense conduct after voluntarily becoming intoxicated. For conduct performed under the influence of involuntary intoxication, see draft Article 603 (Involuntary Intoxication) and its corresponding commentary.

Sections (a) and (b) of this draft Article provide that voluntary intoxication is a defense, but only to the extent that it negates a culpability requirement greater than recklessness. A defendant should not be able to use his intoxication as an excuse when he would have had the required culpability for an offense had he been sober. In this way, this Article strikes a balance that helps ensure that the greatest number of blameworthy offenders will be held accountable, but without arbitrarily subjecting those people to heightened punishment against which they are unable to defend.

*Relation to Current Law.* Article 402 corresponds to the Penal Code (1962) Art. 54 (Voluntary of Culpable Drunkenness) and Art. 56 (Drunkenness Caused by Narcotic Drugs). The Penal Code (1962) Art. 55 (Habitual Drunkenness) increases punishment when the offense was committed under the influence of alcohol and the offender is a “habitual” drunkard. Habitual drunkenness would be included as a factor in sentencing in this draft Code. The Penal Code (1962) Art. 57 does not hold liable someone who is “in a state of chronic intoxication induced by alcohol or drugs” by reference to Arts. 50 (Total Mental Deficiency) and 51 (Partial Mental Deficiency). This draft Article captures this in Section (b)(3)(B), which allows proof of addiction to show that the intoxication was not voluntary.

*Relation to Sharia law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>29</sup> IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 480 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) (“Jurists applying *hadd* to the person who does not act directly consider the term ‘murderer’ applicable to him metaphorically.”).

<sup>30</sup> IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER 484 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994) (“majority of the jurists of the provinces said that the group is to be executed for one person, whatever the number of the group.”).

### **Comment on Article 403. Divergence Between Consequences Intended or Risked and Actual Consequences**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 22 (Offences Punishable Subject to Existence of a Condition), 30 (Injury of Person Other than the One Against Whom the Injury Was Directed), and 31 (Event Different from That Desired by the Offender)

**Comment:**

*Generally.* This Article addresses situations of “transferred intent,” where a person intends, foresees, or risks one result that would be an offense, but ends up causing or risking another result that is also an offense. In that case, liability may be imposed for the unintended offense that actually results. Note that where a person causes both the intended result and another result that is also an offense, he or she may be held liable for both offenses subject to Article 303 (Conviction When the Defendant Satisfies the Requirements of More than One Offense). Where the intended result does not occur, the person may be held liable for attempting to commit the intended offense as well as for committing the unintended offense.

*Relation to Current Law.* This draft Article corresponds to Penal Code (1962) Art. 22 (Offences Punishable Subject to Existence of a Condition) by allowing punishment even when the result of the conduct (“the consequence which is a necessary condition for rendering the act punishable”) was not intended by the actor. It also corresponds to Penal Code (1962) Arts. 30 (Injury of Person Other than the One Against Whom the Injury Was Directed) and 31 (Event Different from That Desired by the Offender), each of which deals with instances in which a particular outcome was not intended or desired by the person. This draft Article codifies these provisions together in a streamlined provision that prescribes that unintended consequences do not negate the requisite culpability for an offense.

*Relation to Sharia law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 404. Mistaken Belief Consistent with a Different Offense**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 19 (Attempt to Commit an Impossible Offense) and 28 (Mistake of Fact)

**Comment:**

*Generally.* This Article addresses situations where a person has a mistaken belief that negates the culpability required for the offense, but is not entitled to a defense under draft Article 204 (Ignorance or Mistake Negating Required Culpability) because even under his mistaken view, he was committing another offense. In those cases, culpability as to the committed offense will be imputed based on the person’s culpability as to the intended offense.

This Article provides that mistake or ignorance is not a defense if the defendant who did commit the lesser offense mistakenly thought he was committing a similar or more serious offense. In other words, the defendant’s culpability as to the greater offense will be imputed to make him liable for the lesser offense. Where the defendant would be guilty of another offense of a lower grade had the situation been as he supposed, attempt liability for the less serious

offense may be appropriate under draft Article 901 (Attempt).

The following example illustrates how a person's culpability may be imputed based on his mistaken belief of committing an offense of a higher grade:

*Example 1:* A gives B an amount of poison, believing the amount is sufficient to kill B, a Class A felony under Article 3101 (Murder in the First Degree). However, the amount of poison is only sufficient to cause serious bodily injury, a Class [D] felony under Article 3202 (Assault), Section (b)(1)(A). C's knowledge as to D's likelihood of dying, although mistaken, is imputed in his prosecution for the Class [D] felony. C may not bring forth evidence of his mistake since he is barred from the defense provided in Article 204 (Ignorance or Mistake Negating Required Culpability).

The following example illustrates what happens when a person acts based on his mistaken belief of committing an offense of a lower grade:

*Example 2:* C places D in a shed as a prank and ties the door closed with string, believing that D will be able to break the string and escape within a few minutes. However, D is unable to break the string and remains trapped in the shed for two days. The grade of the Unlawful Restraint that C believed he was committing under Article 3402 is merely a Class [A] misdemeanor. Since that is a lesser offense than the harm actually caused by exposing the person to a risk of serious bodily injury (see Section (c)(2) of Article 3402) his culpability is not imputed to the greater harm and he is not liable for a Class D felony. However, C is still liable for committing the lesser offense.

*Relation to Current Law.* Article 404 corresponds to Sections 1 and 2 of Art. 28 (Mistake of Fact) of the Penal Code (1962). It also incorporates Section 2 of Penal Code (1962) Art. 19 (Attempt to Commit an Impossible Offense), which provides that an act is punishable as the offense actually committed, not the one intended, when "the act comprises the ingredients constituting a different offense." That same principle is reflected in this draft Article, with the limiting condition that the offense the person thought he or she was committing must be the same or a higher grade than the offense actually committed. This limiting condition is present in Section 2 of Penal Code (1962) Art. 77 (Offence Different From That Intended by Any of the Persons Participating). This prevents punishing someone for a crime that is harsher than the one he believed himself to be committing.

*Relation to Sharia law.* There is general support for the concept of mistaken belief in Sharia law. For example, Ahmed Fathi Bahnassi cites the example of a man who sleeps with a woman he thinks to be his wife, but is not. Because he made a mistake as to the woman's identity, he would not be punished for adultery.<sup>31</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 405. Definitions**

**Corresponding Current Provision(s):** None

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<sup>31</sup> Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 182 (M. Cherif Bassiouni, ed. 1982).

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **General Defenses**

### **Chapter 500. Justification Defenses**

#### **Introduction: Chapter 500. Justification Defenses**

The principles underlying the defenses contained in Chapters 500 (Justification Defenses), 600 (Excuse Defenses), and 700 (Nonexculpatory Defenses) are different in important ways. Justifications differ from excuses in that they relate to specific conduct, not specific persons (although sometimes, only particular persons are authorized to perform the justified conduct). In other words, an act is (or is not) justified, whereas an actor is (or is not) excused. Justifications exist independently of an actor's state of mind: in common-law legal terms, a justification negates the existence of an *actus reus*, not the existence of a *mens rea*.

This distinction is important because a defense's status as a justification, excuse, or nonexculpatory defense has significant legal implications. For example, when a person's conduct is justified (e.g., when an attacked person acts in self-defense) bystanders may assist that person, and it is unlawful to interfere with their assistance. On the other hand, when a person's conduct is excused (e.g., when a person mistakenly believes herself to be acting in self-defense), others may not assist, and may interfere with the person's conduct.

Moreover, the burdens of proof differ for justifications (which put the burden of proof on the prosecution) and excuses (which put the burden of proof on the defendant). This is sensible because justifications recognize conduct that is socially acceptable, and often desirable, and therefore the prosecution has not proved the commission of an offense if it has not ruled out any justifications for the conduct. Excuses and nonexculpatory defenses, by contrast, operate to prevent liability for harmful conduct that would ordinarily constitute an offense. Thus, the prosecution need not prove the nonexistence of these defenses. Additionally, evidence relevant to an excuse or nonexculpatory defense, like the defendant's culpable mental state, is frequently accessible only to the defendant. Therefore, it is sensible to shift the burden of persuasion to the defendant for excuse defenses.

#### **Comment on Article 501. Lesser Evil**

**Corresponding Provision(s):** Penal Code (1962) Art. 36 (State of Necessity), 303 (Cases Which Are Not Punishable).

**Comment:**

*Generally.* This provision ensures that conduct will not give rise to criminal liability where the conduct is objectively necessary to avoid a threatened harm even greater than that caused by the conduct itself. For example, an ambulance may exceed the speed limit or pass through a traffic light, or a person may destroy property to prevent the spread of a fire.

*Relation to Current Law.* Article 36 (State of Necessity) of the Penal Code (1962) justifies acts done in a “state of necessity,” and is fully incorporated into Article 501. Similarly, Penal Code (1962) Section 1 forbids punishment for acts done “by the necessity of saving himself or a near relative from a serious and unavoidable injury to liberty or honour.” This is incorporated here as well.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 502. Execution of a Public Duty**

**Corresponding Provision(s):** Provisional Constitution (2012) Arts. 126 (Ensuring Security of the Federal Republic of Somalia); Penal Code (1962) Art. 33 (Exercise of a Right or Performance of a Duty)

**Comment:**

*Generally.* This provision provides a justification for conduct explicitly allowed by a governmental institution with the lawful power to authorize the conduct. This draft Article incorporates the law governing public duties, rather than reiterating it. Section (a)(1) justifies conduct authorized by laws defining the powers and duties of public officers. Section (a)(2) provides a defense for conduct authorized by laws governing the execution of legal process. Section (a)(3) immunizes conduct sanctioned by a court or tribunal. Section (a)(4) is a catch-all provision justifying conduct authorized by other laws imposing public duties.

*Relation to Current Law.* Article 33 (Exercise of a Right or Performance of a Duty) of the Penal Code (1962) provides that acts that would otherwise be criminal are not so when properly and legally authorized, the same as in draft Article 502.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 503. Law Enforcement Authority**

**Corresponding Provision(s):** Provisional Constitution (2012) Art. 126 (Ensuring Security of the Federal Republic of Somalia); Penal Code (1962) Art. 35 (Lawful Use of Arms)

**Comment:**

*Generally.* This provision provides a justification for conduct—specifically, use of force—necessary to bring a person into lawful custody, or prevent a person’s escape from custody. This justification only available to law enforcement officers performing lawful arrests and maintaining lawful detentions, and persons summoned to assist those officers. Section (a)(2) places strict limitations on when deadly force may be used under this Article. Section (a)(3)

provides a limited mistake provision, allowing a person’s conduct that would be unlawful because of an invalid warrant to remain justified under this Article as long as the actor did not know the warrant was invalid. Section (b) sets requirements for use of force to prevent escape from detention, whether temporary or from correctional facilities.

*Relation to Current Law.* Art. 126 of the Provisional Constitution (2012) (Ensuring Security of the Federal Republic of Somalia) provides for military, intelligence, police, and prison forces to guarantee the peace in Somali and safety for its citizens. This draft Article allows them to use force to do so. Article 35 (Lawful Use of Arms) of Penal Code (1962) allows the use of force by law enforcement authorities. Article 503 incorporates that use of force when necessary for the performance of law enforcement duties.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 504. Conduct of Persons with Special Responsibility for Care, Discipline, of Safety of Others**

**Corresponding Provision(s):** Provisional Constitution (2012) Art. 29 (Children)

#### **Comment:**

*Generally.* This Article provides a justification for use of force by those charged with a special responsibility for others. This conduct—including parents’ or teachers’ authority to protect or discipline children; wardens’ authority to impose order on a prison population; and medical professionals’ need to administer care or restrain those posing a danger to others or themselves—might not otherwise fall within the scope of the justifications set out in this Chapter. Each part of the provision specifies the categories of person to whom it applies and the range of conduct allowed.

*Relation to Current Law.* While there is no corresponding provision in the Penal Code (1962), this provision recognizes that there are certain relationships where the limited use of force may be permitted.

The age of 18 in Section (a)(1)(A) corresponds to the age in the Provisional Constitution (2012), Art. 29, Section 8.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 505. Defense of Person**

**Corresponding Provision(s):** Provisional Constitution (2012) Arts. 13 (Right to Life), and 15 (Liberty and Security of the Person); Penal Code (1962) Art. 34 (Private Defence)

#### **Comment:**

*Generally.* This provision entitles a person to use force to protect herself or another person from physical harm. Section (a) authorizes general use of force. Section (b) limits the use of force in defense of another person, and creates an exception for use of force to resist arrest, including unlawful arrests. Section (c) sets forth the more limited circumstances in which

deadly force may be justified, which are the only circumstances justifying deadly force in Chapter 500 aside from the law enforcement authority justification in draft Article 503. Section (c) also provides rules as to when a person must retreat instead of using deadly force. Section (d) provides a justification for use of force to prevent another person from committing suicide or inflicting serious physical injury on himself.

*Relation to Current Law.* Provisional Constitution (2012) Art. 13 (Right to Life) and Art. 15 (Liberty and Security of the Person) guarantee the “right to life,” the “right to personal security,” and “right to physical integrity. This draft provision ensures that individuals have the ability to effectuate and maintain those rights.

Article 34 (Private Defence) of the Penal Code (1962) allows for proportional defense to the threat of “unlawful injury.” This draft provision incorporates that requirement as it applies to bodily injury (rather than injury to property) and articulates it more specifically.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 506. Defense of Property**

**Corresponding Provision(s):** Penal Code (1962) Art. 34 (Private Defence)

#### **Comment:**

*Generally.* This provision entitles the owner of property, or someone with a special relation to the owner, to use force to protect property from invasion, destruction, or theft. However, this authorization is limited by Sections (b) and (c). If it is reasonable to do so before using force under Section (a), Section (b) requires that a property owner first request that the aggressor cease interfering with the owner’s property. Section (c) specifies that a property owner can never use deadly force solely to protect property. However, if the aggressor also endangers the life of a person, deadly force might be justified under draft Article 505.

*Relation to Current Law.* Article 34 (Private Defence) of the Penal Code (1962) allows for proportional defense to the threat of “unlawful injury.” This draft provision incorporates that requirement and extrapolates upon it when the threat is to property.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 507. General Provisions Governing Justification Defenses**

**Corresponding Provision(s):** None

#### **Comment:**

*Generally.* This provision sets out several general rules applying to justification defenses. Section (a) creates a rule mandating the supremacy of more specific justifications over more general ones. This is because the more specific justifications set out in full the legislative determinations that have been made regarding liability for specific forms of conduct. To allow a more general provision to supersede or complement the more specific one would enable circumvention of the particular determinations the legislature has made regarding that conduct.

At the same time, Section (b) makes clear that conduct may relate to several justification rules at once—for example, an aggressor’s conduct may threaten both a person’s life and property. Where this is the case, the person may act according to the allowances of any relevant justification. In the above example, if the self-defense provision authorizes deadly force, the person may employ that level of force even though the defense of property provision, standing alone, would not allow it.

Section (c) notes that justified conduct, beyond merely being non-criminal, merits heightened legal status: one person may lawfully assist, and may not lawfully seek to impede, another’s justified conduct.

Section (d) covers situations where an actor causes the circumstances that give rise to the justification for his conduct.

Section (e) specifies that justified conduct could still give rise to criminal liability where the conduct causes injury, or creates a risk of injury, to innocent persons unconnected to the circumstances that make the conduct justified.

Section (f) provides that there is no civil liability for justified conduct against an aggressor.

*Relation to Current Law.* While there is no corresponding provision in the Penal Code (1962), this provision is necessary to explain the workings of Chapter 500 of the draft Penal Code.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 508. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 440 (Hurt)

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

Section (i)’s definition of “serious bodily injury” encompasses only the most grievous injuries short of death. For example, the loss of part of one’s earlobe constitutes bodily injury but not serious bodily injury. Similarly, it would include the loss of motor functions, loss of a limb or other appendage, disfigurement, mental disability, and serious scarring, excluding minor scars or damage to appendages.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

Section (a) defines “bodily injury.” This corresponds to the mention in Penal Code (1962) Art. 440 (Hurt) Section 1 of “hurt to another from which physical or mental illness results.”

The definition in Section (i) for “serious bodily injury” comes from Sections 2 and 3 of Art. 440 (Hurt) of the Penal Code (1962).

The definition of “incompetent person” in Section (f) corresponds to mentions of the mentally infirm throughout the Penal Code (1962). For example, see Art. 500 (Undue Influence on Persons Under Disability).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.



*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 600. Excuse Defenses**

### **Introduction: Chapter 600. Excuse Defenses**

While justifications relate to an individual's conduct, excuses relate to an individual's state of mind. An act is (or is not) justified, while an actor is (or is not) excused. Excuses exist independently of the conduct that occurred: in common-law legal terms, an excuse negates the existence of a *mens rea*, not the existence of an *actus reus*.

### **Comment on Article 601. Involuntary Act and Omission**

**Corresponding Provision(s):** Penal Code (1962) Arts. 26 (Accident or Force Majeure), and 27 (Physical Compulsion)

#### **Comment:**

*Generally.* This draft Article provides a defense for persons whose conduct would normally constitute an offense, but where the actor was unable to control his actions. The involuntary act defense in Section (a) is applicable in cases where the defendant's conduct is not the product of her effort or determination, as where the defendant is sleepwalking or suffers a seizure. This defense differs from the one in draft Article 602 (Insanity) in that the defendant's lack of control over his conduct at the time of the offense need not result from a mental illness or serious mental disorder. At the same time, in most cases addressed by draft Article 602 (Insanity), the defendant's impairment will not be so severe as to render his conduct completely involuntary. Section (b) provides a similar defense in cases where liability is based on an omission.

*Relation to Current Law.* The Penal Code (1962) excuses acts that occur as a result of force majeure (Art. 26) or physical compulsion (Art. 27), both of which would be considered involuntary under this draft provision.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 602. Insanity**

**Corresponding Provision(s):** Penal Code (1962) Arts. 50 (Total Mental Deficiency), 51 (Partial Mental Deficiency), and 58 (Deaf and Dumb Condition)

#### **Comment:**

*Generally.* This provision sets out a defense excusing persons who perform conduct constituting an offense, but do so under the influence of a mental disease or defect, making criminal liability inappropriate.

*Relation to Current Law.* The Penal Code (1962) Art. 50 (Total Mental Deficiency) excuses the actions of those who are totally mentally deficient. This provision incorporates that article. Article 58 (Deaf and Dumb Condition), however, is not incorporated because an

individual's actions should not be excused solely because the person is deaf and dumb if the person is not lacking in mental capacity. In addition, Art. 51 (Partial Mental Deficiency) is not incorporated in order to reflect the general principle that only those sufficiently lacking the requisite *mens rea* are excused. Note that the person's incapacity may nevertheless excuse the person from liability if it causes the person to satisfy any other provisions of Chapter 600.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 603. Involuntary Intoxication**

**Corresponding Provision(s):** Penal Code (1962) Art. 53 (Drunkenness Due to Accident or Force Majeure)

#### **Comment:**

*Generally.* This draft Article provides a defense for a person who commits an offense while under the influence of a state of intoxication that he did not voluntarily create. The elements of this defense are identical to the ones in draft Article 602 (Insanity) due to the similar effects mental diseases or defects and intoxicating substances can have on a person.

*Relation to Current Law.* The Penal Code (1962) Art. 53 (Drunkenness Due to Accident or Force Majeure) excuses an act done by a person who was intoxicated by accident or force majeure. That provision is incorporated into this draft Article. However, section 2 of Art. 53, governing partial intoxication, is not included in this draft Article to ensure that only those who are sufficiently lacking the requisite *mens rea* are excused.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 604. Immaturity and Youth**

**Corresponding Provision(s):** Penal Code (1962) Arts. 59 (Persons Under Fourteen Years of Age), and 60 (Persons Under Eighteen Years of Age)

#### **Comment:**

*Generally.* This provision creates a “defense” for persons whose immaturity prevents them from predicting the consequences of their conduct or understanding the wrongfulness of their conduct. Any person under the age of 18 who is found to be immature is automatically transferred to juvenile court, subject to enumerated exceptions found throughout current law. Section (b)(1) establishes an irrebuttable presumption that a person less than 14 years of age is conclusively immature, while section (b)(2) establishes a rebuttable presumption of immaturity for persons between age 14 and 18.

*Relation to Current Law.* Penal Code (1962) Art. 59 (Persons Under Fourteen Years of Age) excuses the actions of those who are under the age of 14. This is incorporated into the irrebuttable presumption in Section (b)(1). Penal Code (1962) Art. 60 (Persons Under Eighteen Years of Age) establishes lesser penalties for those who are between the ages of 14 and 18. While this is not explicitly incorporated, it is reflected in the rebuttable presumption for those

within that age group in Section (b)(2). This allows for full liability where the young offender is shown to be fully culpable, and full excuse where the offender is shown to lack the necessary culpability.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 605. Duress**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article defines a defense for persons who were forced to perform a criminal act under coercion that an ordinary person would not be able to resist.

*Relation to Current Law.* There is no corresponding provision in existing law; however, this draft provision is necessary to ensure that those most responsible for a criminal act, as opposed to those who are coerced to perform criminal acts on the behalf of others, are held responsible.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 606. Ignorance Due to Unavailable Law**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This provision upholds the legality principle of criminal law, which allows criminal liability only where a written statement of the law's commands exists prior to the alleged violation of those commands. While ignorance of the law is generally not an excuse, fairness dictates that citizens not be punished for conduct if the government provided inadequate notice of the conduct's prohibition. The rationale for criminal liability does not apply where the defendant did not know, and could not reasonably have known, that his conduct was criminal. Section (c) requires that the defendant not know that the conduct in question is criminal. This prevents exploitation of the law's unavailability by persons for whom that unavailability was irrelevant.

*Relation to Current Law.* While Article 606 has no corresponding provision in the Penal Code (1962), this provision is necessary to ensure that individuals are not punished for acts that they could not have known were criminal at the time they were committed.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 607. Reliance Upon Official Misstatement of Law**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* Article 607, like Article 606 (Ignorance Due to Unavailable Law) upholds the legality principle, but instead of applying in the case where no statement of the law is available, it applies where an existing official statement of the law is inaccurate, and a person reasonably relies on that inaccurate statement.

*Relation to Current Law.* While Article 607 has no corresponding provision in the Penal Code (1962), this provision is necessary to ensure that individuals are not punished for acts that they were led, due to an official misstatement, to believe were not criminal at the time they were committed.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 608. Reasonable Mistake of Law Unavoidable by Due Diligence**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article codifies a defense for persons who, even after affirmatively seeking in good faith to determine the law's requirements, make a reasonable mistake as to those requirements, and unwittingly engage in prohibited conduct. The defense is allowed only if the offender exercised due diligence in an effort to determine the law's requirements, and only if the subsequent mistake is reasonable. There is little likelihood that the defense would be subject to abuse, as the defendant has the burden of proving by a preponderance of the evidence that he exercised due diligence, that he was honestly mistaken, and that the mistake was reasonable. Note that an honest mistake, under this Article, cannot be reasonable if the defendant failed to pursue all reasonable means available to him to discover whether his conduct would be criminal.

*Relation to Current Law.* While Article 608 has no corresponding provision in the Penal Code (1962), this provision is necessary to ensure that individuals are not punished for acts that they reasonably believed were not criminal at the time they were committed.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 609. Mistake as to a Justification**

**Corresponding Provision(s):** Penal Code (1962) Arts. 33 (Exercise of a Right or Performance of a Duty), 34 (Private Defense), 35 (Lawful Use of Arm), 36 (State of Necessity), and 38 (Presumed Circumstances Excluding Punishment)

**Comment:**

*Generally.* This draft Article establishes an excuse defense for actors who engage in conduct under the mistaken belief that the conduct is legally justified in their situation. Because justification defense are defined objectively in Chapter 500, an actor who believes that circumstances exist that would give rise to a justification defense does not receive a justification

defense if his conduct is not actually justified under the circumstances as they exist. Instead, he may have an excuse defense under this Article. The rationale behind this excuse is that an actor who reasonably thinks his conduct is justified is not blameworthy for acting in what would be a justified manner under the circumstances as he believes them to be.

Article 609 requires that the person's conduct satisfy the requirements of a justification defense, as defined in Chapter 500, under the circumstances as he believes them to be. Thus this provision does not apply in cases where a person is mistaken about his conduct being justified even if the circumstances were as he supposed. Only mistakes as to the facts of a situation qualify for this defense. If the person is mistaken as to what the law is regarding justification defenses, he would still not fulfill the requirements of a valid justification and would not satisfy the requirements of mistake as to a justification excuse defense.

The following example illustrates when a person's mistake of fact may permit this defense:

*Example 1:* A perceives that B is about to shoot him with a gun. In fact, B is holding a water pistol. A shoots B to defend himself against a threat of deadly force. Since A was mistaken about the fact of whether B was about to shoot him, A may receive a defense under Article 609 if he fulfills the requirements of the defense under Section (a)(2).

The following example illustrates when a person's mistake of law may not receive this defense:

*Example 2:* C perceives that D is about to slap him. C mistakenly believes that he is justified in shooting D to defend himself contrary to the restrictions on the use of force risking death or serious bodily injury in the defense of person justification defense. Regardless of this mistake, the law is as written and thus C would not satisfy the requirements of the justification. Therefore, C cannot receive the excuse defense provided in this Article.

The purpose of the requirements in Section (a)(2) is to deny the excuse to actors who, despite their mistaken justification, are nonetheless blameworthy as to the offense charged.

Section (a)(2)(A) and (a)(2)(B) provide two alternative culpability requirements. Section (a)(2)(A) permits the defense when the person's mistake is non-negligent. Thus a faultless mistake would always permit this defense. Section (a)(2)(B) permits the defense—even though the mistake is culpable—when the mistake is less culpable than the culpability required by certain elements of the offense charged. This effectively creates a sliding scale that reduces a person's liability to a lower offense that matches the culpability of his mistake, or eliminates liability if no such lower offense exists.

The following example illustrates the sliding scale effect of Section (a)(2)(B):

*Example 3:* E perceives that F is about to shoot him with a gun. In fact, F is only holding a water pistol made of bright yellow plastic. E intentionally shoots F to defend himself against a threat of deadly force. E's mistake was reckless, because F's yellow plastic water pistol clearly was not a real gun. E thus has a defense against the charge of murder despite having intentionally killed F. His mistake was less culpable than the intent or knowledge requirements for the result element of murder (causing death).

However, E would still be liable for manslaughter under draft Article 3103 since that offense only requires recklessness as to causing death

Section (b) provides a related defense for persons who carry out unlawful orders of their superiors, but only in situations where the law does not permit the persons to question those orders. A person who knows an order is unlawful and is permitted to question it, but fails to do so, cannot be absolved of liability for the unlawful conduct.

*Relation to Current Law.* Penal Code (1962) Art. 38 (Presumed Circumstances Excluding Punishment) excuses actions that the person believed were justified under the circumstances, as is the case with this draft provision. To receive a justification defense, a party must meet the requirements specified in Chapter 500. Thus, to the extent that a person commits acts described in Art. 33 (Exercise of a Right or Performance of a Duty), Art. 34 (Private Defence), Art. 35 (Lawful Use of Arm), and Art. 36 (State of Necessity) but does not satisfy a justification defense in Chapter 500, the person nonetheless receives a defense under this draft Article if he or she meets its requirements.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 610. General Provisions Governing Excuse Defenses**

**Corresponding Provision(s):** Penal Code (1962) Arts. 49 (Voluntarily Produced Incapacity of Understanding or Volition), and 52 (Conditions of Emotion or Passion)

#### **Comment:**

*Generally.* This draft Article sets out general rules relating to all excuse defenses. These rules are distinctly relevant to excuse defenses and may be articulated only in a Code that distinguishes excuses from other defenses.

Section (a) makes clear that excuses differ from justifications; justified conduct may be assisted and may not be resisted. Neither of these collateral rules applies where a person is excused, but not justified. This is because it is not the act that is excused, but the actor; the act is still considered improper and socially undesirable.

Section (b) states that a person's excuse remains valid even if he created the conditions giving rise to the excuse, unless he did so with the same level of culpability required by the offense. In that situation, the basis for criminal liability is not the conduct causing the offense (because that conduct is excused), but the actor's earlier conduct in causing the conditions of his excuse. For example, a young person may join a gang knowing that it frequently engages in criminal activity and, indeed, has its own "laws" requiring participation in criminal activity. Later, the person may be forced by other gang members at gunpoint to commit a crime he would otherwise not commit. Though the person might normally be eligible for a duress excuse because he was compelled to commit the crime, the fact that he knew about the gang's customs and the likelihood that he would be forced into criminal activity vitiates the rationale behind the defense and supports holding the gang member liable for his offense. This person, who knew of the gang's tendencies, could be held liable for an offense requiring knowledge; a person who was reckless as to the gang's involvement in crime would, under Section (b), be eligible for liability only for offenses requiring recklessness.

Generally, one of three culpability rules is applied to a person's conduct creating an excusing condition: a general culpability rule of negligence, a general culpability rule of recklessness, or a culpability rule tracking the culpability requirement for the (excused) offense ultimately committed. Section (b)(2) follows the third rule, as it seems appropriate to require the culpability normally required by the offense committed, rather than an alternative, possibly conflicting requirement. A contrary rule would effectively impute criminal responsibility to persons based on an actual level of culpability lower than that usually required for the offense in question. However, as Section (b)(3) provides, the defendant may also have a defense for that earlier conduct, notwithstanding the fact that he had the requisite culpability when he performed that conduct. For example, the gang member in the example above might have an immaturity defense, or might have a defense of duress if he were forced against his will to join the gang in the first place.

Section (c) states that a mistaken belief in an excuse, unlike a mistaken belief in a justification, cannot be a defense to criminal liability. While justifications relate to the context and circumstances of an actor's conduct, excuses relate to whether the actor suffers from a disability. The actor's own erroneous belief that such a disability exists (e.g., "I thought I was insane") is not relevant to a determination of criminal liability.

Section (d) states that the defendant has the burden of proving an excuse defense by a preponderance of the evidence.

*Relation to Current Law.* Penal Code (1962) Art. 49 (Voluntarily Produced Incapacity of Understanding or Volition) provides that those who bring about the circumstances necessary to excuse their actions will not be excused, as provided in Section (b). Penal Code (1962) Art. 52 (Conditions of Emotion or Passion) denies relief for those who act with emotion or passion, and while this is not reflected in the text of the provision, the omission of passion as an excuse has the same effect.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 611. Definitions**

**Corresponding Current Provision(s):** None

### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 700. Nonexculpatory Defenses**

### **Introduction: Chapter 700. Nonexculpatory Defenses**

Nonexculpatory defenses represent bars to prosecution that apply even when both the *mens rea* and *actus reus* requirements are met. This Chapter lays out numerous provisions where illicit conduct that is neither justified nor excused cannot be prosecuted. These nonexculpatory defenses serve as limits on prosecutorial power.

### **Comment on Article 701. Prosecution Barred if Not Commenced Within Time Limitation Period**

**Corresponding Provision(s):** Penal Code (1962) Art. 12

**Comment:**

*Generally.* This draft Article sets time limitations for bringing prosecutions and provides rules governing the operation of the limitations. Time limitations encourage prompt investigation of crimes and prevent stale prosecutions. This goal must be balanced against the goal of prosecuting blameworthy offenders, especially those who have committed serious crimes.

Section (a) provides different time limitations for Class A felonies, other felonies, and misdemeanors and violations. This reflects the balance described above by allowing a greater opportunity for more blameworthy offenders to be brought to justice. Section (b) provides for extended periods of limitation in situations where it would be unjust to limit prosecution strictly under Section (a). Section (c) provides that the limitation periods under Section (a) may be tolled, or “paused,” when a defendant’s wrongful conduct causes the commencement of prosecution to be delayed. A defendant should not get the benefit of a defense under this Article if he is responsible for pushing his own prosecution beyond the end of the relevant limitation period. Sections (d)–(f) states when a limitation period begins and ends.

*Relation to Current Law.* While Article 701 has no corresponding provisions in the Penal Code (1962), this provision is necessary to prevent prosecutions from occurring long after the crime either occurred or was discovered. This is necessary because it prevents prosecutors from using their power to go after those who have committed crimes long ago, and also ensures that prosecutions occur within a reasonable period of time, when evidence is most readily available.

Penal Code (1962) Art. 12 requires the period of calculation not include the initial day. This draft Code codifies this requirement at Section (d).

Penal Code (1962) Art. 12 also requires the period be calculated by the ordinary calendar. This draft Code does not specify a calendar.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 702. Entrapment**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article sets out a defense covering cases where the defendant likely would not have committed the crime had law enforcement not induced him to do so. This defense is meant to curb excessively coercive or manipulative police conduct. It does not,



however, suggest a lack of blameworthiness in the defendant, who has committed a crime under circumstances that would not provide a truly exculpatory defense, like duress.

*Relation to Current Law.* While this Article has no corresponding provisions in the Penal Code (1962), this provision is necessary to ensure that persons are not punished for conduct that is coerced by law enforcement. This helps limit the improper use of power by the police.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 703. Unfitness to Plead, Stand Trial, or Be Sentenced**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article sets the fitness standard under which defendant will not be required to face criminal adjudication. This defense ensures that all criminal defendants will have the mental capacity to aid in their own defense. Without this guarantee, a mentally unfit defendant might be wrongfully convicted or improperly sentenced due his inability to present the best evidence or arguments in his favor.

*Relation to Current Law.* While this Article has no corresponding provisions in the Penal Code (1962), this provision is necessary to ensure that those who are unfit to plead, stand trial, or be sentenced do not face situations that they are unfit to handle.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 704. Prior Prosecution for Same Offense as Bar to Present Prosecution**

**Corresponding Provision(s):** None.

**Comment:**

*Generally.* This draft Article sets out the rules governing the effect of former prosecutions for the same offense.

*Relation to Current Law.* While this Article has no corresponding provisions in the Penal Code (1962), this provision is necessary to prevent individuals from being prosecuted for the same offense multiple times.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 705. Prior Prosecution for Different Offense as a Bar to Present Prosecution**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article sets out rules governing the effect of former prosecutions on a criminal prosecution for a different offense. This provision requires, in certain circumstances, that different crimes arising out of the same conduct be tried together. Article 705 protects defendants by preventing the prosecution from relitigating factual issues decided in the defendant's favor at a previous trial.

*Relation to Current Law.* This Article has no corresponding provisions in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 706. Prior Prosecution by Another Jurisdiction as a Bar to Present Prosecution**

**Corresponding Provision(s):** Penal Code (1962) Art. 9 (Cases in which Criminal Proceedings Cannot Be Instituted) and 10 (Recognition of Foreign Penal Judgments).

**Comment:**

*Generally.* This draft Article sets out the rules governing the effect of former prosecutions from different jurisdictions. Like Article 705 (Prior Prosecution for Same Offense as Bar to Present Prosecution) this provision protects defendants from multiple prosecutions for the same acts. The rationale for this defense applies even though the prosecution occurred in a different jurisdiction.

*Relation to Current Law.* Penal Code (1962) Arts. 9 (Cases in which Criminal Proceedings Cannot Be Instituted) bars prosecution in Somalia where the person has already been convicted and sentenced abroad in certain circumstances.

Penal Code (1962) Art. 10 (Recognition of Foreign Penal Judgments) has not been fully incorporated here.<sup>32</sup>

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 707. Prosecution Not Barred Where Former Prosecution Was Before a Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article excludes various cases from the bars in draft Articles 704 through 706, where former prosecutions should not act as a bar to subsequent prosecutions, because either: (1) the original court lacked jurisdiction to hear the case; (2) the defendant surreptitiously obtained the prior prosecution with the intent of avoiding a harsher sentence; or (3) the prior conviction was invalidated on due process grounds unrelated to the merits.

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<sup>32</sup> **Query:** This is currently under discussion by the Somalis.

*Relation to Current Law.* While this Article has no corresponding provisions in the Penal Code (1962), this provision is necessary to ensure that improper prosecutions do not bar subsequent legal ones.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 708. General Provisions Governing Nonexculpatory Defenses**

**Corresponding Provision(s):** None

**Comment:**

*Generally.* This draft Article describes the rules that govern the operation of the nonexculpatory defenses set out in Chapter 700. Conduct subject to a nonexculpatory defense (such as conduct by one who has been entrapped) may be resisted, whereas justified conduct (such as the use of force in self-defense) may not. A person who is mistaken as to a nonexculpatory defense—who, for example, thinks she has been entrapped by the police when she has not—is not entitled to any defense

Section (c) provides a general rule that the defendant must prove all nonexculpatory defenses by a preponderance of the evidence. These defenses are not based on a judgment that the underlying conduct is not harmful, or that the actor is not blameworthy. They apply in situations involving conduct ordinarily subject to liability, but where some alternative social interest is deemed to override the assessment of criminal liability. Because these defenses do not exculpate the defendant, the burden should be on the defendant to prove that one of them applies. Moreover, this burden should apply uniformly to all exculpatory defenses.

Section (d) specifies that, unless expressly provided otherwise, nonexculpatory defenses are to be ruled on by the court rather than the jury. As noted above, these defenses do not involve determinations of guilt or moral blame, and accordingly do not demand jury resolution. Resolution by the court will also be more expedient and may render unnecessary a full trial of the facts.

*Relation to Current Law.* While this Article has no corresponding provisions in the Penal Code (1962), this provision is necessary to outline the way by which the nonexculpatory defenses provided in this Chapter function.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 709. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 240 (Definition).

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962). It also codifies Penal Code (1962) Art. 240 (Definition) Sections 1 and 2, which define “public officer” and “a person entrusted with a public service.”

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 800. Criminal Liability of Organizations and Other Non-Human Entities**

### **Introduction. Chapter 800**

This draft Chapter sets out the liability for corporations and other non-human entities, as well as individuals acting on behalf of such organizations. Draft Article 801 establishes liability for organizations. Draft Article 802 establishes the parameters of criminal liability for individuals acting on behalf of an organization.

### **Comment on Article 801. Criminal Liability of Organizations**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This draft Article prescribes the circumstances under which a corporation or other non-human entity may be held criminally liable for its actions. Criminal liability is imposed on organizations in certain circumstances to deter their agents from violating the law or failing to perform a legal duty. The draft Chapter uses the term “organizations,” because unincorporated associations should merit criminal liability to the same extent as corporations, since many associations often resemble corporations in every respect except for the fact they have not formally incorporated. Thus, the goal of deterring criminal conduct and punishing collective criminal enterprise is equally present in unincorporated associations, business entities, and corporations.

Section (a) provides three situations that result in an organization’s criminal liability. Section (a)(1) imposes liability on an organization when it fails to perform a specific duty imposed on it by law. For instance, if a company fails to take proper precautions when disposing of toxic waste, and thereby recklessly endangers members of the public, it would be criminally liable under draft Article 3204 (Recklessly Endangering Another Person).

Section (a)(2) imposes liability on the organization when criminal conduct is engaged in, solicited, requested, commanded, authorized, or recklessly tolerated by the board of directors or high managerial officers. However, this provision restricts such liability to instances in which such officers do so in the scope of their employment and on behalf of the organization. For instance, if the Chief Financial Officer of a corporation solicits illegal money laundering services in order to raise capital for the corporation, in such a scenario, the corporation is liable for that offense.

Section (a)(3) applies to criminal conduct by any employee or agent of the organization while acting within the scope of their employment or agency on behalf of the

organization. However, Section (a)(3) restricts liability to only misdemeanors and violations for which the law clearly demonstrates intent to impose liability on an organization. It restricts liability to these circumstances to reduce excessive organizational liability for actions taken by any employee or agent who may not have supervisory authority, as compared to Section (a)(2), which applies to actions by the board of directors or a high managerial agent.

Section (b) makes clear that even if the conduct giving rise to liability under Section (a) was not permitted by the internal rules or regulations of the corporation, this provides no defense to criminal liability. For instance, in a scenario where the Chief Financial Officer of a corporation solicits illegal money laundering services, the fact that such conduct violates the corporation's own rules does not exempt the corporation from criminal liability.

*Relation to Current Law.* The Penal Code (1962) does not provide for corporate or non-human liability, but this draft Article is included in the draft code to prevent agents of corporations from engaging in conduct harmful to society by hiding behind a corporate veil. There is a strong public policy argument for holding organizations criminally liable for their actions. Irresponsible organizations have the capacity to do great harm to society and the environment. Imposing liability on organizations, which would result in criminal sanctions in the form of fines, can deter their agents from violating laws or failing to perform legal duties intended to protect society and the environment. Criminal liability for organizations holds particular importance for the Federal Republic of Somalia, where much of the economy is dependent on agriculture, which could be jeopardized by irresponsible organizational action or inaction.

*Relation to Sharia Law.* There is disagreement as to whether Sharia law traditionally recognizes legal rights, responsibilities or personalities of non-natural persons, such as partnerships or corporations.<sup>33</sup> However, the legal personality of the corporation has been recognized by the Islamic Fiqh Academy of the Organization of Islamic Conference (OIC) on the basis of the concept of sharikah musahamah.<sup>34</sup> Thus, the principles in this draft Article are supported by modern Islamic jurisprudence on non-human entities.<sup>35</sup>

Furthermore, Sharia law principles relating to vicarious liability also support this draft Article. For instance, it is generally held that "an employer may be civilly liable for the practices of his subordinates."<sup>36</sup> This principle can be expanded to cover criminal liability in the corporate and organizational setting. In addition, if the law grants organizations legal personality for business purposes, then it should also hold them legally responsible for their actions.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 802. Criminal Liability of an Individual for Organizational Conduct**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 33 (Exercise of a Right or Performance of a Duty)

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<sup>33</sup> IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATION: CORPORATIONS 80-81 (International Institute of Islamic Thought 1998).

<sup>34</sup> *Id.* at 122 (citing Resolution No. 7/1/65 adopted in the 7th session in May 1992).

<sup>35</sup> Even those Muslim jurists who disagree with justifying corporate personality on the basis of sharikat musahamah agree that other concepts, like wakalah (agency) and inan (partnerships), can serve to establish this personality. *Id.* at 175.

<sup>36</sup> Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 175 (M. Cherif Bassiouni, ed. 1982).

**Comment:**

*Generally.* This draft Article prevents individuals from escaping liability by virtue of having acted on behalf of an organization. Section (a) establishes that such individuals are legally responsible for his or her conduct, or conduct he or she caused to be performed, regardless of the fact that it was undertaken on behalf of an organization.

Section (b) provides that the punishments prescribed for individuals for a given offense will apply to individuals engaging in the same conduct on behalf of the organization with equal force, despite the fact that the prescribed punishment for an organization committing the same offense may be different, or even less severe. Accordingly, if three directors of a corporation's board engaged in fraud to inflate their earnings, both the corporation (under draft Article 801) and the officers themselves (under this section) would be criminally liable. This section thus ensures that individuals who commit offenses receive the same treatment, regardless of the particular reason why an offense is committed (i.e., an agency relationship with an organization).

Section (c) provides an exception to liability for following reasonable instructions of one's superior. Such conduct does not constitute the sort of blameworthy activity the draft code seeks to prohibit.

*Relation to Current Law.* Although current Somali law is mostly silent on individual liability for conduct on behalf of an organization, this draft Article is justified by similar public policy arguments discussed in the Comment on draft Article 801 (Criminal Liability of Organizations). Moreover, for this draft code to deter agents of organizations from acting or failing to act in a way that harms society and the environment, such agents cannot be allowed to escape liability by virtue of having acted on behalf of a corporation or association.

Section (c) incorporates Art. 33 (Exercise of a Right or Performance of a Duty) of the Penal Code (1962), which precludes liability when the law does not allow the person to question an "order" or when the person believes "due to justifiable mistake" that he was obeying a lawful order. This section streamlines both of those requirements and limits the exemption from liability to a person's following "reasonable" instructions of his or her superiors. This language avoids the possibility that a person will escape liability when he or she should have considered the implications, unlawfulness, or potential harm, of unreasonable instructions.

*Relation to Sharia Law.* A basic principle of Sharia law is that "a person is totally responsible for his actions—a responsibility brought upon him by his reason, his will, inclinations and choice."<sup>37</sup> Many jurists base this principle of individual responsibility on Qur'an 2:134 "[U]nto them shall be accounted what they have earned, and unto you, what you have earned."<sup>38</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 803. Definitions****Corresponding Current Provision(s):** None**Comment:**

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<sup>37</sup> Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 172 (M. Cherif Bassiouni, ed. 1982).

<sup>38</sup> *Qur'an* 2:134 (Muhammad Asad, trans.).

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Inchoate Offenses**

### **Chapter 900. Inchoate Offenses**

#### **Introduction: Chapter 900**

This draft Chapter defines the requirements for imposing criminal liability for offenses in the initial preparation stage or incomplete form, including criminal attempt, criminal solicitation, and criminal conspiracy. This Chapter also provides defenses to these inchoate offenses, including: (1) where the defendant is a victim of the offense; (2) where his or her conduct is inevitably incident to the offense's commission; or (3) where the defendant voluntarily renounces his or her criminal purpose and prevents the inchoate offense in which he or she participated from becoming a completed offense. Draft Article 908 of this Chapter establishes the separate, but related, offense for the possession of instruments of crime.

#### **Comment on Article 901. Criminal Attempt**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 17 (Crimes Attempted), and 19 (Attempt to Commit an Impossible Offense).

#### **Comment:**

*Generally.* Draft Article 901 defines the requirements for liability for an attempt to commit an offense. Attempts are subject to liability because, like completed offenses, they involve a culpable mental state and overt conduct. Liability for attempt is imposed when a person, acting with the culpability required for the underlying offense, intentionally engages in conduct constituting a substantial step toward the commission of the offense. However, attempts differ from completed offenses in that, due either to fortuity of circumstance or the actor's failure to complete the offense, the offense's resulting harm does not occur, or it occurs to a lesser extent.

As defined in draft Article 901(a), attempt liability requires that a person engage in some conduct that would constitute a "substantial step toward commission of the offense." Attempt liability, like criminal liability generally, requires an overt act. The general requirement of an act ensures that the criminal law does not punish mere thoughts. The specific requirement of a "substantial step" ensures that the law also does not punish mere preparation, where the actor still has an opportunity to recant and abandon his or her criminal plan. This way, only would-be criminals who have shown a certain degree of steadfast criminal intent are subject to liability. The performance of an overt act amounting to a substantial step also supplies evidence that the actor did, in fact, have a culpable mental state, and has demonstrated his or her willingness to act according to that culpable mental state.

Section (a)(2) imposes liability only for acts that constitute an offense. If the believes he is attempting to commit an offense but the actual offense cannot occur, he is not liable under this draft Article. This eliminates attempt liability for impossible results. For example, a person is not liable for an attempt if he thinks he is buying drugs, but in fact he is not. If the relevant conduct includes a substantial step for a different crime that is not impossible, however, liability can attach under this draft Article.

Section (b) helps delineate the requirements for a substantial step. Consonant with Section (a), Section (b)(1) outlines that an overt act will not be considered a substantial step unless it is corroborative of the defendant's mental state to commit the substantive offense. Section (b)(2) establishes that a person satisfies the substantial step requirement if the person believes that he or she has completed the conduct constituting an offense, or believes that he or she has committed the last act needed to cause the result element of the underlying substantive offense. Section (b)(2) does not alter the standard of Section (b)(1), but merely establishes a bright-line rule that performing all the requisite conduct toward committing a substantive offense will always meet the substantial step test.

The following example illustrates when conduct may be considered a substantial step so as to impose liability for criminal attempt:

*Example:* A intends to kill B. Knowing B's route home after work, A lies in wait for B with a gun on a deserted street. B takes a different route home, and A is apprehended by a police officer that notices him lurking in an alley with a gun. Lying in wait for a contemplated victim constitutes a substantial step when corroborative of the person's purpose to complete the offense. A's waiting along B's known route home with a deadly weapon is corroborative of A's intent to murder B, as is his possession of a gun in circumstances indicative of such intent. Thus, A is liable for attempted murder.

Articles 17 (Crimes Attempted) and 19 (Attempt to Commit an Impossible Offense). Draft Article 901, like current Art. 17, imposes liability for culpable overt acts even if the event intended is not completed. The principle of Article 19, that there is an impossibility defense to attempt liability, is codified here in Section (a)(2).

*Relation to Sharia Law.* Sharia law does not impose attempt liability in the case of *hadd* offenses or intentional homicide and assault. Courts may, however, impose discretionary punishment (*ta'zir*) on persons whose conduct would, in general, conform to criminal attempt as that offense is defined in this Chapter.<sup>39</sup> Thus, draft Article 901 is in conformity with Sharia law both in its imposition of liability for criminal attempt and in its reduction by one grade of the punishment for attempt liability (see the comment to draft Article 906). The requirement of section (a)(1) that the person act "with the culpability required for commission of the offense" ensures that the person is punished only if he has the blameworthy state of mind required for the commission of the underlying offense.

Some scholars, like 'Abd al-Qadir 'Oudah, have found authority for the "substantial step"

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<sup>39</sup> Riyadh Maydani, "Uqubat: Penal Law," in *Law in the Middle East: Origin and Development of Islamic Law* 226 (Majid Khadduri & Herbert J. Liebesny eds., 1955) (citing, Ibn Tamiyya and Abu Yusuf); 'Abd al-Qadir 'Oudah, *Criminal Law of Islam (Kitab al-Tashri al-jinai al-Islam)*, volume 2, 45 & 180; See generally, Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*.



requirement in section (a)(2) in the *hadith* literature.<sup>40</sup> For example, scholars cite the Prophet's teaching that "Allah has forgiven the people belonging to my Ummah for the notions coming into their minds unless they utter them or put them into practice."<sup>41</sup> Mere preparation is not punishable under this draft Article or Sharia law.

Some scholars of Sharia law claim it is improper to punish attempt, because the law does not define attempt liability with sufficient precision.<sup>42</sup> Section (b)(1) addresses this concern by requiring that conduct be "strongly corroborative of the person's purpose to complete the offense" to constitute a "substantial step" within the meaning of Section (a). Also, Section (b)(2) describes seven kinds of conduct that are always sufficient to constitute a "substantial step" so long as they are strongly corroborative of the person's purpose to complete the offense.

The general analysis in this comment with regard to the jurisprudential basis for attempt liability under Sharia law applies to the other inchoate offenses defined in this draft Chapter.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 902. Criminal Solicitation**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 71 (Punishment for Those Who Participate in an Offense), 74 (Participation in Crimes Committed with Culpa), 230 (Instigation to Commit Any of the Crimes Referred to in Chapters I and II); 231 (Public Instigation and Extolling Crimes); 320 (Instigation to Delinquency), and 321 (Instigation to Disobey the Laws).

#### **Comment:**

*Generally.* Draft Article 902 imposes liability on a person who solicits another person to commit an offense. The offense of solicitation recognizes that a person who intends to promote an offense, and is willing to instigate such conduct, merits criminal liability. The criminal solicitor thus must act with the intention required for the underlying offense. The independent act of commanding, encouraging, or requesting another person to commit the offense takes the place of the substantial step towards commission of the offense required for attempt liability under draft Article 901 or the conduct towards the objective of the conspiracy required for conspiracy liability under draft Article 903. The offense of solicitation also takes into account the additional danger of group criminality that arises when a person solicits another to commit an offense.

Section (b) makes clear that a person need not actually communicate with another to be held liable for solicitation, provided the person's conduct is designed to effect that communication. The person's endeavor to communicate his criminal intentions makes his culpability clear; it does not matter that, by chance, the communication was never received. For example, under Section (b), a person sending a letter soliciting another to commit murder would not escape liability simply because the letter was not received. This approach has the benefit of

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<sup>40</sup> Dr. Anwarullah, *Criminal Law of Islam* 14-15 (Islamic Da'wah, Centre 1995); *See also* 'Abd al-Qadir 'Oudah, *Criminal Law of Islam (Kitab al-Tashri al-jinai al-Islam)*, vol. 2, 44 (endorsing purpose as the proper mens rea for attempt).

<sup>41</sup> *Id.*

<sup>42</sup> Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, 120 (quoting the Qu'ran, Surah 17, Verse 15: "Nor would We visit with our wrath until we had sent a messenger.")

avoiding the need for, or possibility of, an offense for “attempted solicitation of [X] offense,” because the person will satisfy the requirements for criminal solicitation, regardless of whether the communication was received.

*Relation to Current Law.* The Penal Code (1962) establishes liability for any participants in a crime under Arts. 71 (Punishment for Those Who Participate in an Offense) and 74 (Participation in Crimes Committed with Culpa). Moreover, the Penal Code (1962) specifically describes culpability for “instigation” in Arts. 230 (Instigation to Commit Any of the Crimes Referred to in Chapters I and II); 231 (Public Instigation and Extolling Crimes). Draft Article 902 also incorporates current Articles 320 (Instigation to Delinquency) and 321 (Instigation to Disobey the Laws), which both concern instigation of another to violate laws of public order, as soliciting another to commit any offense is a crime under this draft Article. The grading and sentencing provisions of current Articles 320 and 321 are not included here, as grading is addressed in draft Article 907.

*Relation to Sharia Law.* See the Comment on draft Article 901.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 903. Criminal Conspiracy**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 76 (Agreement to Commit an Offense: Instigation), 232 (Political Conspiracy by Agreement); 233 (Political Conspiracy by Association), 235 (Conspiracy: Exemption from Punishment), 236 (Armed Group: Exemption from Punishment), and 322 (Association for Purpose of Committing Crimes).

#### **Comment:**

*Generally.* Draft Article 903 establishes liability for the offense of conspiracy, which is committed when two or more persons agree to commit an offense and any one of them commits an overt act toward the underlying substantive offense with the purpose of promoting or facilitating its commission. Conspiracy liability, like attempt liability, requires more than mere intent to commit a crime; an “overt act” in furtherance of the conspiracy is also necessary. Conspiracy differs from other inchoate offenses in that collective criminal enterprises are considered harmful in and of themselves, beyond the fact that they may also represent unsuccessful efforts to commit other substantive offenses. Therefore, culpably agreeing to commit an offense, coupled with any conduct towards the objective of the conspiracy, establishes both culpability and dangerousness, regardless of whether the underlying substantive offense is ever committed. Like draft Article 901, this draft Article requires that a conspirator act with the intention required for the commission of the underlying offense as well as with the purpose of promoting or facilitating commission of the offense. In addition, all of the conspirators are held liable for the conduct of any one of them.

It is important to note the difference between conspiracy and complicity. Complicity is a doctrine of imputation, allowing for the imputation of one person’s conduct to another (to satisfy an element of the offense that otherwise would not be satisfied), while conspiracy is an inchoate, or “incomplete,” offense. An accomplice is liable for the underlying offense (through the mechanism of complicity), while a conspirator is liable for an inchoate form of the offense (conspiracy). One cannot be charged with conspiracy if the substantive crime is fully realized.

Section (b), consonant with the general principle that thought crimes are not to be

prosecuted, requires more than a mere agreement to initiate prosecution under this draft Article. If two individuals agree to commit a crime, one must nevertheless perform an overt act in furtherance of the conspiracy for either to be liable under this draft Article. For instance, if three people agree to rob a bank, and the next day one of them goes and buys face masks for them to wear during the robbery, all three men would be liable for conspiracy to commit the underlying substantive offense, since the one man took an overt act in furtherance of the conspiracy.

Section (c) is designed to punish criminal organizations in which many of the participants do not know each other. The following example illustrates when individuals unknown to each other may be held liable for the same conspiracy:

*Example:* A agrees with B (the ringleader) to commit the offense. Then, unbeknownst to A, B agrees with C to commit the same offense. A has not agreed to anything with C. However, if A could reasonably have expected that B would agree with another person to commit the same offense, Section (c) dictates that A be deemed to have agreed with C to commit that offense. As a result, A and C are liable as co-conspirators with B.

Section (d) simply recognizes that conspiracies cannot last forever. There are three ways a conspiracy may end. First, a conspiracy may achieve its objective. Second, law enforcement may “frustrate” a conspiracy by prosecuting its members or otherwise interfering and foiling the conspiracy. Third, a conspiracy may be abandoned by its members. Section (d) makes it clear that once a person has committed an offense under Section (a), conspiracy liability exists until either the conspiracy ends or the person withdraws from the conspiracy.

Section (e) imposes one of two requirements on a person who wishes to withdraw from a conspiracy. Such a person must inform all of his co-conspirators of his withdrawal, or must inform law enforcement authorities of the existence of the conspiracy and of his participation therein. Ordinarily, the withdrawal of one conspirator will provide law enforcement authorities with enough information to frustrate a conspiracy and prosecute its members. However, there may be cases where, due to the effect of Section (c), a person may effectively withdraw from a conspiracy, but he lacks sufficient information about co-conspirators and other aspects of the conspiracy to enable law enforcement to frustrate the conspiracy and prosecute its members. Despite these difficulties, the former conspirator’s withdrawal should be given full effect in these cases. To establish a rule to the contrary would be tantamount to punishing an actor for circumstances beyond his control.

Section (f) outlines the requirements for a single prosecution of multiple participants in a conspiracy. Joinder of criminal defendants may only occur if the individuals prosecuted jointly conspired together or were involved in two conspiracies that are so intertwined as to be considered one overarching enterprise.

*Relation to Current Law.* The Penal Code (1962) establishes liability for any participants in a crime under Arts. 71 (Punishment for Those Who Participate in an Offense) and 74 (Participation in Crimes Committed with Culpa). This draft Article also incorporates the principles of the Penal Code (1962) Art. 76 (Agreement to Commit and Offense: Instigation). The general principle that individual conspirators are individually liable for the offenses of their coconspirators, found in current Article 71, is incorporated here but fully fleshed out in draft Article 401 (Liability for the Conduct of Another). Current Article 76, which prohibits liability for mere agreements, is reflected in Section (a)(4) and Section (b) of this draft Article, which require the commission of an overt act for a conspiracy to exist

Section (e), which provides for withdrawal from a conspiracy, corresponds to current law Articles 235 (Conspiracy: Exemption from Punishment), and 236 (Armed Group: Exemption from Punishment).

Articles 233 (Political Conspiracy by Association) and 322 (Association for Purpose of Committing Crimes) of the Penal Code (1962) are reflected here because the grading of conspiracy under the Draft Code is determined by the grading of the substantive offense. See Draft Article 907.

*Relation to Sharia Law.* This draft Article is generally supported by Sharia law because, as ‘Abd al-Qadir ‘Oudah explains, jurists agree that conspiracy liability should attach only when an agreement is proven.<sup>43</sup> This draft Article respects this concern. As long as the other requirements of Section (a) are satisfied, Section (a)(2) imposes liability for both implicit and explicit agreements to commit an offense, if the prosecution proves the existence of an agreement to a practical certainty.

Section (c) expands on Sharia law’s requirement of a “meeting of the minds” for a punishable agreement in a manner that is consistent with the expansive view taken of conspiracy liability by Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 904. Unconvictable Confederate Not a Defense**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 72 (Causing A Person Not Liable or Not Punishable to Commit and Offence)

#### **Comment:**

*Generally.* Draft Article 904 makes clear that a person may not escape liability for conspiracy or solicitation solely because the co-conspirator or solicited person is not subject to prosecution or conviction for the same offense. One person’s blameworthiness for pursuing a criminal objective is not contingent on the status of any other person involved in the enterprise or endeavor. For example, where one member of a conspiracy manipulates or coerces another person who lacks the capacity to appreciate the criminality of his conduct, the manipulator should not escape liability merely because the confederate cannot be found criminally liable. Indeed, the manipulative coconspirator is arguably even more culpable in that situation. This is consistent with the unilateral-agreement rule for conspiracy. (See Commentary for draft Article 903). Solicitation is also subject to this draft Article, which makes clear that the solicitation is complete upon an attempt to communicate the solicitation, regardless of whether the communication is received, or whether the solicited person acts upon the defendant’s solicitation.

*Relation to Current Law.* This draft Article incorporates Penal Code (1962) Art. 72 (Causing A Person Not Liable or Not Punishable to Commit and Offence). The general language of Section (e), “or otherwise not subject to criminal sanction,” is included to ensure the breadth of draft Article 904 is commensurate with current Art. 72. The grading provision of current Art. 72, however, is not included in this draft Article because inchoate offenses are comprehensively graded in draft Article 907. Current Article 72 is also incorporated, more substantially, in draft Article 401 (Complicity).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

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<sup>43</sup> ‘Abd al-Qadir ‘Oudah, Criminal Law of Islam (*Kitab al-Tashri al-jinai al-Islam*), vol. 2, 57.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 905. Defense for Victims and for Conduct Inevitably Incident**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* Draft Article 905 provides a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense, or when his or her conduct is inevitably incident to its commission. Section (a) protects people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a “conspiracy” with the extortionist.

Section (b) covers situations where, because a person’s conduct is ancillary to the underlying crime, it is unclear whether the person should be held liable. For example, it is not clear whether the purchaser of stolen goods should be liable for conspiracy to traffic in stolen goods. Under Section (b), the legislature would still be free to decide on a case-by-case basis that such people should be subject to liability by writing the law defining the specific underlying offense to reflect that understanding.

The defense in Section (a) has been included because it seems fundamentally unjust to punish the victim of an offense, even if the victim satisfies the technical requirements for liability. The defense in Section (b) has been included because it is not clear that liability should be imposed upon a person whose conduct is ancillary to an underlying offense.

*Relation to Current Law.* The current Penal Code (1962) is silent on the issues addressed by draft Article 905. However, there is a strong public policy argument for providing a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense or his conduct is inevitably incident to its commission. For example, as stated, this defense would protect a person who agreed to pay money to an extortionist, thereby technically entering into a “conspiracy” with the extortionist. Because the person who pays the extortionist is more of a victim than a co-conspirator of the extortionist, he should not be criminally liable for his actions. This draft Article thus maintains the integrity of the criminal justice system by providing a defense for people who find themselves in such situations.

*Relation to Sharia Law.* This draft Article can be construed as a corollary to the “meeting of the minds” requirement mentioned in the commentary to draft Article 903 above. More specifically, where a person is a victim of the underlying offense, as in Section (a), or a person’s conduct is ancillary to the underlying crime, as in Section (b), the “meeting of the minds” requirement is not met.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 906. Defense for Renunciation Preventing Commission of the Offense**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 18 (Desistance and Repenting and Acting Upon Repentance)

**Comment:**

*Generally.* Draft Article 906 provides an affirmative defense for persons who, after committing an inchoate form of an offense, voluntarily renounce their criminal purpose and prevent the inchoate offense from becoming a completed offense. As Section (b) makes clear, however, renunciation is not “voluntary” when it is merely a response to a fear of being caught, or a tactical decision to pursue the crime in a different way, or at a different time. Under Section (c), the defendant would bear the burden of proving this defense by a preponderance of the evidence.

Although the renunciation defense may not be necessary to provide an incentive for an offender to stop his criminal conduct, since inchoate offenses are graded less seriously than completed offenses, it is still desirable to include such a provision because a person who voluntarily and completely renounces before completing the offense no longer evidences a willingness to commit the offense and is therefore no longer blameworthy or dangerous.

*Relation to Current Law.* Draft Article 906 substantially incorporates Penal Code (1962) Art. 18 (Desistance and Repenting and Acting Upon Repentance). Both aspects of current Article 18, desistance and prevention of the offense, are included in draft Article 906. The grading provision, however, is not included in this draft Article because inchoate offenses are comprehensively graded in draft Article 907.

*Relation to Sharia Law.* Sharia law supports a broad renunciation defense, whatever the actor’s motive, so long as the offense is not completed and none of the steps accomplished on the way to completion were crimes in and of themselves<sup>44</sup>. As ‘Abd al-Qadir ‘Oudah points out, this policy reflects the Quran’s interest in sparing those who renounce by repenting.<sup>45</sup> ‘Oudah also says that under Sharia law, to absolve the actor of liability, renunciation must be voluntary and complete.<sup>46</sup> Section (a) of this draft Article similarly requires that renunciation must be voluntary and complete, and Section (b) describes what makes renunciation voluntary and complete.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 907. Grading of Criminal Attempt, Solicitation and Conspiracy**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 18 (Desistance and Repenting and Acting Upon Repentance)

#### **Comment:**

*Generally.* Unlike many other Chapters in the draft Code, grading for the offenses defined in draft Chapter 900 is consolidated into a single draft Article. This format is used mainly for efficiency, but it also highlights what the offenses in this draft Chapter have in common, namely reduced liability in relation to the attempted, solicited, or conspired offense.

Draft Article 907 grades all inchoate offenses one grade lower than the offense attempted, solicited, or agreed to by coconspirators. This system relates the seriousness of the inchoate offense to that of the underlying offense, but reduces liability in recognition of the fact that the inchoate offense does not generate the resulting harm with which the underlying offense is

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<sup>44</sup> Dr. Anwarullah, *Criminal Law of Islam*, 14-15.

<sup>45</sup> ‘Abd al-Qadir ‘Oudah, *Criminal Law of Islam (Kitab al-Tashri al-jinai al-Islam)*, vol. 2, 47 (quoting the *Qu’ran* 5:34, “Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful.”).

<sup>46</sup> ‘Abd al-Qadir ‘Oudah, *Criminal Law of Islam (Kitab al-Tashri al-jinai al-Islam)*, vol. 2, 46.

concerned. Reduced liability for the incomplete offense also creates an incentive for an offender to stop short of the completed offense and thus promotes public safety.

*Relation to Current Law.* There is no consolidated provision of the current Penal Code (1962) that addresses grading of attempt offenses. For the public policy reasons explained above, attempts are to be graded one level lower than the completed offense. Section 2 of Art. 18 (Desistance and Repenting and Acting Upon Repentance) of the Penal Code (1962), which reduces the punishment for an attempted offense that is prevented, is consistent with this draft Article's approach, as is the rest of the Penal Code (1962).

Other individual provisions of the Penal Code (1962) provide for punishment that is one half that of the substantive offense. See, e.g., Section 2 of Art. 230 (Instigation to Commit Any of the Crimes Referred to in Chapters I and II) and Section 2 of 232 (Political Conspiracy by Agreement).

*Relation to Sharia Law.* In Sharia law, attempt, solicitation, and conspiracy are prescribed a lesser punishment than the intended offense since such crimes are both less dangerous and less reprehensible than the completed offense.<sup>47</sup> Al-Mawardi notes that Sharia law punishes attempts under *ta'zir*, including for conduct that would normally be punished as a *hadd* offense. In the same way, draft Article 907 stipulates a lesser punishment for attempt than for the completed crime.<sup>48</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 908. Possession of Instruments of Crime**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 546 (Sale or Delivery of Keys or Pick-Locks to an Unknown Person)

#### **Comment:**

*Generally.* Draft Article 908 establishes an offense for the possession of instruments of crime. Section (a) defines the offense to prohibit possession of an instrument of crime with intent to use it criminally, incorporating the definition of an "instrument of crime." Section (b) grades the offense as a Class [A] misdemeanor

This offense is included in draft Chapter 900 because it relies on an underlying offense—the person must have the purpose to employ the instrument of crime in committing an offense—and, like attempt, solicitation, and conspiracy, a person is still liable for possession of instruments of crime if the underlying offense is not completed. The offense does not seek to prohibit possession itself as much as it seeks to prohibit the harmfulness and dangerousness of another offense indicated by the possession of instruments to be used in such an offense.

*Relation to Current Law.* There is no Article in the Penal Code (1962) that specifically targets the possession of instruments of crime, but for similar reasons as the other inchoate crimes, there are strong public policy reasons for attaching liability for those who possess instruments intending to further criminal behavior.

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<sup>47</sup> 'Abd al-Qadir 'Oudah, *Criminal Law of Islam (Kitab al-Tashri al-jinai al-Islam)*, vol. 2, 72.

<sup>48</sup> Abu al-Hasan 'Ali b. Muhammad b. Habib al-Mawardi, *The Ordinances of Government (al-Ahkam al-Sultaniyya)*, 257-258 (translated by Wafaa H Wahba, Garnet Publishing 2000) (Attempted burglary falls under *ta'zir* and merits a maximum of 10 lashes (out of a possible 75); *See also*, Riyad Maydani, "'Uqubat: Penal Law," 226 (gives two examples of reduced punishment for attempt: homicide and theft).



The Penal Code (1962) punishes the sale or delivery of keys or pick-locks in Art. 546 (Sale or Delivery of Keys or Pick-Locks to an Unknown Person). This conduct is covered here by punishing possession.

*Relation to Sharia Law.* Sharia law endorses preventive detention of a theft suspect arrested in possession of an “instrument of crime.”<sup>49</sup> This draft Article clarifies that the prohibition extends to anything specially made or specially adapted for criminal use or anything commonly used for a criminal purpose and possessed under circumstances strongly corroborative of the defendant’s criminal purpose. Sharia law also recognizes that possession of an instrument of crime should be punished because it is indicative of the harmfulness and dangerousness of another offense.<sup>50</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Offense Grades and Their Implications**

### **Chapter 1000. Offense Grades and Their Implications**

#### **Introduction: Chapter 1000**

The purpose of this Chapter is to provide a coherent framework for the grading and sentencing of offenses. The grading of offenses under this draft Code, as well as the related matters dealt with in this Chapter, are rooted in the fundamental operation of a modern penal code, which defines grades of offenses, each with varying degrees of punishment, and then assigns each offense in the code a grade consistent with the offender’s culpability and the resulting harm of a given offense. Thus, Chapter 1000 establishes punishment grades for the entire draft code so that punishments are consistent within and across offenses.

Chapter 1000 is not intended to address all issues regarding the sentencing and disposition of offenders. For example, Chapter 1000 lays out the grading of offenses and the maximum punishments that can be handed down for each offense, but it does not address whether incarceration shall be served under house arrest or in a prison. It is anticipated that such issues will be dealt with more comprehensively in other statutory chapters on sentencing or in a set of sentencing guidelines to accompany this draft code. Judges will retain some discretion in determining the length and type of sentences given.

Rather, Chapter 1000 only deals with those basic issues necessary to make clear the meaning of the draft Code’s general scheme of offense grading as expressed in [Art. [X] (Milestone Grading Table)], and to address the impact of recidivism on maximum authorized penalties or offense grades for a given offense. Chapter 1000 also provides the evidentiary standard for the valuation of harms or benefits when such valuation is required to establish the offense grade for certain offenses.

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<sup>49</sup> Awad M. Awad, “The Rights of the Accused Under Islamic Criminal Procedure,” in *The Islamic Criminal Justice System* 103 (M. Cherif Bassiouni, ed. 1982).

<sup>50</sup> Al-Mawardi, *The Ordinances of Government (al-Ahkam al-Sultaniyya)*, 257-258 (providing the example of possession of burglar’s tools as suggesting burglary but not meriting as severe as punishment as more substantial conduct).



Chapter 1000 is silent as to more complex sentencing issues because they are beyond the current scope of this project. Therefore, Chapter 1000 does not incorporate many of the sentencing guidelines currently found in the Penal Code (1962). These may be incorporated into a separate set of sentencing guidelines to accompany the draft code. The maximum sentences identified in Chapter 1000 will need to be revised by the Somali government as appropriate over time.

### **Comment on Article 1001. Offense Grades**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 15 (Offenses: Distinction Between Crimes and Contraventions)

#### **Comment:**

*Generally.* This provision provides a grading scheme that classifies all criminal offenses, including those offenses defined outside the Code, into eleven grades for purposes of determining the appropriate punishment for criminal liability. Criminal offenses are classified into felonies, misdemeanors, and violations. Such distinctions are important “for purposes either (1) of the substantive criminal law, or (2) of criminal procedure, or (3) of legal matters entirely outside the field of criminal law.”<sup>51</sup>

First, as represented by this draft code, within the substantive criminal law most offenses are defined in terms of felonies and misdemeanors. For example, draft Article [3404 (Criminal Coercion)] punishes the compulsion of another to commit a felony more seriously than the compulsion of a misdemeanor. Similarly, within Chapter 1000 itself, the effect of recidivism on offense grades in draft Articles 1006 (General Adjustments to Offense Grades for Recidivism) and 1003 (Authorized Terms of Imprisonment; Presumptive Sentencing Range) is partially determined by whether the offender previously committed an offense of the same grade rather than an offense of the same kind, with the latter approach found under the Penal Code (1962). Categorizing crimes this way helps the law readily recognize and appropriately punish repeat offenders.

Second, rules of criminal procedure and sentencing may depend on an offense’s classification as a felony or a misdemeanor. Rules of arrest, jurisdiction, indictment, pre-trial detention, and testimony impeachment may turn on this distinction.<sup>52</sup>

Third, the distinction may be relevant, or may become relevant, outside of the criminal sphere. For example, a felony conviction may prevent individuals from the rights to hold public office, to vote, or to work as an attorney, even if such results are temporary.<sup>53</sup>

*Relation to Current Law.* This draft Code reflects Art. 15 (Offenses: Distinction Between Crimes and Contraventions) of the Penal Code (1962), which provides that all offenses are either “crimes or contraventions,” by distinguishing between “felonies” and “misdemeanors.”

In addition to categorizing offenses, this draft code also grades offenses. The current Penal Code (1962) is ungraded. The result of an ungraded penal code is that each offense contains a unique penalty. There are two complications in such a system: inconsistency, and the difficulty of adding new offenses. Grading a penal code furthers consistency of punishment and allows streamlined additions of new offenses.

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<sup>51</sup> Wayne R. LaFave, CRIMINAL LAW § 1.6(a) (3d ed. 2000).

<sup>52</sup> Wayne R. LaFave, CRIMINAL LAW § 1.6(a) (3d ed. 2000).

<sup>53</sup> Wayne R. LaFave, CRIMINAL LAW § 1.6(a) (3d ed. 2000).

A grading scheme furthers consistency by ensuring that each offense in the code has a punishment that is (1) consistent with the offender's blameworthiness and (2) appropriate relative to the blameworthiness of every other offense in the draft code. A code without a grading scheme gives rise to inconsistency of punishment because of the difficulty of assessing a single penalty relative to the entire penal code. Without examining each and every provision in the current Penal Code (1962), it is impossible to know whether a given penalty is proportionate to other offenses and their penalties. For instance, two unrelated offenses perceived as having the same level of blameworthiness could have different associated punishments with little normative or legal justification for such a distinction. A comprehensive grading scheme avoids this problem by providing a scale on which to place each offense, thereby furthering consistency and unifying the penal code.

Moreover, a grading scheme allows the streamlined addition of new offenses. Without a grading system, one would need to examine the entire penal code before determining the appropriate penalty for a newly enacted offense. Giving each offense a grade systematically "expresses a judgment of degree,"<sup>54</sup> making the addition of new offenses and their penalties much simpler and more consistent with the entire code.

Limiting the possible penalties to a system of six felonies, four misdemeanors, and violations greatly simplifies the Penal Code (1962)'s current system of providing a specific punishment for every offense. Simplification yields greater consistency and proportionality, but this comes at the loss of some flexibility. In such a classification scheme, all offenses must be grouped into a total of eleven categories.

Such a loss in flexibility, however, is greatly offset by the gains in consistency and proportionality, and ease of grading future offenses. This is especially true where the net loss in flexibility is not particularly great: although each offense must fall within one of the eleven offense grades outlined in this draft Article, within each offense grade, there is a great deal of flexibility as to the length of the sentence, the amount of fines imposed, or both, depending on the circumstances of a given offense. Such factors will primarily be dealt with in sentencing guidelines to accompany this draft code.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law. While Sharia law does not label crimes as felonies or misdemeanors, a gradation of offenses does exist which functions in similar fashion.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 1002. Authorized Sentences**

**Corresponding Current Provision(s):** None.

### **Comment:**

*Generally.* This article describes the sentences that may be imposed. Section (a) authorizes any combination of imprisonment or fines, as long as the total punishment is equivalent to an appropriate total sentence had the equivalent sentence been imposed entirely in a single form. For example, if the offense is a Class C felony, a combination of half the authorized sentence and half the authorized fine could be imposed. Alternatively, one quarter the authorized

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<sup>54</sup> Paul H. Robinson, CRIMINAL LAW § 1.5 (1997).

imprisonment could be imposed, and one half the authorized fine, such that the total punitive effect is three quarters of the maximum available sentence.

Section (b) reserves the maximum sentence for any offense for those instances that are egregious, under Section (b)(1), or those that are recently repeated under Section (b)(2).

Section (c) requires that the court justify any sentence outside the presumptive range set in Article 1003 (Authorized Terms of Imprisonment; Presumptive Sentencing Range) with an explanation of the reason for the deviation.

Section (d) allows for an alternative sentence to imprisonment, as long as such sentences have an equivalent punitive bite as the authorized sentence.

*Relation to Current Law.* Although not directly supported by current law provisions, this provision is consistent with current law and with the general aims of this draft Code.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1003. Authorized Terms of Imprisonment; Presumptive Sentencing Range**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 61 (Recidivism), 62 (Discretion of the Judge in Cases of Recidivism), 63 (Offenses of the Same Kind), 70 (Effects of Declarations Relating to Habitual and Professional Offenders), 94 (Punishment of Death), 95 (Imprisonment for Life), 96 (Imprisonment for Crimes), and 124 (Increased Punishment for Recidivism)

#### **Comment:**

*Generally.* This draft Article establishes the maximum term of imprisonment for each offense grade, or “Class.” In general, Section (a) provides that the maximum authorized terms of imprisonment in the proposed scheme roughly doubles at every consecutive grade up through Class A felonies, except for the last few misdemeanor offenses. A proportionately smaller penalty is thought to be applicable to the least severe offenses for which imprisonment is appropriate. For instance, 3 months is the statutory maximum for a Class C misdemeanor, but only 30 days is the statutory maximum for a Class D misdemeanor.

Because the offense classes are associated with significantly different maximum authorized penalties, it is important to pay close attention to ensuring the grade of each offense in the draft Code correctly reflects its seriousness.

The maximum possible penalty under this draft code, [life imprisonment or capital punishment] is for Class A felonies, the most severe offenses. Imprisonment is only authorized for Class D misdemeanors and higher graded offenses; imprisonment is not authorized for violations.

It is important to note that imposed sentences can, and often should, be lower than the maximum authorized offense; doing so is fully compatible with the draft code’s scheme of assigning each offense a grade that reflects its perceived severity. For example, under Section (a)(4), a Class D felony may be punished with a term of imprisonment of 6 years, which is within the range of punishments permitted for that grade, as the maximum authorized punishment is 8 years. However, a Class D felony should not be punished by a term of less than 4 years, since

that would defeat the legislative purpose of grading the offense a Class D felony rather than a Class E felony.

Section (b) outlines the most straightforward circumstances in which the maximum authorized penalty is merited. Sections (b)(1)-(2) are introduced with the language that maximum authorized penalties are “reserved” for certain situations. This language underscores the general approach that the maximum authorized penalty for a given offense grade should not be routinely handed down by the sentencing authority under otherwise normal circumstances. Rather, the inherent flexibility of penalties within each offense grade reflects the notion that some commissions of the same offense are more blameworthy than others, and thus the maximum penalty is appropriate in instances where the offense is most blameworthy.

Section (b)(1) states that the “most egregious form” of a given offense warrants the maximum penalty. Section (b)(2) provides the circumstances under which recidivism warrants the maximum penalty. However, this enumeration of certain circumstances that generally warrant the maximum penalty within an offense grade is not intended to vitiate any future sentencing guidelines to accompany the draft code, or to remove discretion from the ultimate sentencing authority. These should all work in tandem.

*Relation to Current Law.* Under Arts. 94 (Punishment of Death) and 95 (Imprisonment for Life) of the Penal Code (1962), the maximum authorized penalties are life imprisonment and capital punishment, which is reflected in Section (a)(1) of this draft Article. Article 98 (Imprisonment for Contraventions) of the Penal Code (1962), which provides for imprisonment up to 3 years, is reflected in the varying maximum authorized imprisonment for classes of misdemeanors in sections (a)(7)-(10) of the draft Article.

Art. 70 (Effects of Declarations Relating to Habitual and Professional Offenders) of the Penal Code (1962) describes the implications of the designations of habitual offenders, including a reference to increased penalties for recidivism. The reference to Art. 124 (Increased Punishment for Recidivism) of the Penal Code (1962) within Arts. 61 (Recidivism) and 70 (Effects of Declarations Relating to Habitual and Professional Offenders) of the Penal Code (1962) is incorporated into Section (b)(2) of this draft Article, as well as into draft Art. 1006 (General Adjustments to Offense Grade for Recidivism).

The legal designations and declarations in Arts. 63-67 of the Penal Code (1962) have otherwise been removed, because their only effect beyond the increase in punishment (already incorporated into the draft code) is the authorization of security measures (i.e., preventative detention). The drafters of this draft Code recommend that any preventative detention regime should be taken up outside of this Code for two reasons. First, preventative detention regimes are extremely difficult to accomplish consistent with Somalia’s international human rights obligations,<sup>55</sup> and the regime as currently expressed in the Penal Code (1962) would be inconsistent with Articles 9 and 14 of the ICCPR. Second, and perhaps more importantly, because preventative detention is intended to prevent offenses from occurring, rather than punish offenses already committed, it does not fit under the conceptual rubric of a modern criminal code. Thus, the legal declarations in Arts. 63-67 of the Penal Code (1962) are not included in the draft code.

Section (b)(2) of this draft Article also incorporates the general principle of heightened penalties for recidivism outlined in Art. 124 (1)-(2) of the Penal Code (1962). Read together, section 2 of Arts. 61 (Recidivism) and section 2 of 124 (Increased Punishment for Recidivism) of the Penal Code (1962) provide that the penalty for a given offense shall be increased by up to

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<sup>55</sup> See generally, U.N. Human Rights Committee, General Comment 35.

one-third where an offense of the “same kind” is committed within 5 years of a prior offense, while serving a sentence for a prior offense, or while evading punishment for a crime.

Section (b)(2) of this draft Article endorses imposing the maximum term of imprisonment in the above circumstances, which is the best approximation of the increased blameworthiness (“up to one third” increase) under current law within the confines of a modern grading scheme. The “up to one sixth” increase outlined in Art. 124 (Increased Punishment for Recidivism) for recidivism without the additional criteria under Art. 61 (2) of the Penal Code (1962) is not incorporated, because such a slight increase in penalty can be easily accommodated within the penalty ranges provided for each offense.

While the criteria outlined in Art. 61 (2) of the Penal Code (1962) are incorporated into Section (b)(2)(A)-(C), the draft Article changes the language requiring that a prior offense be of the “same kind” to the requirement that the prior offense be of the “same or higher grade.” Doing so still captures the increased blameworthiness of an offender who continues to commit the same or more serious crimes, while also not overly penalizing an offender who may have committed a very minor offense in the past that does not have a significant impact on his blameworthiness for the current offense.

For instance, the fact that an offender was convicted of petty theft within the past five years has much less impact on his or her relative blameworthiness for subsequently committing an armed robbery than if the offender’s prior offense was that of aggravated assault. This draft Article thus reflects the notion that committing a crime of the same grade but of a different type is a better approximation of the person’s blameworthiness than committing an offense of the same type but a different grade.

The fact that Section (b) does not mandate, but merely supports, the imposition of a maximum penalty in cases of recidivism reflects the policy expressed in Art. 62 (Discretion of the Judge in Cases of Recidivism) of the Penal Code (1962), that it is also within the discretion of the sentencing authority to *not* impose a higher penalty for recidivism in appropriate instances.

*Relation to Sharia Law.* Some punishments that are available in Sharia law are not included in this grading system, for instance, amputation as a punishment for theft. These punishments are not included because they do not exist in current Somali law, and therefore do not reflect prevailing Somali norms. Furthermore, these punishments would not be consistent with Somalia’s international legal obligations.<sup>56</sup>

Furthermore, the majority of Muslim nations have not adopted this punishment. The Dar al-Ifta al-Missriyyah, the primary body for issuing Sharia legal opinions in Egypt, notes that halting execution of punishments like amputation is acceptable given the “extreme difficulty of meeting the necessary conditions” for application.<sup>57</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

#### **Comment on Article 1004. Authorized Fines**

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<sup>56</sup> See, for example, the *United Nations Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.

<sup>57</sup> Dar al-Ifta al-Missriyyah, “The Execution of Islamic Penalties (hudud): Myths & Facts,” [http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=611&CategoryID=5#\\_ftnref6](http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=611&CategoryID=5#_ftnref6).

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 90 (Principal Punishments), 97 (Fine for Crimes), and 120 (Limits of Increase of Punishment where there Occurs More than One Aggravating Circumstances)

**Comment:**

*Generally.* This provision establishes the maximum fine for each class of offenses.

*Relation to Current Law.* This draft Article enumerates maximum fines for all felonies, misdemeanors, and violations. This proposal builds significantly on, but does not directly conflict with the 1962 penal code. Penal Code (1962) Art. 90 (Principal Punishments) provides only that fines are one type of possible punishment. Penal Code (1962) Art. 97 (Fines for Crimes) prescribe a minimum fine of SOS 10 and a maximum fine of SOS 50,000 for most crimes. Similarly, Penal Code (1962) Art. 120 (Limits of Increase of Punishment where there Occurs More than One Aggravating Circumstances) providing that a fine of up to SOS 300,000 may be imposed in certain situations. Similarly, in the draft code, fines are still one possible punishment, and minimum and maximum fines are prescribed, albeit as part of a more detailed grading system. Because the draft code does not distinguish between crimes and contraventions, the provisions of Penal Code (1962) Art. 99 (Fines for Contraventions) are not included in this draft Article.

The maximum fine is roughly doubled at each class, starting from [USD 50] for violations. The maximum fines for serious felonies is [USD 100,000]. This figure is much higher than the Penal Code (1962)'s articulated SOS 300,000 maximum fine but is still an appropriate amount for several reasons. First, given the amount of time that has passed since the passage of Penal Code (1962) Arts. 97 (Fines for Crimes) and 120 (Limits of Increase of Punishment where there Occurs More than One Aggravating Circumstances), the figures in those current provisions must be increased to reflect inflation. Second, it is important to remember that the figures in this draft Article reflect the maximum fine appropriate for each offense grade, which should be imposed only when an individual's culpability merits imposition of the harshest punishment available. As always, judges can exercise discretion within the bounds prescribed by this Code or sentencing guidelines when crafting the most appropriate punishment for each offender. Third, setting the penalties sufficiently high is critical to making fines an effective punishment and a viable alternative to imprisonment. Fines are a valuable form of punishment, because they can save the state significant resources in terms of the cost of imprisonment. It is therefore crucial that the fines imposed be sufficiently high to serve as an effective alternative to imprisonment.

Although this proposal would significantly modify current law, it reflects the use of the proposed grading scheme incorporated into the rest of the draft code. The new scheme proposed by this draft Article corresponds to the offense grading scheme laid out in draft Article 1001 (Offense Grades), applied to every offense in the draft Code, and used to determine maximum terms of imprisonment in draft Article 1003 (Authorized Terms of Imprisonment; Presumptive Sentencing Range).

*Relation to Sharia Law.* Restitution in Sharia law has generally categorized as *diya* ("blood money"), but did not always involve bodily injury, loss of a limb or death. For instance, Ibn Duyan notes that restitution must also occur where a criminal act results in property damage.<sup>58</sup> Mohamed El-Awa notes that the "Prophet imposed financial penalties as *ta'zir*

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<sup>58</sup> Ibn Duyan, Crime and Punishment under Hanbali Law, 39.

punishments.”<sup>59</sup> This was the view taken by Malik, Ahmad b. Hanbal, Abu Yusuf and some Shafi‘is.<sup>60</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1005. Unclassified Offenses**

**Corresponding Provision(s):** Penal Code (1962) Art. 1 (Offences and Punishment to Be Expressly Provided by Law)

#### **Comment:**

*Generally.* This provision provides classifications for offenses not included in the draft code. While all offenses should be classified (i.e. assigned a felony or misdemeanor grade), the possibility remains of an unclassified (ungraded) offense. In the case of an unclassified offense that provides a specified term of imprisonment, this draft Article provides that the offense may be classified according to that term of imprisonment.

If the offense generally declares itself to be a felony or misdemeanor, Section (a) provides a default classification consistent with the legislative expression of the offense’s severity. If the offense provides no guidance as to its penalty, Section (b) of this draft Article provides that it is to be treated as a violation. Such a system ensures that a disproportionately high sentence or penalty is not created where unintended.

*Relation to Current Law.* Prior Somali law, whether under the Penal Code (1962) or other legislation, provides an individual penalty for every offense, not a classification assigned to each offense.

Article 1 (Offences and Punishment to Be Expressly Provided by Law) of the Penal Code (1962) does provide that “[n]o one shall be punished for an act which is not expressly made an offence . . . by law, nor with a punishment . . . which is not prescribed therefore . . . .” While Art. 1 of the Penal Code (1962) is mostly integrated under draft Art. [1XX (Abolition of Non-Statutory Offenses; Applicability)], this draft Article also recognizes it as a normative matter by classifying any offense that is silent on punishment as a violation (with no resulting criminal liability).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1006. General Adjustments to Offense Grade for Recidivism**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 61 (Recidivism), 67 (Professional Offenders), and 124 (Increase for Recidivism)

#### **Comment:**

*Generally.* This provision allows for extended terms of imprisonment by increasing the grade of an offense by one level in cases of aggravated recidivism. This provision provides four

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<sup>59</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 103.

<sup>60</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 104.

ways to increase an offense grade, all of which have approximately equal levels of increased blameworthiness.

The first, under Section (a)(1), is when an offender is a professional offender.

The second, under Section (a)(2), is met if the offender has previously been convicted of three or more offenses of the same or higher grade.

The third, under Section (a)(3), requires that the offender was previously convicted only one offense of the same or higher grade, but that he or she also meets two or more of the aggravating criteria outlined in Section (b)(2)(A)-(C) of draft Article 1003 (Authorized Term of Imprisonment).

The fourth, under Section (a)(4), requires that the offender was previously convicted of two or more offenses of the same or higher grade, and he or she meets one of the criteria enumerated in Section (b)(2)(A)-(C) of draft Article 1003 (Authorized Term of Imprisonment).

*Relation to Current Law.* The Penal Code (1962) does not have a General Part provision that aggravates grades of specific offenses consistently. While Penal Code (1962) Art. 39 (Ordinary Aggravating Circumstances) enumerates aggravating factors as a general matter, there is no indication as to the corresponding increase in punishment that should result from each factor, since those are handled by specific provisions or left to the judge's discretion under current law.

Thus, where a given offense in the Penal Code (1962) has outlined specific aggravating factors or accessory penalties, such as loss of public office, those features have been incorporated directly into the specific offense provisions. Thus, Penal Code (1962) Art. 39's enumeration of "Ordinary Aggravating Circumstances" is not included in this draft Article, especially since many of the increases in punishment are not as serious as an increase in offense grade. Furthermore, many of the factors in Article 39 of the Penal Code (1962) can and should be treated as sentencing factors for assigning appropriate punishment within each offense grade's inherent range.<sup>61</sup>

By contrast, the Penal Code (1962) does enumerate the extent of increased punishment for serious instances of recidivism. Section 3 of Article 124 (Increase for Recidivism) and §2 of Article 61 (Recidivism) of the Penal Code (1962) provides the significant increase in punishment by up to two thirds where two or more of the factors in Art. 61 (2) are present. Because such a serious increase is closer to a jump in offense grade (approximately doubling the maximum penalty) than simply endorsing the maximum penalty within the offense grade, for those circumstances, allowing but not mandating a jump in offense grade appropriately reflects the increased blameworthiness of aggravated recidivism.

Like Article 61 (2) of the Penal Code (1962), this draft Article provides multiple ways of satisfying the requirements for a serious increase in punishment, and does so in a manner consistent with the offense-grading scheme of a modern code.

*Relation to Sharia Law.* In Sharia law, prevention of "recurrence of serious criminal behavior" is accompanied by punishment in order to help the offender "repent his wrongs."<sup>62</sup> The idea of additional hardship on the perpetrator of a crime due to their recidivism is embraced by Imam Shafi'i who, unlike Abu Hanfia, supported the idea of repeat punishments for repeated offenses, including severe punishments like amputation.<sup>63</sup>

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<sup>61</sup> See Comment to Article 1003 (Authorized Terms of Imprisonment).

<sup>62</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 96.

<sup>63</sup> Intisar Rabb, *Doubt in Islamic Law*, 177.



*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1007. Valuation for the Purposes of Grading.**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This provision establishes a uniform method of calculating the value of harms or benefits whenever that value determines the grade of an offense, such as theft, criminal damage, or defrauding secured investors.

Sections (a) and (b) of this draft Article set preferred valuation methods for harms or benefits when the value of a harm or benefit determines an offense grade. The words “reproducing, or recovering” are used in Section (a)(2) in order to account for valuation of intangible property, which is not easily replaced in the same way that tangible property might be. For example, data stored in computers that have been damaged criminally under draft Article 4102 (Criminal Damage) may be extremely valuable, but could not be replaced or given a readily ascertainable market value. Digital information is sometimes recoverable even once damaged, but data recovery itself can be an expensive service. Section (a)(2) allows the cost of that service to determine the grade of the offense. If digital information is not recoverable, Section (a)(2) would allow the value of the property to be decided by the cost of reproducing the information anew. That could be determined by the number of hours of work required, multiplied by the value of each hour of work.

Section (b) of this draft Article provides that where a writing has value beyond the four corners of the document, that external value is used to determine the value of the harm or benefit for purposes of grading. For instance, a check may have negligible value as paper, but it represents the value inscribed on it.

Each section requires that the value be proved by a preponderance of the evidence. This standard of proof for valuation was chosen because the “beyond a reasonable doubt” standard should be reserved for the elements of the offense, i.e. the conduct that establishes liability. It is important to note that some offenses require some form of resulting harm or benefit as an element of the offense (i.e., to establish liability at all). In those cases, the fact of the harm or benefit still must be proven beyond a reasonable doubt, per draft Article 201 (Basis of Liability). However, the value of harm or benefit, where it determines the grade of the offense, need only be proven by a preponderance of the evidence, because the “beyond a reasonable doubt” standard will often pose difficult evidentiary problems with wide variances in valuation methodologies.

*Relation to Current Law.* The Penal Code (1962) does not set out a consistent method for the valuation of harms or benefits. This draft Article changes that approach, and makes valuation methodologies consistent across offenses so that the appropriate and proportionate punishment corresponds to each offense.

*Relation to Sharia Law.* Mohamed El-Awa states that the “majority of the jurists” agree that “value of the stolen property (*nisab al-sariqa*) should exceed, or at least be worth, a minimum fixed by law; the punishment for theft is not to be inflicted if its value is less than this minimum.”<sup>64</sup> He goes on to note that determining what “minimum value” requires punishment is the “duty of the lawmakers in each country” and should be “reviewed in light of contemporary

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<sup>64</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 3.

social circumstances.”<sup>65</sup> In addition, Muslim jurists have long recognized that where results in certain individual cases constitute technical infringements of the law, those results are contrary to the overriding purposes of the law (*maqasid al-shari’ah*) and the case should therefore be overturned.

The idea that technical violations with no resulting harm should not result in criminal liability is incorporated into Section (c) of the draft Article, which states: “When the value of benefit or harm cannot be satisfactorily ascertained under Section (a) or (b), it is assumed to have the value that corresponds to the lowest possible offense grade.” Because the “lowest possible offense grade” for such offenses is often a violation with no resulting criminal liability, the draft Article is in harmony with the foregoing Sharia law principles. Only where a particular behavior has harmful societal effects beyond the value of the harm inflicted do certain offenses depart from the foregoing principles and assign a higher minimum offense grade. For instance, draft Article 4408 (Fraud in Insolvency) is at minimum a Class [B] misdemeanor to reflect the State’s interest in the protection of creditors and the efficient administration of estates.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1008. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 64 (Habitual Delinquency Presumed by Law), 65 (Habitual Delinquency Declared by the Judge), 66 (Habitual Contraveners), and 67 (Professional Offenders)

#### **Comment:**

*Generally.* This Article defines the term used for the first time in this Chapter. This Code may also use this term elsewhere in the Code.

*Relation to Current Law.* This draft Article defines “professional offender.” This definition corresponds to the definition in the Penal Code (1962) Art 67 (Professional Offenders). Penal Code (1962) Arts. 64-67 create for levels of offenders depending on the number of previous offenses they have committed. This draft Article only includes a single level—the most serious category of offender, the “professional offender”—because the structure of this draft Code allows for discretion in sentencing. The only offender type that is significant for this Code is the type that might increase the offense by an entire grade.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>65</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 4-5.

## **Part II: The Special Part**

### **Crimes Against the State**

#### **Chapter 1100. Crimes Against the State**

##### **Introduction: Chapter 1100**

This Chapter punishes crimes against the Somali State. Its goal is to punish and deter both individuals and groups whose actions threaten the political, economic, and social development of the state by threatening the State's security and stability. This chapter includes offenses which threaten the security and stability of the state in various ways, from taking up arms against the state, which poses a violent threat to state security, to unauthorized disclosure of classified information, which poses a threat to state security by sharing state secrets with foreign governments or non-state actors. The punishments in this Chapter reflect the risks each type of offense poses to the Somali State and citizens.

##### **Comment on Article 1101. Treason**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 184 (Attempts against the Integrity, Independence, or Unity of the Somali State; High Treason), 185 (Citizen Who Bears Arms against the Somali State), 217 (Attempts against the Constitutional Order), 218 (Attempts against the Constitutional Organs), 221 (Armed Insurrection against the Powers of the State), 222 (Devastation, Pillage, and Slaughter), 223 (Civil War), and 224 (Usurpation of Political Powers or Military Command).

##### **Comment:**

*Generally.* Article 1101 defines the offense of treason. It criminalizes taking up arms against the Somali State or intentionally committing an act that results in all or part of the territory of the state coming under the domination of a foreign state or organization.

Section (a) defines the prohibited act. Section (a)(1) defines one of the two ways to commit treason. To commit an offense under Section (a)(1), a person must recklessly take up arms against the state. This means that the person either knew or disregarded a substantial risk that he or she was taking up arms against the state. If a person is not aware of a substantial risk that he is taking up arms against the State, then the person is not eligible for the offense. For example, if a person joins an armed group that the person knows or should reasonably know is in route to occupy a government building, he or she commits an offense.

Section (a)(2) defines the second way to commit treason. To commit an offense under Section (a)(2), a person must commit any act with the intent that it will result in all or part of the territory of the state coming under control of a foreign state or organization. For example, if a person tells someone he or she knows is part of a terrorist organization about a weakness in border security, the person commits an offense under Section (a)(2). A person would also commit an offense under Section (a)(2) if her or she provides assistance, including but not limited to arms, food, or shelter, to the enemy and as a result the enemy is able to take control of

all or part of the state. In contrast, a person would not commit an offense if he or she was coerced into providing food or shelter to the enemy. For example, if a person is held at gunpoint and forced to harbor a soldier, he or she does not commit an offense under this Article. Providing assistance to an enemy that does not result in all or part of the state coming under the control of a foreign state or organization is criminalized under draft Article 1102 (Aiding the Enemy).

Because this draft Article applies to all people, not merely to citizens, Section (b) creates an exception for a person who is in a foreign state and is required by the law of that state to take up arms against the Somali State or to otherwise commit an act that results in the takeover of Somali territory.

Section (c) grades the offense as a Class A felony because of treason's serious implications for the Somali state and its citizens. Both taking up arms against the state and committing an act that results in territory coming under the control of a foreign state or organization hinders the state's ability to protect its borders and citizens and exposes citizens to the danger and violence which accompanies such actions. Because of its potentially devastating impact, the offense can be punished with capital punishment.

*Relation to Current Law.* The definition of treason in draft Article 1101 reflects the offenses described in Penal Code (1962) Arts. 184 (Attempts against the Integrity, Independence, or Unity of the Somali State; High Treason), 185 (Citizen Who Bears Arms against the Somali State), 217 (Attempts against the Constitutional Order), 218 (Attempts against the Constitutional Organs), 221 (Armed Insurrection Against the Powers of the State), 222 (Devastation, Pillage, and Slaughter), and 223 (Civil War).

It also encompasses the offense described in Art. 224 (Usurpation of Political or Military Command) to the extent usurpation of military command consists in taking up arms against the state or causing losses to the State's territory. Usurpation of military command might also be an offense under draft Article 1105 (Subversive or Anti-National Activity). If the usurpation of command does not satisfy the requirements of any offense, it would be dealt with by codes or regulations of military conduct.

Penal Code (1962) Art. 185 includes an exception from liability for someone who is in the territory of an enemy state and required by that state's laws to commit the act. This exception is included in this draft Article, even though it does not exist in the other codified Penal Code (1962) articles.

Classifying this offense in the highest punishment grade also reflects the Penal Code (1962), as Arts. 184, 185, 217, 218, 221, 222, and 223 prescribe either life in prison or death as punishment.

*Relation to Sharia Law.* Article 1101 is generally supported by Sharia law. According to Khalid 'Abd al-Qadir 'Audah, "the crimes of treason in Islam are the crimes that an individual or a group of people intentionally commits against the security and safety of society."<sup>66</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Section 1102. Aiding the Enemy**

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<sup>66</sup> Khalid 'Abd al-Qadir 'Audah, *Treason and High Treason in Islam*, Arab West Report, March 20 1998, available at <http://www.arabwestreport.info/en/year-1998/week-12/6-treason-and-high-treason-islam>.

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 191 (Providing the Enemy with Supplies), 192 (Participation in Loans in Favor of the Enemy), 193 (Trading with the Enemy), and 225 (Unauthorized Enlistment or Arming in the Service of a Foreign State)

**Comment:**

*Generally.* Draft Article 1102 defines the offense of aiding the enemy. Section (a)(1) provides that this offense can only be committed by citizens or people in the Somali State when they act. Foreigners abroad who aid their own government or another organization against the Somali State are not liable for that conduct.

Section (a)(2)(A) criminalizes providing physical aid to the enemy, making it an offense to provide arms, ammunition, supplies, money, or other things that may be used to the detriment of the Somali State to an enemy of the State. To commit an offense under section (a)(2)(A), a person must know or should reasonably know that he or she is providing these things to an enemy of the state. Negligence is insufficient to be liable for the offense under Section (a)(2). For example, if a person provides food to an individual he does not know is an enemy of the state, he is not liable for this offense.

Section (a)(2)(B) criminalizes harboring, protecting, or otherwise aiding the enemy. To commit an offense under section (a)(2)(B) a person must know that he is harboring, protecting, or otherwise aiding the enemy. For example, while sheltering an enemy of the state is illegal under this section, sheltering an individual who the person does not know is an enemy of the state is not. Nor does a person commit this offense if he or she is coerced into providing shelter for an enemy of the state, for example if he or she is threatened with death if he or she does not provide shelter to an enemy of the state.

Section (b) grades the offense as a Class C felony if committed during a time of war and a Class D felony if committed at any other time. A higher grade during a time of war reflects the higher degree of harm to the state and its citizens if an enemy receives assistance while at war with the state.

*Relation to Current Law.* Article 1102 encompasses the offenses described in Penal Code (1962) Arts. 191 (Providing the Enemy with Supplies), 192 (Participation in Loans in Favor of the Enemy), 193 (Trading with the Enemy), and 225 (Unauthorized Enlistment or Arming in the Service of a Foreign State), all of which either explicitly punish providing certain types of aid to the enemy or punish conduct that inevitably aids an enemy of the Somali state. The grading of the offense is also consistent with the Penal Code (1962), which prescribes harsh punishments for all these offenses and an increase in the punishments' severity if the offenses are committed during a time of war.

The requirement in Section (a)(1) reflects Penal Code (1962) Arts. 191, 192 and 193, which provide exceptions for "a foreigner who commits the act abroad," as well as Art. 225, which requires the person to have acted from within the territory of the State.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1103. Failure to Execute Contracts for Wartime Supplies**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 194 (Failure to Execute Contracts for Supplies in Time of War), 195 (Fraud in Furnishing Supplies in Time of War), and 280 (Breach of Contract for Public Supplies)

**Comment:**

*Generally.* Draft Article 1103 criminalizes the reckless failure, during a time of war, to carry out the obligations arising from a contract for the supply of goods or services necessary for the war effort. This offense aims to ensure that the military will be able to rely on its suppliers during a time of war. To commit an offense, a person must intentionally fail to carry out such obligations or disregard a substantial risk that he or she will not be able to fulfill the obligations of the contract without reasonable excuse for failure. For example, it is an offense if a person knows or disregards a substantial risk that he or she will not have sufficient product to fulfill a contract to supply food for soldiers in the war and does not try to find an alternative supplier. In contrast, it is not an offense if the person is unable to fulfill the contract because there simply is no available alternative source of food to fulfill the contract.

Section 1103(b) grades the offense as a Class E felony. This reflects the negative impact on the armed forces if they are unable to obtain supplies necessary for fighting a war. Because the armed forces are critical to state security, especially during a time of war, this offense also harms the state as a whole.

*Relation to Current Law.* Draft Article 1103 encompasses the offenses described in Penal Code (1962) Arts. 194 (Failure to Execute Contracts for Supplies in Time of War), 195 (Fraud in Furnishing Supplies in Time of War). It also encompasses the offense in Art. 280 (Breach of Contract for Public Supplies) if the public supplies are necessary for the war effort.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law and is generally supported by the principles of contract law in Islam.

*Relation to International Law.* This draft Article is in tension with Somalia's obligation under Art. 11 of the ICCPR, which provides that "no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." The fact that this draft Article applies during a time of war does not relieve this tension because, according to Art. 4 of the ICCPR, Art. 11 is a non-derogable provision, even in times of war or public emergency.

### **Comment on Article 1104. Destruction or Sabotage of Military Works**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 196 (Destruction or Sabotage of Military Works), and 197 (Facilitation with Culpa).

**Comment:**

*Generally.* Draft Article 1104 criminalizes the reckless destruction or sabotage of military works. To commit an offense under Section (a), a person must commit an act that destroys or makes unusable a military work or works designed for use by or currently used by the armed forces of the state. In order to be liable for this offense, a person must know that his or her action will destroy or make unusable a military work that services the armed forces of the state, or disregard a substantial likelihood that such harm will result. For example, a person who is conducting maintenance work on a military building and negligently fails to protect the

construction from the rain is not liable for this offense, even if the result is that the building is rendered unusable. For purposes of this offense, military works include but is not limited to military bases and recruiting stations, ships, airplanes, cars, tanks, and any other instrument of transportation.

Section (b) grades the offense. The grading differentiates punishments based on whether the offense occurs during a time of war. Section (b)(1) grades the offense as a Class D felony if it is committed during a time of war. Section (b)(2) grades the offense as a Class F felony if it is committed at any other time. The higher punishment imposed during a time of war reflects the increased harm to state security if a military work used by the armed forces is rendered unusable during a time of war, when such works are most necessary.

*Relation to Current Law.* Article 1104 encompasses the offenses described in Penal Code (1962) Arts. 196 (Destruction or Sabotage of Military Works) and 197 (Facilitation with Culpa). The imposition of a harsher punishment when an offense is committed during a time of war is also consistent with the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1105. Subversive or Anti-National Activity**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 208 (Political Defeatism), 209 (Instigating Soldiers to Disobey the Law), 210 (Economic Defeatism), 212 (Anti-National Activity of a Citizen Abroad), 213 (Subversive Associations), 214 (Anti-National Associations), 215 (Subversive or Anti-National Propaganda), 219 (Bringing the Nation or State into Contempt), 234 (Formation of and Participating in an Armed Group), 254 (Incitement to Disparage or Bring into Contempt Public Institutions, Laws, or Orders of Authorities), 508 (Formation of Armed Bodies not Intended for Commission of Offenses), 509 (Seditious Cries and Assemblies), and 510 (Seditious Assembly)

#### **Comment:**

*Generally.* Article 1105 criminalizes the participation in or promotion of anti-national organizations. Section (a) defines the offense as knowing participation in an organization whose purpose is to overthrow the Somali government, or instigate others to overthrow the Somali government. In order to be liable the offense, a person must knowingly participate in or promote such an organization, meaning he either knows or disregards a substantial likelihood that the organization in which he is participating or which he is promoting has such a purpose.

Importantly, this offense should not be interpreted as criminalizing participation in or promotion of a political party or other political group that simply opposes the current ruling party but does not seek to overthrow the government structure or institutions themselves. Nor does it criminalize peaceful protesting against members of the government or current ruling party.

Section 1105(b) grades the offense as a Class F felony, which reflects the harm caused to national stability. Though such organizations pose a threat to national stability, the offense under Article 1105 does not warrant a higher grade because this offense does not address physical violence against the national government or citizens. Such physical violence is criminalized under draft Articles 3202 (Assault), 3203 (Causing or Risking Catastrophe), 3204 (Recklessly

Endangering Another Person), and other draft articles criminalizing offenses against the person. Physical violence against the government is criminalized by draft Article 1101 (Treason).

*Relation to Current Law.* Draft Article 1105 corresponds with the offenses described in Penal Code (1962) Arts. 213 (Subversive Associations), 214 (Anti-National Associations), 215 (Subversive or Anti-National Propaganda), 510 (Seditious Assembly). The offense under Draft Article also criminalizes participation in or promotion of an organization whose purpose is to commit any of the offenses described in Arts. 208 (Political Defeatism), 209 (Instigating Soldiers to Disobey the Law), 210 (Economic Defeatism), 219 (Bringing the Nation or State into Contempt), 254 (Incitement to Disparage or Bring into Contempt Public Institutions, Laws, or Orders of Authorities), and 509 (Seditious Cries and Assemblies). The offense in draft Article 1105 also encompasses Art. 212 (Anti-National Activity of a Citizen Abroad). Draft Article 1105 also encompasses the conduct described in Art. 234 (Formation of and Participating in an Armed Group) and 508 (Formation of Armed Bodies not Intended for Commission of Offenses), assuming the armed group's purpose is anti-national activity. The highest level of punishment should be reserved for participation in such armed groups, given the increased risk to national security posed by an armed group.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law. This Article falls within Islamic law's general aversion to acts that produce civil strife (*fitna*). According to many scholars, Muslims are encouraged to "avoid supporting civil turmoil or strife."<sup>67</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1106. Hostile Acts against a Foreign State**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 187 (Hostile Acts against a Foreign State Which Expose the Somali State to the Danger of War), 211 (Offenses Against Allied States), 227 (Attempts against the Heads or Representatives of Foreign States), 228 (Bringing into Contempt the Flag or Emblem of a Foreign State), and 229 (Condition of Reciprocity)

#### **Comment:**

*Generally.* This Article criminalizes the reckless commission of hostile acts against a foreign state. To commit an offense under Section (a), a person must commit a hostile action against a foreign state that disturbs relations with a foreign government or exposes the Somali State or its citizens to the danger of reprisal or retaliation. The culpability requirement for this offense is recklessness, which means a person must know or disregard a substantial risk that his or her act will expose the state to the danger of hostilities.

An action against a foreign state must target the government or sovereignty of the foreign state. It is not enough for the offense to target citizens of the foreign state. For example, it would be an offense under this Article for a Somali citizen to murder a foreign dignitary. It would not be an offense under this Article for a Somali citizen to murder a foreign citizen who is not a government representative. It would also be an offense under this Article for a person to drive into a neighboring state and try to occupy land because that act challenges the sovereignty of the foreign state. It would not be an offense to illegally or without authorization drive across

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<sup>67</sup> KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 44 (2001).



the border into another state without trying to occupy land. It would also be an offense under this Article to send military aid to anti-government groups in other states because that act threatens the sovereignty of the foreign government.

However, it would not be an offense under this Article for a person to criticize the government of another state, because criticism is not a “hostile action.” Thus, this draft Article is designed to avoid conflicting with the Provisional Constitution (2012) Art. 18 (Freedom of Expression and Opinions).

The grading of the offense depends on the result of the commission of the hostile act and the intention of the actor. Section (b)(1) grades the offense as a Class A felony if the person intends that war result. This conduct receives a higher grade because war can result in physical harm to the state and every citizen. Section (b)(2) grades the offense as a Class C felony if the result is a disruption of relations with the foreign government or exposure of the Somali State or its citizens to the danger of reprisal or retaliation. These results are less likely to place the state or its citizens in danger of physical harm, and thus constitute a lower grade offense.

*Relation to Current Law.* This Article reflects the offense described in Penal Code (1962) Art. 187 (Hostile Acts against a Foreign State Which Expose the Somali State to the Danger of War). However, this draft Article differs from Art. 187, which imposes a life sentence on a person who commits a hostile action causing war, in that it reserves the most serious punishment grade for instances where the person intends war to result. This requirement avoids treating someone who merely acts recklessly as a murderer, and is therefore consistent with the general grading structure of the Code.

This draft Article also encompasses the offenses described in Arts. 211 (Offenses against Allied States), 227 (Attempts against the Heads or Representatives of Foreign States), and 228 (Bringing into Contempt the Flag or Emblem of a Foreign State), as these acts constitute hostile acts against a foreign state that may expose the Somali State or its citizens to the danger of reprisal or retaliation. Prosecutorial discretion and the power of the executive to negotiate international agreements maintain the State’s power with respect to relations with foreign nations, consistent with Penal Code (1962) Art. 229 (Condition of Reciprocity).

*Relation to Sharia Law.* Sharia law categorically prohibits an individual from usurping the authority of the state and pursuing hostile acts against another nation.<sup>68</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1107. Espionage**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 186 (Intelligence with Foreigners for the Purpose of Waging War against the Somali State), 188 (Intelligence with Foreigners for the Purpose of Engaging the Somali State to Neutrality or War), 189 (Corruption of a Citizen by Foreigners), 190 (Favoring the Enemy in Time of War), 198 (Suppression, Falsification, or Purloining of Papers or Documents Concerning the Security of the Somali State), 199 (Procuring Information Regarding the Security of the Somali State), 200 (Political or Military Espionage), 201 (Espionage Concerning Information the Disclosure of Which Has Been Prohibited), 202 (Facilitation with

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<sup>68</sup> Javed Ahmad Ghamidi, *Islamic Law of Jihad*, RENAISSANCE, June 2002.

Culpa), 203 (Clandestine Penetration Into Military Areas and Unjustified Possession of Means of Espionage), and 216 (Acceptance of Honors or Benefits from an Enemy State).

**Comment:**

*Generally.* This Article criminalizes obtaining, delivering, communicating, or receiving Somali military or political information with the knowledge that by such conduct he militarily disadvantages the Somali State. Section (a) defines the prohibited act. To commit the offense, a person must obtain, deliver, transmit, communicate, or receive military or political government information. The information must be military or political in nature because the harm from the offense comes from the risk that the use of the information will harm the security or stability of the state or the citizens. It is not an offense if the person could not know the information is military or political information.

Section (a)(1) requires that a person knowingly cause the disadvantage to the Somali State. Thus, a person must actually know the information can be used to disadvantage of the Somali State or the advantage of any foreign state. It is not enough for the person to realize there is a substantial risk that the information will be used for these purposes and disregard that risk.

For example, it is an offense under this Article to send military documents from a government office if a person knows the information in the documents, like plans for a military operation, could be used to harm the Somali State or provide an advantage of any foreign state. It is also an offense for a person to sell government information if the person knows the information could be used to the disadvantage of the Somali State or the advantage of any foreign state. This Article also covers spying on behalf of a foreign state. It is not an offense under this Article for a person to disclose government information, like budgets for roads or schools. If that information is classified, disclosure is an offense under Article 1108, but because disclosure could not be used to disadvantage the Somali State or to the advantage of any foreign state, disclosure is not espionage under this Article.

This offense can be charged together with Article 1108 (Unauthorized Use or Disclosure of Classified Information), with this offense covering the gathering or obtaining of classified government information and Article 1108 covering the disclosure and use of classified government information.

Section 1107(b)(1) grades the offense as a Class A felony if it is committed during a time of war. Espionage committed during a time of war gives an advantage to the enemy when the state during an ongoing conflict, putting the people and the government at greater risk than any other time. Section 1107(b)(2) grades the offense as a Class B felony if it is committed at any time other than a time of war.

*Relation to Current Law.* This draft Article encompasses the offenses described in Penal Code (1962) Arts. 186 (Intelligence with Foreigners for the Purpose of Waging War against the Somali State), 188 (Intelligence with Foreigners for the Purpose of Engaging the Somali State to Neutrality or War), 189 (Corruption of a Citizen by Foreigners), 190 (Favoring the Enemy in Time of War), 198 (Suppression, Falsification, or Purloining of Papers or Documents Concerning the Security of the Somali State), 199 (Procuring Information Regarding the Security of the Somali State), 200 (Political or Military Espionage), 201 (Espionage Concerning Information the Disclosure of Which Has Been Prohibited), 202 (Facilitation with Culpa), 203 (Clandestine Penetration Into Military Areas and Unjustified Possession of Means of Espionage), and 216 (Acceptance of Honors or Benefits from an Enemy State), if those honors are accepted in exchange for such information.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1108. Unauthorized Use or Disclosure of Classified Information**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 204 (Disclosure of State Secrets), 205 (Disclosure of Information the Divulgence of Which Has Been Prohibited), 206 (Utilization of State Secrets), and 253 (Disclosure of Official Secrets)

#### **Comment:**

*Generally.* Article 1108 criminalizes the reckless use publication, divulgence, disclosure, or making known any classified information. This offense aims to prevent the sharing of classified government information because of the risk posed to the security of the state from internal and external threats. Section (a) defines the prohibited act. To have committed the offense, a person must be reckless, meaning that the person disregarded a substantial and unjustifiable risk that he or she is publishing, disclosing, or making known any classified government information.

The information that is published, disclosed, or made known must be classified government information, meaning it must be designated by the government as classified information. This means the information that is published, divulged, disclosed or made known cannot yet be in the public sphere and the public cannot yet know the content of the information. The harm of the offense is the risk posed to the state of having classified information made known to the public because classified information is kept secret to protect the state and the citizens. Making known information that is already known does not pose a risk to the state or the citizens. A person may have gained access to the information in any way and does not have to be a public officer to commit this offense. Acquiring classified information without authorization is criminalized by this Article.

For example, it is an offense for a person to steal classified information from a government facility and then publish it online if that information is not yet known to the public. It is not an offense under this Article to publish that information if someone has already published the information. Stealing such information is criminalized by Chapter 4300. It would also be an offense for a public officer who is party to classified information as part of his or her job to tell that information to anyone who was not authorized to know the information, including close friends and family. It would not be an offense for a person to discuss the classified information with his or her colleagues who are also party to the information. That would not pose a security risk to the state because the classified information would not be spread to anyone who was not authorized to know, whereas if the information were made known to people who were not authorized to know the information it could pose a security risk to the state.

Section (b) grades the offense as a Class B felony if it causes another's death or if it endangers the stability of the Somali State. Otherwise, the offense is a Class C felony.

*Relation to Current Law.* This draft Article encompasses the offenses described in Penal Code (1962) Arts. 204 (Disclosure of State Secrets), 205 (Disclosure of Information the Divulgence of Which Has Been Prohibited), 206 (Utilization of State Secrets), and 253 (Disclosure of Official Secrets). While the punishment in these offenses would grade this

offense as a Class C felony, this draft Article includes an additional grade increase for conduct that causes death or endangers the State's stability.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1109. Attempts Against the Political Rights of a Citizen**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Arts. 16 (Freedom of Association), 17 (Freedom of Religion and Belief), 18 (Freedom of Expression and Opinions), 20 (Freedom of Assembly, Demonstration, Protest, and Petition), and 22 (Right of Political Participation); Penal Code (1962) Art. 226 (Attempts Against the Political Rights of a Citizen).

#### **Comment:**

*Generally.* Article 1109 criminalizes inhibiting or preventing the exercise of political rights by a citizen through the use of force, threat, or deception. Section (a) defines the offense. To commit an offense, a person must disregard a substantial and unjustifiable risk that he or she is inhibiting or preventing the exercise of political rights by a citizen through force, threat, or deception. Political rights protected under this Article are, under: Section (a)(1) the right to vote; Section (a)(2) the right to hold public office; Section (a)(3) the right to petition the government and have the petition examined by the government; Section (a)(4) the right to reside in, return to, and travel freely in the state; Section (a)(5) the right to associate with lawful political parties. This offense aims to criminalize behaviors including, but not limited to, creating intimidation at polling stations, blocking access to polling stations, preventing citizens from voting, and creating or using fraudulent ballots. This Article protects values adopted by the Provisional Constitution, including freedom of association, religion, belief, expression, opinion, assembly, demonstration, protest, petition, and political participation.

For example, a person would commit an offense if he or she prevented someone from entering a polling station to vote by using threatening language or physical force. This would violate Section (a)(1) because the behavior would inhibit or prevent a citizen's right to vote. It would not be an offense if a person simply told another person not to vote if there is no accompanying threat, force, or deception. This does not qualify as an offense because it does not fulfill the requirement of force, threat, or deception.

It would be an offense under Section (a)(2) for a person to prevent another from registering to run for public office by using force, threat, or deception. This could involve destroying the applicant's registration paperwork, which would be deception, or threatening the applicant to prevent him or her from registering to run. However, it would not be an offense to accidentally tell an applicant for office the wrong directions to the application office because that would not involve threat, force, or deception, even if it made it harder for a person to register to run for office.

It would be an offense under Section (a)(3) for a person to tear up a petition that is going to be submitted to the government by a citizen. This would violate Section (a)(3) because tearing up a petition is using force to inhibit the right to petition the government. It would not be an offense under Section (a)(3) to refuse to sign the petition because a refusal does not involve

force, threat, or deception and does not inhibit or prevent the petition from being submitted to the government.

It would be an offense under Section (a)(4) for a person to deny a citizen otherwise valid residency in a particular area by force, threat, or deception. It would also be an offense to deny a citizen otherwise valid use of public thoroughways or other means of transportation.

It would be an offense under Section (a)(5) to prevent a person from joining a political party by threatening the person. This means it would violate section (a)(5) because threatening a person to prevent him or her from joining a political party would interfere with his or her right to associate with a lawful political party. However, it would not be an offense to try to convince someone to join another political party without the use of threat, force, or deception. This section only protects the right to join lawful political parties, and therefore does not protect the right to join terrorist organizations or other organizations that are criminalized by Article 1105 (Subversive or Anti-National Activity).

This offense may be combined with an offense that criminalizes physical violence if physical violence results.

Section (b) grades the offense as a Class A misdemeanor.

*Relation to Current Law.* Article 1109 encompasses the offense described in Article 226 (Attempts Against the Political Rights of a Citizen).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 1110. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 237 (Time of War)

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962). The definition of “time of war” reflects Art. 237 (Time of War), which defines “time of war” to include the time before a war when war is imminent.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Crimes Against Humanity**

### **Chapter 2100. Genocide and Human Trafficking**

#### **Introduction: Chapter 2100**

This Chapter defines two particularly socially damaging crimes that post-conflict countries have found useful to define in their criminal codes: genocide and human trafficking.

Many countries have added provisions like these in the last several decades to combat these specific harms.

### **Comment on Article 2101. Genocide**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 13 (Right to Life)

#### **Comment:**

*Generally.* This Article defines the offense of genocide. Section (a)(1) requires a person to have acted with the intent to destroy a group of people. The trier of fact may infer proof of this intent from the totality of the circumstances, or a pattern of intentional action.

The existence and identity of a group under Section (a)(1) is determined considering both subjective and objective factors. If the perpetrator or the victim considers the group to exist, this is a factor indicating the existence of the group under this Article. However, case-specific objective factors are also relevant, like a group's religion, ethnicity, or familial ties.

The offense definition includes the intent to destroy a significant part—rather than the entirety—of a group. International courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have interpreted international law on genocide to cover a person's intent to destroy “a part” of a group to mean a significant part, “substantial part,” or “a considerable number.”<sup>69</sup> What qualifies as “substantial” will depend on a variety of factors, including the size and concentration of the group in question.

Although the existence of a plan to commit genocide may be an important factor in many cases—especially to indicate one's intent—it is not a required element of the offense. Thus, individuals can commit the offense by acting without a coordinating authority, or without anyone else at all.

Section (a)(2)(A) covers genocide through killing. There is no requirement that the killing be premeditated, as long as the requisite intent in Section (a)(1) is met.

Section (a)(2)(B) covers genocide through infliction of serious bodily injury. This includes torture, among other things. This broad definition recognizes that certain conduct may be used to diminish the group's power, and thus facilitate its destruction.

Section (a)(2)(C) covers genocide through the commission of sexual offenses, and section (a)(2)(D) covers deportation. The Model Code for Post-Conflict Justice (MCPCJ) and other international treaties on genocide include destruction through causing “mental harm,” which is meant to encompass deportation as well as sexual offenses.<sup>70</sup> This draft Article does not include the causing of mental harm because of its ambiguity, but instead specifically lists the types of actions that cause mental harm.

Section (a)(2)(E) is meant to be a more specific definition of what the MCPCJ has defined as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>71</sup> This draft Article defines the conduct as purposely

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<sup>69</sup> Model Code for Post-Conflict Justice (MCPCJ), cmt. to Art. 86, at 198; *Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraph 97; *Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, October 19, 1999; *Prosecutor v. Bagilishema*, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraphs 56–59; *Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, October 19, 1999; *Prosecutor v. Bagilishema*, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraphs 56–59.

<sup>70</sup> See MCPCJ, Art. 86 and cmt., at 200.

<sup>71</sup> *Id.*

inflicting inhumane living conditions on members of the group, or denying them access to necessary services. This provision covers the conduct described in the MCPCJ commentary as “subjecting the group to a subsistence diet, systematic expulsion from homes, and denial of the right to medical services . . . . It also includes circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion.”<sup>72</sup>

The definition in this draft Article also encompasses actions that could cause “mental harm,” like “inhumane or degrading treatment or persecution” which are included in the international legal definitions of genocide.<sup>73</sup>

Sections (a)(2)(F) and (G) contribute to the destruction of a group’s future existence, and are therefore components of the definition of the offense.

The offense is a Class [A] felony, commensurate with other offenses of similar severity in this draft Code, like murder.

*Relation to Current Law.* This draft Article is supported by the Provisional Constitution (2012), which guarantees the right to life to all people in Article 13 (Right to Life). There are no corresponding provisions in the Penal Code (1962).

*Relation to Sharia Law.* There is strong support for this Article in Sharia Law. The Qur’an has categorically prohibited the killing of non-combatants and individuals not guilty of capital offenses.<sup>74</sup> Genocide would inevitably implicate a purpose to violate these principles.

*Relation to International Law.* This draft Article is based on Article 86 of the Model Code for Post-Conflict Justice (MCPCJ), which copies Article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. This definition has been incorporated into a number of international treaties, including the Rome Statute of the International Criminal Court, the Statute for the International Criminal Tribunal for Rwanda (ICTR), the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), and, in East Timor, UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses.

## **Comment on Article 2102. Human Trafficking**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 14 (Slavery, Servitude and Forced Labour); Penal Code (1962) Arts. 456 (Dealing and Trading in Slaves), 457 (Sale and Purchase of Slaves), 458 (Enforced Subjection), and 459 (Crimes Committed Abroad)

### **Comment:**

*Generally.* This draft Article defines the offense of human trafficking. Unlike Article [3401] (Kidnapping), the offense of human trafficking covers a wider range of conduct: recruiting, transporting, transferring, harboring, or receiving a person. Kidnapping also requires the person to have a purpose to commit one of several specific acts, including holding the victim for ransom or reward, and terrorizing the victim. But the offense of human trafficking solely requires the purpose of exploitation.

Section (a)(1) includes a non-exhaustive list of instances of exploitation, rather than a comprehensive definition. This allows judicial flexibility in identifying instances of exploitation.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *Qur’an* 2:190 and 5:32.

Other conduct, such as use of victims in armed conflict or in the pornography industry, may also fulfill the requisite element of exploitation. “Forced labor or services” includes slavery or practices similar to slavery and servitude.

The means described in Section (a)(2)(B) are important because the offense is only meant to criminalize harmful conduct, not thoughts that may or may not lead to that conduct. Someone who transfers another with the intent to exploit that person, but in fact does not violate that person’s liberty, would not commit an offense under this draft Article. Additionally, because “exploitation” does not have a comprehensive definition, the inclusion of required means reduces the vagueness of this offense’s definition.

The means by which the person recruits, transports, harbors, or receives the victim are listed in Section (a)(2)(B). In some cases, the means listed refer to criminal offenses defined elsewhere in the code: criminal coercion is defined in Article [3404]; and unlawful restraint is defined in Article [3402]. Other means are defined in this draft Article or in Article 2103.

Section (a)(2)(B)(iii) covers the use of deception in human trafficking. The definition of deception in Section (a) of draft Article 2103 is consistent with the definition elsewhere in this draft code. It includes false statements (Section (a)(1) of Article 2103); preventing another from obtaining relevant knowledge (Section (a)(2) of Article 2103); failing to correct false impressions (Section (a)(3) of Article 2103). Fraud is also a prohibited means under the definition of deception.

Section (a)(2)(B)(iv) covers the situation where there is an abuse of power and a position of vulnerability. People who can abuse power include relatives, guardians, educators, hostel administrators, staff of rehabilitation homes, and prison personnel.<sup>75</sup> Victims are especially vulnerable because of their youth, or being in a position in which social norms require compliance with the will of another, like a parent or spouse.

Section (a)(2)(B)(v) covers paying a person who has control over the victim. This covers the common situation in which parents, family members, and boyfriends essentially end up “selling” their loved ones to traffickers. Authorities of state institutions, like orphanages, have also been known to accept compensation for handing over individuals under their control to traffickers.<sup>76</sup>

The offense is a Class [B] felony. This comports with offenses of similar severity in this draft Code.

*Relation to Current Law.* This draft Article implements protection for the basic right to be free from trafficking guaranteed by Provisional Constitution (2012) Art. 14 (Slavery, Servitude and Forced Labour).

This draft Article also codifies Penal Code (1962) Arts. 456 (Dealing and Trading in Slaves), 457 (Sale and Purchase of Slaves), and 458 (Enforced Subjection). Penal Code (1962) Art. 459 (Crimes Committed Abroad) is codified here, combined with the general provision on jurisdiction, draft Article [105] (Jurisdiction). Other articles in the Penal Code (1962) also convey an intent to punish the conduct described in this draft Article: Articles 401 (Abduction for Purposes of Lust or Marriage), 486 (Detention of a Person for the Purposes of Robbery or

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<sup>75</sup> See Central European and Eurasian Law Initiative (CEELI), *Human Trafficking Assessment Tool and An Introduction to the Human Rights Assessment Tool: An Assessment Tool Based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, at 37.

<sup>76</sup> *Id.* at 38.



Extortion), 460 (Seizure of a Person), 455 (Reduction to Slavery), and 433 (Abduction of Persons under Legal Incapacity).

*Relation to Sharia Law.* See the Comment to draft Article 3401 (Kidnapping).

*Relation to International Law.* This draft Article is based on Article 102 in the Model Code for Post-Conflict Justice (MCPCJ), which is based on Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The age for a potential victim has been raised from 14 to 18.

## **Offenses Against the Person**

### **Chapter 3100. Homicide Offenses**

#### **Introduction: Chapter 3100**

This draft Chapter targets the offense of taking the life of another person. Draft Articles 3101 through 3104 reach all homicides except those that are non-negligent. Offense grades vary with culpability, and range from a Class [A] felony, for intentional murder, to a Class [D] felony or negligent homicide. The different degrees of culpability for the offense of homicide reflect moral distinctions amongst different types of offenders. Draft Article 3105, in accordance with the current Penal Code (1962), punishes causing or aiding the suicide of another and attempting suicide of oneself, respectively. Draft Article 3106 punishes unlawful abortions, also corresponding to current law.

#### **Comment on Article 3101. Murder in the First Degree**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 329 (Carnage), 434 (Murder), and 442 (Homicide or Hurt Caused by Parent)

#### **Comment:**

*Generally.* Draft Article 3101 defines first-degree murder as knowingly causing the death of another person. The offense is graded as a Class [A] felony, the most serious grade in this draft Code.

*Relation to Current Law.* Penal Code (1962) Art. 434 (Murder) does not condition the liability for murder based on the culpability of the offender. However, this draft Chapter establishes the grades of First Degree Murder, Second Degree Murder and Manslaughter to reflect the degree of culpability and the dangerousness of the relevant conduct.

This draft Article also incorporates conduct prohibited by Penal Code (1962) Art. 329 (Carnage) where it results in death.

This draft Code does not adopt the policy of Penal Code (1962) Art. 442 (Homicide or Hurt Caused by Parent), because a parent is no less culpable when committing a crime and a child is no less deserving of redress for a wrong committed against him or her.

*Relation to Sharia Law.* Liability for Murder under this draft Article corresponds roughly

with liability under Sharia law for intentional homicide (qatl al-‘amd).<sup>77</sup> Ibn Duyan defines intentional homicide (qatl al-‘amd) as intentionally causing the death of another.<sup>78</sup> Mohamed El-Awa defines intentional homicide (qatl al-‘amd) as homicide where the person “intend[s] to kill and employ[s] some means likely to have that result.”<sup>79</sup> Al-Shafi’i divided intentional homicide into two parts: purely intentional (qatl al-‘amd) and quasi-intentional (qatl shibh al-‘amd) homicide.<sup>80</sup> Substantively, there is no difference between knowledge and intent in relation to homicide, because the common law notion of intent includes both knowledge and purpose, as defined in this drafted code.

The Shafi’i school of thought punishes purely intentional (qatl al-‘amd) and quasi-intentional homicides (qatl shibh al-‘amd) differently. In cases of purely intentional (qatl al-‘amd) homicide, the victim’s heirs choose between retaliation (qisas) and compensation (diya);<sup>81</sup> in cases of quasi-intentional (qatl shibh al-‘amd) homicide, the victim’s heirs receive enhanced compensation (diya) only.<sup>82</sup> However, consistent with modern penal practice, this draft Article grades First -Degree Murder as a Class [A] felony. This draft Article transfers the right to punish persons who commit homicide from the victim’s family to the State, consistent with modern practice, including that of many Muslim countries. Both compensation (diya) and penance have been moved from the criminal system to the civil system for greater efficiency.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3102. Murder in the Second Degree**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 434 (Murder), 441 (Preterintentional Homicide), 442 (Homicide or Hurt Caused by Parent), 447 (Death or Hurt Caused as a Consequence of Another Crime); Counterterrorism Law of 2014 Arts. 20 (Offenses Against the Safety of Civil Aviation) and 21 (Offenses Against Safety at Airports Serving Civil Aviation)

#### **Comment:**

*Generally.* This provision defines and grades the offense of second-degree murder. Draft Article 3102 imposes an intermediate punishment for offenses that, though considered less serious than first-degree murder, are considered more serious than the reckless killings covered by draft Article 3103.

Homicides falling under Section (a) should represent a wanton and willful disregard of the likelihood that the natural tendency of the defendant’s behavior is to cause death or serious

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<sup>77</sup> See generally, IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW (*Manar al-Sabil*); see also MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY.

<sup>78</sup> IBN DUYAN, CRIME AND PUNISHMENT UNDER HANBALI LAW (*Manar al-Sabil*), 5.

<sup>79</sup> MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY, 75.

<sup>80</sup> IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER (*Bidayat al-mujtahid*), Volume 2, at 481 (Purely intentional homicide requires that the defendant intend to kill and “employ some means likely [to kill]. . . . Quasi-intentional homicide presumes the defendant’s intent is to “strike and not commit homicide” when he uses “some means used intentionally for beating, but not for killing.”).

<sup>81</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (*Umdat al-Salik*), 586-587.

<sup>82</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (*Umdat al-Salik*), 589. See also, Ibn Duyan, CRIME AND PUNISHMENT UNDER HANBALI LAW (*Manar al-Sabil*), 5 & 8.

bodily injury. Examples of such behavior include intentionally shooting a gun into a crowded room, or driving a car at a very high speed in inclement weather while highly intoxicated. It would also be murder in the second degree where a person leaves the gate open to his yard in which he keeps a vicious dog trained to kill, knowing that people will be walking by. This is in contrast to ordinary recklessness, which is described in Article 3103 (Manslaughter).

Liability under Section (b) is similar, because homicides resulting from “the commission, attempt to commit, or flight after commission of any violent offense” likely demonstrate the required recklessness and extreme indifference of Section (a). Liability under Section (b) is limited to cases involving violent offenses, because, viewed *ex ante*, violent offenses are the most likely to cause death. Section (b)’s rebuttable presumption would be unfair if applied to cases of nonviolent offenses where the risk of causing death is much lower. The paradigmatic case of murder under Section (b) is similar to the one described above as to Section (a), except that under Section (b), homicide related to the commission of a violent offense triggers a presumption of recklessness and extreme indifference, which the defendant has a right to rebut by a preponderance of the evidence. For example, a thief fleeing an armed bank robbery in a car might be guilty of murder if he accidentally strikes a pedestrian, thereby killing him. However, the bank robber would be permitted to rebut the presumption of recklessness and extreme indifference by showing that the armed robbery was not a violent offense (i.e., “an offense likely to cause bodily injury”), because the gun he used to threaten the bank teller was unloaded, or because there was a hurricane and he reasonably did not expect there to be any pedestrians on the street.

*Relation to Current Law.* Penal Code (1962) Art. 434 (Murder) does not condition the liability for murder based on the culpability of the person. However, the draft does delineate the grades for homicide depending on the degree of culpability to reflect the dangerousness of the act between First and Second-Degree Murder, and Manslaughter.

This draft Article also follows Penal Code (1962) Art. 441 (Preterintentional Homicide) in that one would be convicted of homicide if he or she commits an assault that results in death, and the circumstances of the assault are so severe that it would constitute an extreme indifference to the value of human life.

This draft Code does not adopt the policy of Penal Code (1962) Art. 442 (Homicide or Hurt Caused by Parent), because a parent is no less culpable when committing a crime and a child is no less deserving of redress for a wrong committed against him or her.

This draft Code does not increase the penalty for the homicide if committed in conjunction with another crime, and therefore deviates from Penal Code (1962) Art. 447 (Death or Hurt Caused as a Consequence of Another Crime).

This draft Article covers Articles 20(1)(a) and 21(1)(a) of the Counterterrorism Law of 2014 if the act involves homicidal violence against the person. This draft Article is listed as the corresponding draft Code Article because it covers a variety of homicide offenses, but the offense committed should be charged under the appropriate corresponding draft Code Article.

*Relation to Sharia Law.* Liability for Murder under this draft Article generally corresponds with liability for quasi-intentional (*qatl shibh al-‘amd*) homicide. As stated above in the commentary for Article 3101 (Homicide), many Muslim jurists, including Shafi’I, define quasi-intentional (*qatl shibh al-‘amd*) homicide as unintentionally causing the death of another using means capable of causing a serious injury but not necessarily death. This is consistent with the language of this draft Article, which defines reckless homicide as occurring “under circumstances manifesting an extreme indifference to the value of human life.” This language

refers to homicide that results from conduct that is very likely or practically certain to cause serious bodily injury to the victim, but which the defendant is not certain will kill the victim.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3103. Manslaughter**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 434 (Murder), 435 (Infanticide for Reason of Honour), 441 (Preterintentional Homicide), 442 (Homicide or Hurt Caused by Parent), 443 (Homicide and Hurt for Reasons of Honour), and 447 (Death or Hurt Caused as a Consequence of Another Crime)

#### **Comment:**

*Generally.* Section (a) of this draft Article punishes recklessly causing the death of another person. This section is different from Section (a) of draft Article 3102 (Murder in the Second Degree), which punishes reckless homicide “under circumstances manifesting an extreme indifference to the value of human life.” Section (a) of this draft Article punishes reckless homicide in the absence of extreme indifference.

Recklessness sufficient to establish liability under Section (a) exists where a person: (1) wounds another person in a vital area, such as the head, (2) drives at an excessively high speed, (3) uses fire without proper precautions, or (4) otherwise acts so as to place a person in clear danger of death. The prosecution bears the burden of establishing the defendant’s awareness of the risk of the other person’s death and the magnitude of such risk.

Section (b) mitigates homicide that otherwise would be punishable under draft Article 3101 (Murder in the First Degree) or 3102 (Murder in the Second Degree) when a defendant committed the homicide under the influence of extreme mental or emotional disturbance, for which there is a reasonable explanation. The burden of proof rests on the defendant to prove this mitigation under draft Article 106 (Burdens of Proof).

“Extreme mental or emotional disturbance” cannot be defined with precision. Such mental or emotional disturbance must rise above the level of everyday stress and aggravation; it must prevent mature and meaningful reflection by a mind capable of comprehending the gravity of the act. The aid of a qualified mental health professional may be necessary to properly evaluate claims under Section (b).

Section (b) adds “the reasonableness of [a person’s explanation] is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believes them to be.” This allows for a closer relation between criminal liability and moral guilt, something advocated by both Sharia law and this draft Code, and therefore requires that the judge consider a defendant’s situation and perspective when determining liability for Manslaughter under Section (b).

Provocations constituting “reasonable explanations” under Section (b) may include, but are not limited to, observation by a person of his spouse committing adultery, aggravated assault or battery upon the defendant, mutual combat, commission of a serious crime against a close relative of the defendant, and illegal arrest of the defendant. When a defendant asserts an unfamiliar “reasonable explanation,” the judge should attempt to analogize the asserted explanation to one of these recognized explanations.

Note also that a person’s “extreme mental or emotional disturbance” under Section (b)

may arise without apparent provocation. For example, a man might kill his own brother under the influence of an extreme mental or emotional disturbance caused by a combination of factors, including child custody problems, the inability to maintain a recently purchased home, or an overwhelming fear of his brother. A person's "extreme mental or emotional disturbance" may also arise without actual involvement by the decedent. For example, after being provoked, the defendant might strike out in a blinding rage and kill an innocent bystander. The guiding question should be whether the defendant's asserted mental or emotional disturbance makes it sufficiently difficult for him to control his actions.

Manslaughter is graded as a Class (C) felony. Manslaughter is graded lower than Murder because of the difference between the culpability required for liability. Under draft Art. 3101 (Murder in the First Degree) or 3102 (Murder in the Second Degree), liability exists when a person causes the death of another person knowingly, or recklessly with extreme indifference; under this draft Article, liability exists where a person causes the death of another person recklessly, or with a higher level of culpability that is mitigated by the influence of his "extreme mental or emotional disturbance for which there is reasonable explanation." For a closer examination of these culpability levels, see draft Art. 203 (Culpability Requirements) and its commentary.

*Relation to Current Law.* Penal Code (1962) Art. 434 (Murder) does not condition the liability for murder based on the culpability of the person. However, the draft does delineate the grades for homicide depending on the degree of culpability to reflect the dangerousness of the act between First and Second-Degree Murder, and Manslaughter.

Also, the defendant can attempt to mitigate an intentional killing of an infant, similar to Penal Code (1962) Art. 435 (Infanticide for Reason of Honour), if the defendant can meet that high bar set out by this draft Article for an extreme emotional disturbance.

This Article also follows Penal Code (1962) Art. 441 (Preterintentional Homicide) in that if a person recklessly commits an assault that causes a homicide, he or she will be charged with the death under this provision. If the crime is so egregious that it constitutes an extreme indifference to the existence of human life, then the person can be charged with Murder in the Second Degree under draft Article 3102.

This draft Code does not adopt the policy of Penal Code (1962) Art. 442 (Homicide or Hurt Caused by Parent), because a parent is no less culpable when committing a crime and a child is no less deserving of redress for a wrong committed against him or her.

Section (b) corresponds to Penal Code (1962) Art. 443 (Homicide and Hurt for Reasons of Honour) insofar as the defendant can prove that he suffered extreme mental or emotional disturbance. Otherwise, the defendant should be charged with First or Second Degree Murder accordingly.

This draft Code does not increase the penalty for the homicide if done in conjunction with another crime, and therefore deviates from Penal Code (1962) Art. 447 (Death or Hurt Caused as a Consequence of Another Crime) for policy considerations.

*Relation to Sharia Law.* Most Muslim jurists would classify Manslaughter under section (a) as quasi-intentional homicide (qatl shibh al-'amd). Muslim jurists define quasi-intentional homicide as unintentionally causing the death of another using means not likely to kill.<sup>83</sup> Cases of quasi-intentional homicide (qatl shibh al-'amd) covered by Section (a) differ from cases covered by Section (a) of draft Article 3102 (Murder in the Second Degree) in that homicide under that Article must occur "under circumstances manifesting an extreme indifference to the

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<sup>83</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 73.

value of human life.” Thus, ordinary recklessness suffices to establish liability under Section (a) of draft Article 3103 (Manslaughter). The paradigmatic case of homicide under both Sharia law and Section (a) is one where a person is aware of a substantial risk that his conduct will harm and perhaps cause the death of another person.

Current law does not expressly mitigate liability for Murder (as defined in draft Articles 3101-3102) committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. However, Section (b) of this Article is consistent with Sharia law, which allows mitigation of liability for murder. Ibn Duyan illustrates this by citing instances where the Caliphs ‘Ali and ‘Umar both mitigated liability for murder in cases where a husband found his wife sexually engaged with another man and killed him in that moment.<sup>84</sup>

The mitigation provided by Section (b) is desirable because a mentally or emotionally disturbed person is similar to an incompetent person who is excused under Islamic law and this Code.<sup>85</sup> Both Islamic law and this Code excuse incompetent persons, because they lack the moral guilt that both laws seek to punish. To a lesser extent, the same is true of persons who commit homicide and satisfy the requirements of Section (b).

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3104. Negligent Homicide**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 445 (Death Caused by Negligence)

#### **Comment:**

*Generally.* This draft Article defines the offense of negligent homicide. Although criminal law generally considers recklessness the minimum culpability level for which liability is appropriate, this draft Article departs from that understanding by recognizing that the harm involved—the death of a human being—is much graver than that punished by other offenses. Draft Article 3104 imposes liability on those who fail to recognize a “substantial and unjustifiable risk” of causing death and whose acts, constituting a “gross deviation” from the reasonable person’s standard of care, result in the death of another person. In other words, if the offender is not aware of the substantial risk that he or she has created, but should have been aware of it, he or she is guilty of Negligent Homicide under this draft Article. This differs from draft Art. 3103 (Manslaughter) and is graded lower because the recklessness required for Manslaughter means the offender knew of but consciously disregarded the substantial risk; in the case of Negligent Homicide, the offender was not in fact aware of the risk, though his negligence in failing to recognize it is still blameworthy. For a closer examination of these culpability levels, see draft Article 203 (Culpability Requirements) and its commentary.

The offender’s negligence, however, must still rise to the level of criminal negligence; ordinary tort negligence does not suffice. For example, if a person fires a gun, unreasonably believing it to be unloaded, and kills another, he may be convicted under this draft Article. Another common example of criminally negligent homicide is careless driving which causes a

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<sup>84</sup> Ibn Duyan, *Crime and Punishment Under Hanbali Law (Manar al-Sabil)*, 19 (quoting al-Qamus al-Muhit, vol. 4, at 122 (Cairo 1938)).

<sup>85</sup> Islamic law excuses mentally incompetent persons, minors, and sleepwalkers. Ibn Duyan, *Crime and Punishment Under Hanbali Law (Manar al-Sabil)*, 12.



death. Other examples include permitting overcrowded conditions in a place of entertainment, delivery of dangerous drugs, and conducting dangerous blasting operations.

*Relation to Current Law.* This draft Article is consistent with current Penal Code (1962) Art. 445 (Death Caused by Negligence).

*Relation to Sharia Law.* Muslim jurists do not specifically use the term “negligent homicide” but allude to it in many places. Sharia law “holds a person responsible for the result whenever it is possible to trace its source back to the act which leads to it.”<sup>86</sup> Ibn Rushd cites the example of when the Caliph ‘Umar imposed liability where “a person was leading his mare and it trampled upon another.”<sup>87</sup> Ibn Duyan comes closest to Article 3104’s definition of negligent homicide; he labels as “mistaken (*khata*) homicide” all cases satisfying the following criteria: “[the defendant] does what is permissible to him to do, (his act) of hitting or aiming at game, or similar to it . . . then killing a person.”<sup>88</sup> Draft Article 3104’s definition of negligent homicide accords with Ibn Duyan’s notion of mistaken homicide, except that this drafted code, unlike Ibn Duyan, would require monetary compensation (*diya*) for non-negligent homicide to be sought in the civil system as opposed to the criminal system. Similarly, other jurists have cited the fact that someone who negligently leaves an item in the middle of the street “so that it injured another person” is “liable for the injury because the injury occurred as a result of his intentional placing” of the item.<sup>89</sup>

According to both Sharia law and draft Article 3104, the negligence required for liability is lacking in two cases. The first case involves a person who acts so as to create a “substantial and unjustifiable” risk of causing death, but is not culpable with regard to his ignorance of such risk, because his ignorance does not constitute a “gross deviation” from the acceptable standards of conduct for a person in the same situation. The second case involves a person who acts so as to create a “substantial and unjustifiable” risk of causing death, but is not culpable with regard to his creation of such risk, because his ignorance results from a reasonable mistake of fact. The example given by Ibn Duyan in this regard is that of a hunter who shoots at what he reasonably believes is a deer, but which in fact is a person dressed as a deer.

Draft Article 3104 departs from Sharia law by not providing for compensation or penance as criminal punishment options, placing them in the civil system; punishment is by incarceration or fine only.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3105. Causing Suicide; Aiding, Soliciting, or Attempting Suicide**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 436 (Death Caused to a Person With His Own Consent), 437 (Attempt to Commit Suicide), and 438 (Instigating or Aiding to Commit Suicide)

#### **Comment:**

*Generally.* This draft Article adopts the premise that suicide is undesirable and should

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<sup>86</sup> Ahmed Fathi Bahnassi, “Criminal Responsibility in Islamic Law,” 174.

<sup>87</sup> Ibn Rushd, *The Distinguished Jurist’s Primer (Bidayat al-mujtahid)*, volume 2, at 503.

<sup>88</sup> Ibn Duyan, *Crime and Punishment Under Hanbali Law (Manar al-Sabil)*, 10 (quoting al-Qamus al-Muhit, vol. 4, at 122 (Cairo 1938)).

<sup>89</sup> Ahmed Fathi Bahnassi, “Criminal Responsibility in Islamic Law,” 175.

not be facilitated or attempted. This draft Code does not punish the individual who successfully commits suicide because authorizing such punishment would be futile. This is also why this draft Article explicitly criminalizes attempted suicides. Since a completed suicide is not an offense, draft Chapter 900's attempt liability would not apply and therefore a specific draft provision is necessary here to cover attempted suicide.

Section (a) punishes a person who causes another to commit suicide by force, coercion, threats, or deception. It should be noted that such conduct need not be directed at the decedent. The defendant is liable under Section (a) for causing person B to commit suicide if, for example, he threatens to kill person A unless person B kills him or herself.

Notwithstanding the decedent's presence as an intervening actor, the offender's conduct therefore closely resembles direct homicide. Section (a)'s knowledge requirement limits the offense to exclude from liability all but the most culpable and dangerous conduct. A person will not be liable unless he is practically certain that his conduct will cause the other person to commit suicide. Furthermore, the need for the suicide to be caused by force, duress, or deception protects those who are not culpable for the suicide. For example, a girl will not, and should not, be punished under this provision for telling a boy she never wants to see him again, even if the boy informs her that receiving this information will make him want to kill himself.

Section (b)(1) criminalizes knowingly aiding or soliciting another to commit suicide. Liability here depends solely on the defendant's conduct and culpable state of mind; the intentions of the decedent are irrelevant. For example, a person is liable under Section (b)(1) if he mixes poison and leaves it where he is practically certain the decedent will find and ingest it (and where the decedent does so). Section (b)(1) also includes cases where multiple people decide to commit suicide together as part of a suicide pact and where one of the pact members survives. For example, suppose persons A and B wish to commit suicide together by driving off a cliff. They drive off the cliff, but person A, the driver, survives. Person A has committed an offense under Section (b)(1) for knowingly aiding (and in fact causing) person B's suicide and would also be guilty of attempting suicide. This section also criminalizes the act of assisting suicide.

Section (b)(2) allows punishment for attempted suicide, but it is especially important in such a case to consider carefully the mental health of the person making such an attempt. In many cases, such a person will be mentally disturbed and therefore not legally responsible for his or her actions. In general under this draft Code, liability for attempt is imposed when a person, acting with the culpability required for the underlying offense, purposely engages in conduct constituting a substantial step toward the commission of the offense. All of the requirements of Attempt, in draft Article [901], in the General Part are required for one to be found guilty of an offense under Section (b)(2) of this draft Article.

An offense under Section (a) is graded as a Class [A] felony if the person who committed suicide was under the age of 14. This is derived from Penal Code (1962). Otherwise, the offense is a Class [B] felony. An offense under Section (b) is a Class [E] felony.

*Relation to Current Law.* This Article comports with Penal Code (1962) Arts. 436 (Death Caused to a Person With His Own Consent), 437 (Attempt to Commit Suicide), and 438 (Instigating or Aiding to Commit Suicide) in both what conduct this offense criminalizes and its punishment. The grading also includes the aggravating circumstance in the Penal Code (1962) for when the person committing suicide is under the age of 14.

*Relation to Sharia Law.* This Chapter is consistent with Sharia law. Section (b) has been added because, as Sharia law generally aims to do, it balances the interests of individuals and the



government. Sharia law discourages suicide, but generally punishes only attempted suicide (as a *ta'zir* offense).<sup>90</sup> Most jurists cite the following Qur'anic verse to justify punishing suicide: "Do not kill yourselves."<sup>91</sup> The jurists' opinions concur with the rationales for imposing liability under Sections (a) and (b).<sup>92</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3106. Unlawful Abortion**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 418 (Abortion without Consent), 419 (Abortion with Consent), 420 (Instigation to Abortion), 421 (Death or Injury of the Woman), 422 (Abortion for Reasons of Honor), and 424 (Aggravating Circumstances and Accessory Penalty)

#### **Comment:**

*Generally.* This draft Article criminalizes conducting or receiving an abortion, subject to certain, limited exceptions. Section (a) criminalizes having an abortion or performing an abortion on another party. Section (a) makes it an offense for a person to perform an abortion on another person, but also provides liability for the woman upon whom the abortion is performed if she requests that another person terminate her pregnancy, or if she takes measures to terminate her own pregnancy. Note that she must take these measures with the purpose of terminating her pregnancy; however, it is not necessary that she actually accomplish terminating her pregnancy as long as she uses instruments, drugs, or violence upon herself for that purpose. Additionally, a person who assists another person in the performance of an abortion is liable as an accomplice under draft Article [401] (Accountability for the Conduct of Another).

Section (b) grades the offense depending on whether valid consent was given by the mother, reflecting the grading of Penal Code (1962) Arts. 418-422.

Section (c) is a direct parallel to Penal Code (1962) Art. 424 (Aggravating Circumstances and Accessory Penalty).

Section (d) provides an exception for cases in which the pregnancy endangers the mother's life. This reflects the general principle that one must balance the mother's right to life with that of the fetus.

*Relation to Current Law.* This Article closely follows Penal Code (1962) Arts. 418 (Abortion without Consent), 419 (Abortion with Consent), 420 (Instigation to Abortion), 421 (Death or Injury of the Woman), 422 (Abortion for Reasons of Honor), and 424 (Aggravating Circumstances and Accessory Penalty). Penal Code (1962) Art. 422 (Abortion for Reasons of Honor), which reduces the punishment for an offense committed after rape or incest from one-half to two thirds the original punishment, is not included here.

Furthermore, the Penal Code (1962) increases punishment for unlawful abortions depending on whether the mother was harmed. However, in the draft Code this is unnecessary because the person committing the abortion that causes death or bodily harm to the mother can

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<sup>90</sup> Ahmad b. Naqib Al-Misri, *Reliance of the Traveler ('Umdat al-Salik)*, §§ 25.0-25; Dr. Anwarullah, *Criminal Law of Islam*.

<sup>91</sup> *Qur'an* 4:29.

<sup>92</sup> Dr. Anwarullah, *Criminal Law of Islam*, 20 (suicide caused by force, threat of force, or deception), 24-25 (assisted suicide).

still be liable under the homicide and assault offenses.

As noted above, Section (c) is a direct parallel to Penal Code (1962) Art. 424 (Aggravating Circumstances and Accessory Penalty).

*Relation to Sharia Law.* There is general support for this Article in Sharia law. In accordance with Sharia, it is not unlawful to terminate a pregnancy of fewer than 120 days.<sup>93</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3107. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 3200. Robbery, Assault, Endangerment, and Threat Offenses**

### **Introduction: Chapter 3200**

This Chapter defines offenses that are antisocial and threatening to the public's well-being. Art. 3201 (Robbery) punishes robbery, which is defined as a more threatening version of theft. It punishes the use of extreme violence and threats when in the course, or immediately following a theft, as defined in Art. 4301 (Theft). Art. 3202 (Assault) punishes touching without consent or conduct that puts a person in fear of imminent bodily injury. Even if no bodily injury results, touching without consent is punished because it is antisocial and violates a person's right to bodily integrity. While conduct that puts a person in fear of imminent bodily injury does not affect that person's bodily integrity, it is still punished on the grounds that it is antisocial and causes psychological harm to the victim. Arts. 3203 (Causing or Risking Catastrophe), 3204 (Recklessly Endangering Another Person), 3205 (Terroristic Threats), and 3206 (Unlawfully Administering Drugs) prohibit risky conduct and threats that are not only antisocial, but also extremely dangerous and psychologically harmful.

### **Comment on Article 3201. Robbery**

**Corresponding Current Provision(s):** Penal Code (1962), Art. 484 (Robbery);  
Counterterrorism Law of 2014 Art. 18 (Hijacking of Aircrafts)

**Comment:**

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<sup>93</sup> See Sahih Bukhari, No. 3208; Sahih Muslim, No. 2643.

*Generally.* This proposed draft criminalizes using violence or threats in the course of, or immediately after, a theft by taking or unlawful disposition as defined in Art. 4302. Robbery is appropriately defined as a separate and serious offense because of the special elements of danger commonly associated with forcible theft from another. The elements of robbery focus on three factors: (1) the nature of the special circumstances that serve to distinguish the offense from ordinary theft (Section (a)(1)-(2)); (2) the time span during which these circumstances must occur (Section (a)'s language "in the course of committing a theft"); and (3) the culpability with which the actor must engage in the specified conduct (discussed below).

"In the course of committing a theft" in Section (a) describes the time span during which the offense must occur. This language includes the conduct occurring during an attempted theft or in flight after its attempt or commission. The culpability required under this statute depends on the element. The culpability required for "in the course of committing the act" in the case of a completed or attempted theft is derived from Art. 4302 (Theft by Taking or Unlawful Disposition). In the case of fleeing, whether from an attempt or completed theft, the culpability must satisfy the requirements of either the attempt or completed theft, and the prosecution must show recklessness as to the flight itself. Recklessness is enough for Section (a)(1)'s conduct. For Section (a)(2), the threatening behavior in this element implies intent; it is not the victim's reaction to the actor's conduct that controls, but rather the intentional behavior of the actor in communicating the threat of injury.

Section (b) grades the base offense as a Class [D] felony. The grading must be more severe than the separate offenses of theft and assault because of the increased danger the person poses to society for having committed these offenses together. By committing a violent theft, the person has expressed his disregard for his fellow human and the punishment must express this.

Section (b) distinguishes the grading for hijacking public transportation vehicles from the grading for the general robbery offense. The grading for hijacking is more severe when the offense involves danger to a large number of human lives. Hijacking an aircraft is distinguished from other forms of public transportation because of the relatively low chances of the passengers surviving the hijacking of an aircraft compared to the hijacking of a bus or other non-aircraft form of public transportation.

This crime is distinguished from extortion by the immediacy and seriousness of the threat. This crime is distinguished from theft by the presence of the victim and the use or threat of violence.

*Relation to Current Law.* Art. 484 of the Penal Code (1962) (Robbery) criminalizes the conduct of "us[ing] violence . . . or threats" to effectuate a theft. The draft penal code criminalizes the conduct of causing serious bodily injury or threatening to cause serious bodily injury to effectuate a theft. This justified by the concern to differentiate this much more serious offense from conduct that should be treated less severely under Art. 4301 (Theft).

In another way, the draft Article also increases the scope compared to Penal Code (1962) because it does not require intent by the person using violence or threats and merely criminalizes that conduct if done in combination with a theft.

Section (b)(1) of the proposed draft includes the aggravating circumstances in Penal Code (1962) Art. 484 of committing the offense while using a dangerous weapon, wearing a disguise, or working in a group.

*Relation to Sharia Law.* Support for this provision can be found in the justifications for Art. 3202 (Assault) and Arts. 4301-4306 (Theft), because this crime is essentially a combination of those two Articles.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3202. Assault**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 312 (Unauthorised Exercise of Private Rights), 329 (Carnage), 439 (Assault), 440 (Hurt), 442 (Homicide or Hurt Caused by Parent), 443 (Homicide and Hurt for Reasons of Honour), 446 (Hurt Caused by Negligence), 447 (Death or Hurt Caused as a Consequence of Another Crime); Counterterrorism Law of 2014 Arts. 20 (Offenses Against the Safety of Civil Aviation), and 21 Offenses Against Safety at Airports Serving Civil Aviation)

#### **Comment:**

*Generally.* This Article defines and grades the offense of assault. Section (a)(1) defines the offense as any touching or injuring of another without consent. The offense requires negligence; however, Section (b) grades the offense differently to correspond to higher levels of culpability. The “touching” requirement is satisfied any time the victim is touched by a thing or body part under the person’s control. An extreme case would be an offender who operates a wrecking ball and uses it to strike another person; the fact that the offender was far removed from the actual contact is no obstacle to his liability. It should also be noted that Art. 3202 imposes liability for all touching, no matter how slight. Imposing liability for an un-consented tap on the shoulder may seem unjust, but the Article avoids injustice by grading such non-injurious touching as a Class [C] misdemeanor. Also, note that the scope of liability of this offense is limited by consent, which could be inferred by the circumstances. This grade also encompasses touching of a more severe nature, such as forceful grabbing, that does not cause injury.

Section (a)(2) defines the offense as putting another person in fear of imminent bodily injury, or injury that is about to occur. The prosecution must establish that a reasonable person in the victim’s position would have thought that the defendant was about to harm him or her. For instance, if a person is in a locked room with another and shouts, “I am going to kill you,” there is reason to fear imminent bodily injury. However, if the person yells the same thing to another person while being restrained by the police, the imminence requirement has not been satisfied.

Sections (b)(1) through (b)(3) separate the grading depending on the injury caused and the culpability level with which it was caused. The grading scale reflects the level of harm to the victim caused by the offense. Under Section (b)(1), a person commits serious assault, the gravest offense under this Article, if he or she causes serious bodily injury to another person. Thus, Section (b)(1) encompasses more injuries and harms than Section (b)(2), and only the serious injuries of Section (b)(1) merit the higher grade associated with serious bodily injury. Section (b)(1) also mitigates the punishment if the serious bodily assault was committed under extreme mental or emotional disturbance, that the defendant must prove. This mitigation is similar to that of Murder in the First Degree down to Manslaughter, and is also reflected in the current Penal Code Art. 443 (Homicide and Hurt for Reasons of Honour). If there is no bodily injury, or if there is bodily injury caused by negligence, then the offense is a Class [C] misdemeanor.

*Relation to Current Law.* This draft Article punishes assault committed with criminal negligence, under current law Art. 446 (Hurt Caused by Negligence). Additionally, Art. 439

(Assault) of the Penal Code (1962) punishes the striking another that causes no physical harm or “mental illness” with six months imprisonment. Art. 440 (Hurt) punishes the causing of physical harm or “mental illness” to another with up to twelve years imprisonment. These Articles punish the offense based on the seriousness of the harm caused. The proposed draft follows this model in grading the offense. It also simplifies the offense by combining the offense of touching someone causing no harm with that which causes harm. Furthermore, the proposed draft criminalizes the act of putting someone in fear of imminent bodily injury, not requiring a touch at all.

This Article would also punish the conduct of Penal Code (1962) Art. 312 (Unauthorised Exercise of Private Rights).

This Article would also punish the conduct prohibited by Penal Code (1962) Art. 329 (Carnage) where it does not result in death (that would be prohibited under the homicide offenses of this draft Code).

This Article punishes conduct prohibited by Art. 20(1)(a) and Art. 21(1)(a) of the Counterterrorism Law of 2014, including violence committed against a person on board an aircraft in flight or violence committed against a person at an airport. All assaultive conduct is prohibited by this Article, whether in flight or on ground.

This draft Code does not adopt the policy of Penal Code (1962) Art. 442 (Homicide or Hurt Caused by Parent), because a parent is no less culpable when committing a crime and a child is no less deserving of redress for a wrong committed against him or her.

This draft Code does not increase the penalty for the assault if done in conjunction with another crime, and therefore deviates from Penal Code (1962) Art. 447 (Death or Hurt Caused as a Consequence of Another Crime).

*Relation to Sharia Law.* Support for this Article comes from the concept of *qisas*, stating that it is appropriate to take equal retaliation upon a person who harms you. One of the conditions required to punish under this doctrine is that the injury must be deliberate (*'amd*) and not accidental (*khata*).<sup>94</sup> This draft provision is consistent with these principles.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3203. Causing or Risking Catastrophe**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 324 (Devastation and Pillage), 330 (Causing Disaster), 331 (Unlawful Omission to Take or Removal of Precautions against Accidents), 333 (Causing Impediments to Protection of Public Safety), 334 (Epidemics), 335 (Pollution of Water and Food), 336 (Adulteration and Simulation of Food), 338 (Sale of Adulterated or Simulated Food), Art. 345 (Crimes with Culpa Involving Danger), 347 (Crimes with Culpa against Public Health), 528 (Collapse of Building or Other Construction), 529 (Failure to Perform Work on Buildings or Constructions Which Threaten to Collapse); Counterterrorism Law of 2014 Art. 20 (Offenses Against the Safety of Civil Aviation)

#### **Comment:**

*Generally.* A person is guilty under this Article if he or she causes or risks a catastrophe, or recklessly fails to take measures to prevent or mitigate a catastrophe under certain

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<sup>94</sup> MUHAMMAD EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY, 73-74 (1982).

circumstances. Under Section (a)(1), a person commits an offense if he or she causes a catastrophe by means of a harmful or destructive force that has the capability of causing widespread damage. The grading for Section (a)(1) depends on the state of mind of the offender. Under Section (a)(2), a person commits an offense if he or she creates a risk of causing a catastrophe. The grading for Section (a)(2) also is based on the state of mind of the offender.

A person is guilty under Section (c) if he or she has a duty to take reasonable measures to prevent or mitigate the catastrophe. A person has such a duty under Section (c)(1) if he or she is a person that either caused or assented to cause the catastrophe, thereby requiring a person to minimize the problem he or she created. A person can also have such a duty under Section (c)(2) by having official, contractual, or other legal obligations, and where he or she knows of these obligations.

*Relation to Current Law.* Art. 330 (Causing Disaster) of Penal Code (1962) punishes causing any disaster endangering public safety, including fire, flood, shipwreck, airplane crashes, and building demolition. Art. 331 (Unlawful Omission to Take or Removal of Precautions against Accidents) of Penal Code (1962) makes it an offense to remove precautions, thereby creating a potential for disaster. This Article codifies both Arts. 330 and 331 of the Penal Code (1962), criminalizing both causing a catastrophe and creating the risk of a catastrophe.

Penal Code (1962) Art. 333 (Causing Impediments to Protection of Public Safety) would be charged as aiding this drafted offense under Art. 401 (Accountability for the Conduct of Another).

The provisions in Penal Code (1962) covering disseminating noxious germs (Art. 334 (Epidemics)), polluting food or water (Art. 335 (Pollution of Water and Food)), poisoning or adulterating food, or selling such food (Arts. 336 (Adulteration and Simulation of Food) and 338 (Sale of Adulterated or Simulated Food) are also included in this drafted Article. Penal Code (1962) Art. 345 (Crimes with Culpa Involving Danger) is included in this drafted Article as well.

The grading in this draft Article gives a lower punishment for crimes committed recklessly rather than knowingly, reflecting the lower grades proscribed in Penal Code (1962) Art. 347 (Crimes with Culpa against Public Health).

This draft Article includes the conduct prohibited by Penal Code (1962) Art. 528 (Collapse of Building or Other Construction) if it fits the adopted definition of a catastrophe. Similarly, Penal Code (1962) Art. 529 (Failure to Perform Work on Buildings or Constructions Which Threaten to Collapse) could constitute the offense of risking a catastrophe under this Article.

This draft Article covers conduct criminalized by Counterterrorism Law of 2014 Art. 20(1)(c) and (e). It is considered causing or risking catastrophe to place or cause to be placed on an aircraft a device or substance that is likely to endanger the safety of flight. It is also considered causing or risking catastrophe to provide false information that endangers the safety of an aircraft in flight.

This draft Article would also criminalize the devastating conduct criminalized in Penal Code (1962) Art. 324 (Devastation and Pillage).

*Relation to Sharia Law.* This Article is supported generally by the principle in Islamic law known as *maslahah* (considerations of public interest). A contemporary Shafi'i scholar, Taha Jabir al-'Alwani, summarizes this notion by stating that: "It is generally held that the principle objective of the Shari'ah and all its commandments is to realize the genuine *maslahah* or benefit of its jurisdiction."<sup>95</sup>

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<sup>95</sup> TAHA JABIR AL-'ALWANI, SOURCE METHODOLOGY IN ISLAMIC JURISPRUDENCE (*Usul al-Fiqh al-Islami*)

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3204. Recklessly Endangering Another Person**

Corresponding Current Provision(s): Penal Code (1962), Arts. 332 (Attempts Endangering Public Safety), 337 (Adulteration or Simulation of Other Articles to the Detriment of Public Health), 339 (Sale of Noxious Food), 340 (Sale and Supply of Spoiled Medicinal Substances), 341 (Supply of Medicinal Substances in a Manner Dangerous to Public Health), 346 (Culpable Omission or Removal of Precautions or Protections against Disasters or Accidents), 524 (Failure to Exercise Custody and Detective Control of Animals), and 563 (Treatment Capable of Depriving Another of Consciousness or Will)

#### **Comment:**

*Generally.* Art. 3204 defines and grades the offense of endangerment. Section (a) criminalizes recklessly creating a risk of serious bodily injury or death. This offense also necessarily includes reckless endangerment in regards to possessing a dangerous animal. Therefore, a person also commits an offense under this Article by having a dangerous animal in his or her possession when that person either does not guard the animal with reasonable precautions, or entrusts the animal's care to an inexperienced person. A person also commits an offense if he or she has an animal that is used for drawing, carrying, or racing in his or her possession in a public place and either leaves the animal unattended or unguarded, or drives or tethers the animal in such a manner as to endanger public safety. Section (b) grades the offense as a Class [F] felony.

*Relation to Current Law.* Art. 332 of Penal Code (1962) (Attempts Endangering Public Safety) penalizes a person who commits any act that endangers public safety. Art. 332 sets the punishment from one to five years. This draft provision sets the grade of the offense as a Class [F] felony because a crime that risks endangerment is less dangerous than a crime where the actor succeeds in causing the harm.

This draft Article corresponds to a number of provisions in the Penal Code (1962) that describe conduct that creates a risk of seriously injuring another, specifically through adulteration or dissemination of items made for consumption. These are Arts. 337 (Adulteration or Simulation of Other Articles to the Detriment of Public Health), 339 (Sale of Noxious Food), 340 (Sale and Supply of Spoiled Medicinal Substances), 341 (Supply of Medicinal Substances in a Manner Dangerous to Public Health).

This draft Article codifies Art. 346 (Culpable Omission or Removal of Precautions or Protections against Disasters or Accidents). It also codifies Art. 524 of Penal Code (1962) (Failure to Exercise Custody and Detective Control of Animals), which criminalizes the irresponsible possession of a dangerous animal. This draft code criminalizes the same conduct as that described in the Penal Code (1962), while also simplifying it by including in its general definition the conduct criminalized under the more specific provisions of the Penal Code (1962).

Penal Code (1962) 563 (Treatment Capable of Depriving Another of Consciousness or Will) is also codified here because it involves endangering the hypnotized person's safety. Note that consent to hypnotization would not excuse exposing a hypnotized person to endangerment. See draft Article 302 (Consent) in the General Part.

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81 (International Institute of Islamic Thought 1990).

*Relation to Sharia Law.* Imposition of penal liability for reckless endangerment is consistent with Islamic law’s strong condemnation of homicide (See Chapter [3100] (Homicide)) and assault (see draft Article 3202 (Assault)). Conduct amounting to reckless endangerment creates conditions making homicide or assault likely to occur, and reckless homicide and assault are both punishable under Islamic law.<sup>96</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3205. Terroristic Threats**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 266 (Aggravating Circumstances), 325 (Intimidation of the Public by Means of Explosive Materials), 326 (Intimidation of the Public), and 468 (Threats)

#### **Comment:**

*Generally.* This Article applies to threats that seriously impair personal security or public order, distinguishing itself from other Articles covering threatening conduct designed to compel particular behavior. Even where the person has no intention of actually carrying out his threat, the threat itself creates certain identifiable harms that are appropriate for redress by the criminal law. Public threats of public destruction create serious inconvenience by creating a need for evacuation and other precautions. For that reason, this Article criminalizes threats regardless of their sincerity. These threats can create psychological distress, panic, and inconvenience.

False public alarms are prohibited under draft Article 6104 (Public Alarms). Threats for the purpose of compelling another to perform a certain act are covered by draft Article 3404 (Criminal Coercion).

An offense under this Section (a) of this draft Article requires that the threat be of a crime of violence, which includes homicide, kidnapping, robbery, and arson. The person must communicate the threat of such harm with purpose to cause terror or at least reckless disregard of the risk of causing such terror.

An offense under Section (b) requires that a person cause an explosion with the intent to cause extreme fear or distress.

*Relation to Current Law.* The offense in Section (a) codifies the offense in Section 2 of Penal Code (1962) Art. 468 (Threats). Section 1 of Art. 468 requires the complaint of a party injured, and so is better dealt with in a non-criminal context.

Art. 468 (Threats) makes it an offense to make a “serious” threat. It references the aggravating circumstances described in Section 2 of Art. 266, which offers instances that can constitute a “serious” threat. Using one of the methods described in Art. 266, like making a violent threat with a large group, or using a mask, is likely to constitute behavior that is reckless as to causing another person to experience extreme fear or distress. Therefore, this draft Article covers similar behavior to that covered by the aggravating circumstances described in Art. 266 in the Penal Code (1962).

This offense also covers the harm described by Art. 326 (Intimidation of the Public) in the Penal Code (1962), which covers threatening to commit crimes so as to cover public panic. If the offense conduct under draft Article 3205 reaches many people, it would be the same conduct describes in Penal Code (1962) Art. 326.

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<sup>96</sup> IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER (*Bidayat al-mujtahid*), vol. 2, at 481.



The offense in Section (b) codifies the offense in Penal Code (1962) Art. 325 (Intimidation of the Public by Means of Explosive Materials).

*Relation to Sharia Law.* Muslim jurists cite the following Prophetic tradition as general support for criminalizing false threats: “Whoever frightens a believer, it is incumbent that God not protect him from the terrors of Judgment Day as a fitting recompense.” Another hadith states that “it is not lawful for a Muslim that he frightens a Muslim.”<sup>97</sup> Imam Najm al-Din al-Ghazzi further supports this by stating that it is unlawful to “frighten, annoy, or alarm.”<sup>98</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3206. Unlawfully Administering Drugs**

**Corresponding Current Provision(s):** Penal Code (1962), Art. 469 (State of Incapacity Produced Through Violence)

**Comment:**

*Generally.* This Article criminalizes administering drugs to another person and intentionally causing an alteration of that person’s physical or mental condition as a result.

*Relation to Current Law.* This Article corresponds to Art. 469 of the Penal Code (1962) (State of Incapacity Produced Through Violence).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3207. Procuring the Impotence of a Person to Procreate**

**Corresponding Current Provision(s):** Penal Code (1962), Art. 423 (Procuring the Impotence of a Person to Procreate)

**Comment:**

*Generally.* This Article criminalizes intentionally causing impotence to another person, or to oneself.

*Relation to Current Law.* This Article corresponds to Art. 423 (Procuring the Impotence of a Person to Procreate).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3208. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 541 (Arms)

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This

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<sup>97</sup> Sunan Abu Dawud 5004.

<sup>98</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (*Umdat al-Salik*), 763.

Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962). The definition of “dangerous weapon” corresponds to the definition of “arms” in Penal Code (1962) Art. 541. The definition in this draft Article is broader because it includes anything capable of producing serious bodily injury, similarly to Art. 541’s inclusion of an “instrument of attack . . . which can be carried only for justifiable reasons.”

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 3300. Sexual Offenses**

### **Introduction: Chapter 3300**

Chapter 3300 punishes rape and sexual assault, and seduction. These offenses are graded higher than comparable assault offenses because they cause greater harm to a person’s bodily integrity and psyche. Similar conduct may be punished under Chapter 6400 (Offenses of the Family), which criminalizes illegal marriage, adultery, and incest, or Chapter 6200 (Public Indecency and Obscenity Offenses), which criminalizes sexual conduct that offends public decency.

The deliberate transmission of sexually transmitted diseases is not covered by this Chapter, nor is it specifically included in the draft code. It is, however, punishable under draft Articles 3202 (Assault) or 3204 (Recklessly Endangering Another Person), if the provisions of those respective Articles are met.

### **Comment on Article 3301. Rape and Sexual Assault**

**Corresponding Current Provision(s):** Penal Code (1962), Arta. 398 (Carnal Violence); 399 (Acts of Lust Committed with Violence); 400 (Unnatural Offenses Committed with Violence)

#### **Comment:**

*Generally.* Art. 3301 criminalizes rape and sexual assault. Section (a) defines the greater offense of rape, which requires sexual intercourse plus an additional action or condition. Such conditions include that the defendant: (1) compels the other person to submit by force or by a threat to any person in a manner that would prevent resistance by a person of ordinary resistance; (2) administers or employs drugs, intoxicants, or other means to substantially alter the other person’s power to appraise his or her conduct in order to prevent resistance; or (3) deceives the other person as to his or her identity. If those additional actions do not occur, a person can still be found guilty of rape if: (1) the offender is a public officer who abuses the power of his or her office to compel a person under arrest or in his or her custody to submit; or (2) the other person is incapable of giving consent due to mental disease or defect, lack of consciousness, or other such impairment, or is under the age of [sixteen] while the defendant is at least [four] years older. A person who participates in a gang rape could be convicted for all rapes that occur, with the person’s liability premised on draft Art. 401 (Accountability for the Conduct of Another). This offense is graded as a Class [C] felony.

Section (b) defines the lesser offense of sexual assault. A person commits an offense if he or she has sexual contact with another person and satisfies one of the conditions outlined in Section (a). The only additional condition criminalized here, but not included within the rape offense under Section (a), is that the person knew that the contact was offensive to the other person. Sexual assault is a Class [E] felony.

Section (c) establishes a rebuttable presumption that if otherwise offensive sexual intercourse or contact occurs between a person and his or her spouse, it is presumably consensual and does not constitute rape or sexual assault. However, if the prosecution overcomes the presumption, proving that the sexual intercourse or contact was not consensual, a person can be nevertheless be convicted of the rape or sexual assault of his or her spouse.

*Relation to Current Law.* Penal Code (1962) Art. 398 (Carnal Violence) criminalizes nonconsensual sex and has a specific provision prohibiting a public officer from abusing his or her power to have sex with someone in his or her custody or control. The primary difference between this and the rape provision is that the rape provision also combines the types of sexual penetration described in Art. 400 (Unnatural Offenses Committed with Violence) into a single provision. Art. 399 (Acts of Lust Committed with Violence) incorporates the same basic definition as Art. 398 (Carnal Violence), which is reflected in the rape provision, but does not require sexual intercourse, making it similar to the lesser offense of sexual assault.

This Section establishes age [sixteen] as the age of consent to reflect Somali marriage law. The grading in this Section is also consistent with existing law.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* This Article does not include a marital exemption, which is consistent with international law. Under this Article, a person can be prosecuted for raping or sexually assaulting his or her spouse.

### **Comment on Article 3302. Seduction**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 29 (Children)

*Generally.* The offense of seduction occurs when an individual has sexual intercourse or sexual contact with another person to whom he or she is not married and either: (1) the other person is less than [21] years old and the actor is his or her guardian or otherwise responsible for general supervision of his welfare; or (2) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him. The offense provides a higher grade for sexual intercourse.

*Relation to Current Law.* While there is no corresponding provision in the Penal Code (1962), Art. 29(2) of the Somali Constitution provides that “Every child has the right to be protected from mistreatment, neglect, abuse, or degradation.” This provision expresses the same principal (though applied to other classes of victims), that it is especially blameworthy to commit offenses preying persons in particularly vulnerable positions.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3303. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 3400. Kidnapping**

### **Introduction: Chapter 3400**

This Chapter covers offenses that involving inhibiting another person's freedom. It separates this general conduct by severity. For example, the offense of Kidnapping under Article 3401 covers severe offenses, such as the use of force to take someone a substantial distance away for the purpose of holding the victim for a reward. The Chapter also includes the more general offense of unlawful restraint, which covers a broad range of conduct from the severe offense of enslavement to temporary, non-injurious restraint. It also covers the taking of minors or those under legal custody of someone else. Lastly, the Chapter covers the offense of criminal coercion, which recognizes that threats can also operate to restrict another's freedom.

### **Comment on Article 3401. Kidnapping**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 401 (Abduction for Purposes of Lust or Marriage), and 486 (Detention of a Person for the Purposes of Robbery or Extortion)

**Comment:**

*Generally.* Kidnapping criminalizes removing or confining someone for specified purposes. The intent is to punish conduct that is an especially terrifying and dangerous instance of unlawful restraint, and conduct that substantially isolates the victim from the protection of the law.

Section (a)(1) identifies the removal and confinement necessary for an offense under this Article. Meeting one of these requirements distinguishes the offense of kidnapping from that under draft Article 3402 (Unlawful Restraint).

Section (a)(2) requires that the person employ force, threat, or deception to accomplish the removal; or, for minors under the age of 14 or for an incompetent person, that the person take the victim without the consent of that person's guardian.

Section (a)(3) lists the requisite purposes with which the person engaged in the conduct set forth in Sections (a)(1)-(2) must have acted. Only one of the purposes must be met for the conduct to be an offense under this draft Article.

*Relation to Current Law.* Penal Code (1962) Article 486 (Detention of a Person for the Purposes of Robbery or Extortion) criminalizes detaining another with the purpose of obtaining a "wrongful gain" as the price of release. This draft Article codifies this offense and further

defines it. Section (a)(1) of this draft Article defines what the Penal Code (1962) called “detention” as removal or confinement with one of the methods in Section (a)(2). The requirement in Penal Code (1962) Art. 486 that the person intended to obtain “wrongful gain” is reflected in Section (a)(3) of this draft Article, but with greater specificity. Any of the purposes of holding for ransom or reward (Section (a)(3)(A)), facilitating the commission of a felony (Section (a)(3)(B)), or interfering with governmental functioning (Section (a)(3)(D)) may be instances of an attempt to obtain wrongful gain. This draft Article adds the purpose of inflicting bodily injury or terror to the list of possible purposes for an offense, as a person with this purpose is particularly dangerous to the community.

This provision also corresponds to Section 1 of Article 401 (Abduction for Purposes of Lust or Marriage) of the Penal Code (1962), which prohibits abduction for purposes of carnal violence by making it a general offense to use violence, threat, or deceit to abduct or detain a person in order to commit a felony, to inflict injury on the person, or to terrorize that person. This draft Article includes felonies of carnal violence currently covered under Section 1 of Article 401 of the Penal Code (1962), but also covers other felonies under Section (a)(3)(B).

Abduction or detention that does not involve removal, as defined in Section (a)(1) or (a)(2), or confinement in isolation for a substantial period of time under Section (a)(3), is not covered in this draft Article. Rather, it falls under draft Article 3402 (Unlawful Restraint).

Section (a)(2)(B) codifies the Penal Code (1962) criminalization of abduction of minors or people incapable of giving consent found in Penal Code (1962) Section 3 of Article 401, and kidnapping of people under age 14, Penal Code (1962) Article 433 (Abduction of Persons under Legal Incapacity).

Section (a)(3)(E) codifies Penal Code (1962) Section 2 of Article 401 (Abduction for Purposes of Lust or Marriage), which makes it an offense to use violence, threats, or deceit to abduct or detain anyone for purposes of marriage.

The Penal Code (1962) Article 486 (Detention of a Person for the Purposes of Robbery or Extortion) prescribes punishment of imprisonment up to 15 years, or 18 years where the offender achieves a wrongful gain from the offense. For that reason, most of the offenses committed with the purposes in Section (a)(3) are Class [C] felonies. This draft code includes an aggravation of the offense to a Class [B] felony where the person does not voluntarily release the victim alive and to a safe place prior to trial reflects the public policy goal of motivating the release of victims. There is no corresponding provision or aggravation in the Penal Code (1962), however there are very strong policy reasons to include this aggravating factor, as it incentivizes the safe release of captives.

Section 1 of Article 401 of the Penal Code (1962) (Abduction for Purposes of Lust or Marriage) authorizes only a 5-year punishment for those who abduct for the purposes of carnal violence. However, this draft Article does not include a lower grade for that offense so as to avoid making abduction for purposes of carnal violence a lesser crime than abduction for purposes of assault. Penal Code (1962) Section 2 of Article 401 authorizes a 3-year punishment for those who abduct for purposes of marriage. This lower grade is reflected here in Section (b)(3), because marriage itself is not a harmful act, unlike the other purposes covered in Section (b)(2).

*Relation to Sharia Law.* Sharia law prohibits individuals restraining other members of society against their will, as this right is reserved for the governing authority.<sup>99</sup> Unlawful restraint is also arguably among the harms sought to be prevented by the *hadd* offense of *hiraba*.

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<sup>99</sup> JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 282 (Dar ul-Ishraq, 2001).

Imam Khattabi explains that there are no grounds for deprivation of a person's freedom unless ordered by the court.<sup>100</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3402. Unlawful Restraint and Involuntary Servitude**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Arts. 14 (Slavery, Servitude and Forced Labour), and 15 (Liberty and Security of the Person); Penal Code (1962) Arts. 460 (Seizure of a Person), 455 (Reduction to Slavery), 458 (Enforced Subjection), 461 (Illegal Arrest), and 464 (Compulsory Labor)

#### **Comment:**

*Generally.* This provision criminalizes unlawfully restraining another person or forcing another into involuntary servitude, including slavery. Unlike draft Article 3401 (Kidnapping), unlawful restraint covers conduct that does not involve substantial removal or confinement, or conduct that lacks any of the purposes required in Section (a)(3) of draft Article 3401. Thus, a person who restrains another for an insubstantial period of time or in a public place may be guilty of unlawful restraint but not of kidnapping. Additionally, someone who uses a gun to force another to drive him somewhere may engage in kidnapping if the purpose of the threat is to terrorize the victim or to commit or escape from a felony. However, if the purpose is simply transportation, the conduct falls under this draft Article.

Section (a)(1) requires proof that the person acted knowingly. The person must have been aware that he was restraining the victim. It also provides that person's restraint of the victim is a breach the person's legally recognized duty to the victim, whether that duty is civil or penal in origin, and the person must know of this legally recognized duty. This includes restraint by one parent in violation of a custody order, or restraint by a person in violation of civil tort law duties. However, where restraint does not breach a duty—for example, parental restraint of a child, or a state official's restraint of a person in custody—no offense occurs.

Section (a)(2) requires substantial interference with the victim's liberty. This prevents criminalizing every instance of restraint that might support a civil action for such restraint. For example, a brief detention of a suspected shoplifter is not covered because the restraint would not be a substantial interference with her liberty.

Section (b) prohibits slavery by making it an offense to knowingly hold another in involuntary servitude. Involuntary servitude is defined as all work or service performed under the threat of any penalty that the person did not voluntarily assume. Although in general work performed in order to provide for oneself or to pay off debts is not involuntary servitude, where the worker's master has caused the worker to believe he or she has no way to avoid continued service to that master, the work is involuntary servitude. Examples include where a law officer threatens to arrest a worker unless he continues to work for a designated person, or where a person secures release of women from prison by paying their fines and forces them into prostitution for repayment.

This offense will often be an alternative offense to that of Human Trafficking in draft Article [2102].

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<sup>100</sup> Cherif Bassiouni, *Sources of Islamic Law and the Protection of Human Rights*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 29 (M. Cherif Bassiouni, ed. 1982).

In recognition of the significant differences in gravity of the conduct, the grading of this offense covers a wide range of conduct: forced involuntary servitude is graded as a Class [B] felony; restraint that creates a risk of serious bodily injury, where the person knows of that risk, is a Class [D] felony; restraint that lasts more than [24 hours] is similarly frightening, and is therefore also graded a Class [D] felony. This length of time is inherently arbitrary, and should be determined to reflect societal beliefs about the gravity of such conduct. Finally, all other offenses are Class [A] misdemeanors.

*Relation to Current Law.* This draft Article codifies the general prohibition in Article 14 of the Provisional Constitution (2012) of “slavery, servitude . . . or forced labour for any purpose.” Trafficking is covered by draft Article 2102 (Human Trafficking). This draft Article also implements protection of the right to be free of illegal detention, in Section 2, Article 15 of the Provisional Constitution (2012).

Additionally, this draft Article codifies several provisions in the Penal Code (1962). Section (a)(1) corresponds to Penal Code (1962) Article 460 (Seizure of a Person), and Art. 461 (Illegal Arrest). This draft Code does not create a separate offense for restraint by a public officer, but includes such conduct within the general offense of unlawful restraint. Section (b) corresponds to Penal Code (1962) Articles 455 (Reduction to Slavery), 458 (Enforced Subjection), and 464 (Compulsory Labor).

Reducing another to slavery under Penal Code (1962) Article 455 is punishable with up to 20 years’ imprisonment, and compelling another to submit to one’s power under Penal Code (1962) Article 458 is punishable with up to 15 years’ imprisonment. Therefore, an offense under Section (b) of draft Article 3402 is graded as a Class [B] felony.

Offenses under Penal Code (1962) Article 460 (Seizure of a Person) are punishable with up to 8 years imprisonment. This draft code grades offenses under draft Article [3402] accordingly as a Class [D] felony, but only where the restraint placed the victim at risk of serious bodily injury or lasted at least [24 hours].

Restraint that does not meet those conditions is significantly less serious, and therefore is graded as a Class [A] misdemeanor, to account for instances of brief, nondangerous restraint.

*Relation to Sharia Law.* See the Comment to draft Article 3402 (Kidnapping).

*Relation to International Law.* International law similarly prohibits involuntary servitude, the prohibition on slavery being *jus cogens*. Involuntary servitude is defined here in accordance with the International Labor Organization’s Forced Labor Convention No. 29, Article 2(1). There is nothing here that is inconsistent with international law.

### **Comment on Article 3403. Interference with Custody**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Arts. 28 (Family Care) and 29 (Children); Penal Code (1962) Arts. 433 (Abduction of Persons under Legal Incapacity), 549 (Failure to Retain in Custody or Unauthorized Custody of Persons of Unsound Mind or Minors in Asylums or Reformatories), and 550 (Failure to Retain in Private Custody or Unauthorized Private Custody of Persons of Unsound Mind).

#### **Comment:**

*Generally.* This draft Article criminalizes taking or harboring a child or committed person away from his or her legal guardian. It recognizes the additional risk to children and committed people on account of their vulnerability, and therefore the draft Article does not

require removal for specific purposes (required by draft Article 3401 (Kidnapping)), or actual restraint (required by draft Article 3402 (Unlawful Restraint)). The draft Article also serves as an independent protection of the custodial relationship from unwarranted interference by persons who have no legal privilege to do so.

Sections (a)(1)-(2) and (b)(1)-(2) require taking or enticing a child (Section (a)) or committed person (Section (b)) from custody, or harboring or detaining a child or committed person away from custody. This does not cover de minimus instances of unauthorized movement, but is meant to cover substantial interferences with parental or governmental control.

Sections (a)(3) and (b)(3) require any removal to be performed with a legal privilege. Such privileges would typically arise from consent of the lawful custodian, expressly or arising from past practice. A court in a custody order, or through statutory authorization, might also establish such legal privileges.

Section (c) provides two categories of special defenses. It is a defense under Section (c)(1) to believe that one's conduct is necessary to protect the child. It is a defense under Section (c)(2) to show that a child, age 14 or older, instigated the taking. This recognizes that there is less of a need to punish someone who merely accommodates a child's desire to leave home. If the child is less than 14 years old, the person is not entitled to this defense unless he or she can affirmatively prove that he or she reasonably believed the child was 14 years old or older.

These defenses are not available regarding committed persons, because removing a committed person from any form of official authority should be sufficient to put the person on notice that the conduct is wrongful.

*Relation to Current Law.* This draft Article recognizes the right of children to be cared for by their parents, found in the Provisional Constitution (2012) Article 28 (Family Care) Section 3, and that in all cases, "the child's best interests are of paramount importance," provided by Article 29 (Children), Section 7.

This draft Article codifies and further defines the prohibition of abduction of minors and the mentally infirm in Penal Code (1962) Art. 433. Section (b)(2) covers Section 2 of Art. 433 by excluding from the offense definition the taking of minors under the age of 18 but over the age of 14 from parental custody if such taking is not against the child's will and at the child's instigation. Unlike the Penal Code (1962), this draft Article does not require the parents or guardians of the child victim to file a complaint for the offender to be prosecuted.

This draft Article is also supported by Penal Code (1962) Art. 307 (Custodian Acting With Culpa), prohibiting those holding others in custody from permitting their escape, and Art. 311 (Facilitating Non-observance of Measures of Detentive Security), prohibiting anyone from assisting or harboring escapees.

This draft Article also corresponds to Sections 1 and 2 of Penal Code (1962) Art. 549 (Failure to Retain in Custody or Unauthorized Custody of Persons of Unsound Mind or Minors in Asylums or Reformatories) and Art. 550 (Failure to Retain in Private Custody or Unauthorized Private Custody of Persons of Unsound Mind) by criminalizing taking a person away from lawful custody. However, this draft Code does not penalize receiving a person in custody, so as to avoid punishing consensual arrangements of custody between caregivers.

*Relation to Sharia Law.* Sharia law recognizes the paramount importance of parental rights. As Sayyid Abul A'la Maududi has written, "the rights of the parents come first among those of all human relations and are next only to the rights of God Himself."<sup>101</sup> This draft Article codifies the important Islamic principle that parents have "an honored position . . . in Islamic

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<sup>101</sup> THE ISLAMIC LAW AND CONSTITUTION 191-192 (Khurshid Ahmad trans., 1960).



society and culture” and recognizes that “it is the duty of the community as well as of the State to take measures to protect and maintain this position.”<sup>102</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3404. Criminal Coercion**

**Corresponding Current Provision:** Penal Code (1962) Arts. 263 (Force of Threats to a Public Officer); 265 (Forces of Threats to a Political, Administrative, or Judicial Body); 266 (Aggravating Circumstances); 465 (Violation of the Right to Engage Workers or to Participate in a Trade Union); 466 (Private Violence); 467 (Violence or Threats Used to Cause the Commission of an Offense); 468 (Threats); 312 (Unauthorized Exercise of Private Rights)

#### **Comment:**

*Generally.* This draft Article criminalizes using threats to restrict another’s choices. Other forms of threat are prohibited under Articles [3205] (Terroristic Threats), [3201] (Robbery), [4204] (Theft by Extortion), and [4206] (Theft of Services). Criminal coercion is a residual offense included to complement and supplement these more specific provisions.

Prosecution under Section (a)(1) requires intent as to the elements in that section. A legally recognized duty under Section (a)(1)(A) includes any duty recognized in civil law, including in tort law, or in criminal law. The culpability requirement of knowledge applies to the legal duty as well. Therefore, threats that someone has a legal right to make are not offenses; for example, a person can threaten to cut another out of his will, or to sell or use his land in a manner deemed undesirable to his neighbors, whether for money or for another concession that is not in itself unlawful. Similarly, lawful efforts to force another to pay a just debt or to perform his obligations under a contract are not punished under this provision. These threats are not covered here because they are not intended to restrict another’s freedom in violation of a legal duty. “Freedom of action” refers to a person’s inherent right to choose to take or refrain from taking any action.

The term, “detriment,” in Section (a)(1)(B) is context-dependent. It is meant to exclude from the offense definition threats that induce another to do something that furthers his or her welfare.

Section (a)(2) lists types of threats that qualify as elements of the offense. This list is limited to those threats that are most associated with wrongfulness, because the purpose of restricting another’s freedom is ambiguous, and it is not always clearly wrongful. Because the threat itself creates the harm, it is inconsequential whether the person actually intends to carry out the threat.

Section (b) provides that it is a defense to threaten someone when the threat is for that person’s benefit and is related to the threatened conduct. For example, a passenger in a vehicle may threaten to report the driver to the police if the driver does not slow down. Or, a friend may threaten to disclose a spendthrift’s history in order to induce him to refrain from gambling. Use of threats for such benign purposes does not mark the actor as a danger to the community. The purpose of such a threat must be limited, meaning that absent the benign purpose, the actor would not have made the threat.

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<sup>102</sup> *Id.* at 192.

The offense is a Class [D] felony where the crime the person threatens to commit under Section (a)(2)(A) is a felony. For example, unlawful coercion by threat of simple assault is a misdemeanor, but coercion by threat of homicide is a felony.

The offense is also a Class [D] felony where the person's purpose in making the threat is to compel the commission of a felony. This allows this offense to coexist with the grading of other offenses. For example, extortion of petty sums is only a misdemeanor under draft Articles [4301 (Consolidation of Theft Offenses)] and [4304 (Theft by Extortion)]. Therefore, it is not possible to punish such conduct as a felony under this section. On the other hand, if the actor's intent is to extort more than [\$2,000], a completed extortion would constitute a felony under draft Article [4304 (Theft by Extortion)], and criminal coercion would also be a felony.

If the offense would otherwise be a Class [D] felony, but it is committed by a ten or more people, or five or more people with a dangerous weapon, then it is a Class [C] felony.

*Relation to Current Law.* Penal Code (1962) Art. 466 (Private Violence) criminalizes using violence or threats to compel another to do something that the law leaves "to his option." This draft Article corresponds to that provision, as well as Penal Code (1962) Art. 263 (Force of Threats to a Public Officer), Art. 265 (Forces of Threats to a Political, Administrative, or Judicial Body), Art. 465 (Violation of the Right to Engage Workers or to Participate in a Trade Union), Art. 467 (Violence or Threats Used to Cause the Commission of an Offense), and Art. 468 (Threats). It also corresponds to Section 2 of Art. 312 (Unauthorized Exercise of Private Rights), which prohibits using threats, rather than recourse to judicial authority, to exercise an alleged right.

Section 1 of Penal Code (1962) Article 312 also prohibits using other means of taking the law into one's own hands. This draft Code prohibits that conduct only inasmuch as it is otherwise criminalized.

In accordance with the Penal Code (1962), which authorizes imprisonment from 3 to 8 years for most instances of the offensive conduct, felonious threats under Section (c)(2) of this draft Article are graded as Class [D] felonies. This draft Article also codifies Section 2 of Penal Code (1962) Art. 266 (Aggravating Circumstances) at section (c)(1) by including a grade increase where a large number of people or a group with a weapon make felonious threats.

*Relation to Sharia Law.* Sharia law prohibits criminal coercion and punishes the compeller as though he had carried out the offense himself.<sup>103</sup> Thus, the draft Article's penalty for criminal coercion where the compelled action is not a crime is an increase from the penalty under Sharia law. However, the draft Article mitigates the penalty provided for in Sharia law if the compelled action would normally constitute an offense of a level higher than a Class [E] felony.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 3405. Definitions**

**Corresponding Current Provision(s):** None

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<sup>103</sup> Ahmed Fathi Bahnassi, *Criminal Responsibility in Islamic Law*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 191 (M. Cherif Bassiouni, ed. 1982); *see also* AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 763 (Nuh Ha Mim Keller trans., Amana Publications 1994) ("to...coerce him to do something he is averse to...is unlawful.").

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Property Offenses**

### **Chapter 4100. Property Damage and Trespass Offenses**

#### **Introduction: Chapter 4100**

This Chapter criminalizes trespass, a person's unlicensed presence on another's property, and property damage offenses, including criminal destruction through fire or explosion and criminal mischief. The draft code does not contain burglary as a separate offense. Burglary is a combination of criminal trespass and some other offense, usually theft. There are three critical advantages to dividing burglary into its component parts.

The first advantage is clarity. Burglary is a composite crime consisting of unlawful entry and an additional offense. By breaking the offense into its component parts, it is easier to identify each element of the prohibited behavior.

The second advantage is the decreased risk of charging a defendant more than once for the same set of culpable actions. In a criminal code that retains burglary as a separate offense, there is a risk that a person who enters a dwelling and steals an item could be charged with theft, criminal trespass, and burglary. This draft Chapter eliminates this possibility by allowing prosecutions for only theft and criminal trespass.

The third advantage is flexible grading that corresponds more closely with the severity of the underlying offense. The grading of theft varies with the value of the stolen property. The grading of criminal trespass varies with the type of property entered without license or consent. Because a composite burglary offense would have only one grading scheme, prosecutors and courts necessarily have more grading flexibility when they can separately charge theft and trespassing. This greater grading flexibility generates punishments that better parallel the culpability and dangerousness demonstrated by the defendant's conduct.

Furthermore, this separation of burglary into the underlying offenses of theft and trespass is supported by the understanding of burglary in Sharia law. El-Awa notes that the majority of jurists concur that punishment for theft will only occur when it meets the minimum value and has been taken from a "place of custody" or *hirz*, thereby recognizing both elements of theft and trespass.

#### **Comment on Art. 4101. Criminal Destruction Through Fire or Explosion**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 344 (Crimes with Culpa Involving Damages)

*Generally.* This Article defines criminal destruction through fire or explosion and related lesser offenses that damage property and endanger life.

Section (a) defines the offense of criminal destruction through fire or explosion. A person commits an offense under this Article if he or she knowingly starts a fire or causes an explosion with the intent to destroy a building or occupied structure of another, or by destroying property owned by anyone in order to collect insurance for the loss. If the property belongs to the person, the offense is criminal destruction through fire or explosion only if he or she had the intent to collect insurance for the loss. If the property belongs to another, however, the person has committed an offense if the intent was to destroy *or* to collect insurance. An offense under this Section is a Class [D] felony.

Section (b) defines the offense of reckless burning or exploding. Although the offense involves destruction of property, the reckless destruction is only an offense under this Article if it endangers human life or a building (increasing the likelihood of endangering human life). The offense under this Section is graded as a Class [F] felony.

Section (c) balances the responsibilities of those most responsible for fires with the risk of harm. For example, if a person starts a fire on his or her property and somehow loses control of the fire, the person has not committed an offense under this section if he or she fails to send an alarm or control the fire if doing so would put him or herself in danger. However, if the person could run away and warn someone without risking injury, an offense has occurred. An offense under this Section is a Class [B] misdemeanor.

*Relation to Current Law.* This Article corresponds to Art. 344 (Crimes with Culpa Involving Damage).

*Relation to Sharia Law.* Under traditional Islamic law, a perpetrator's intent is irrelevant because the victim of the property damage is to be compensated whether the property is destroyed intentionally or by mistake.<sup>104</sup> In either case, the usurper's punishment is to compensate the owner the value of his or her property.<sup>105</sup> Imam al-Shafi'i holds the usurper liable for the usurped property and requires the usurper to retribute the owner's loss.<sup>106</sup> Thus, the owner of the property has the option of proceeding against the offender in a civil action.<sup>107</sup> These standards established by the jurists, however, are more appropriate in a civil law context, where the victim sues the damager of property directly for compensation. The draft code articulates the obligations that individuals owe to the State, and the draft code does not affect the rights of parties in the civil context.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Art. 4102. Criminal Damage**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 387 (Destruction of Raw Materials or Agricultural or Industrial Products or Means of Production), 388 (Diffusion of Diseases of Plants or Animals); 490 (Violent Disturbance of the Possession of Immovable Property), 491 (Damage to Property), 492 (Trespass by Animals), 494 (Killing or Injuring of Animals), 495 (Disfigurement and Contamination of Property),

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<sup>104</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 383.

<sup>105</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 384.

<sup>106</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 385.

<sup>107</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 386.

499 (Fraudulent Destruction of One's Own Property and Fraudulent Self-Mutilation), 517 (Destruction or Defacement of Posters); Draft Counterterrorism Law of 2014 Arts. 20 (Offenses Against the Safety of Civil Aviation), and 21 (Offenses Against Safety at Airports Serving Civil Aviation)

*Generally.* A person commits an offense under this draft Article if the person recklessly damages the property of another, tampers with the property of another and thereby creates a risk of damage to the property, or unlawfully tampers with property used to deliver a public service.

The grading under this Article is primarily based on the value of the property damaged or threatened. The values and corresponding offense grades from Art. 4301 (Consolidation of Theft Offenses) are consistent with this Article. Since harm that results from theft is the loss of property, causing that same harm through damage or destruction should be punished equivalently. Furthermore, just as Extortion can raise the grade one level under Art. 4301 (Consolidation of Theft Offenses), there is a similar grade increase under this Article if the offense is committed knowingly, as opposed to recklessly.

There are, however, two key differences. First, offenses under this Article are one grade lower to reflect the lower culpability in not appropriating the property for oneself. Second, to reflect Art. 491 (Damage to Property) of the Penal Code (1962) damage to certain types of immovable property have been incorporated into the grading scheme.

This draft Article provides a higher grade for criminal damage committed against an air navigation facility to punish the greater blameworthiness and danger of damaging an air navigation facility.

*Relation to Current Law.* Arts. 490 (Violent Disturbance of the Possession of Immoveable Property) and 491 (Damage to Property) of Penal Code (1962) protect moveable and immovable property, both of which are incorporated into this Article.

In addition, Art. 491 provides for escalated punishment if the damage is done: (1) violently; (2) related to a labor dispute; (3) upon public buildings, religious buildings, or buildings for public use; (4) upon irrigation systems; or (5) upon crops for economic use. With the exception of the violence and labor provisions, all of the protections of Penal Code (1962) are incorporated into this draft Article. The violence section of current Art. 491 is not incorporated because any violent act committed while committing an offense under this Art. can be charged as a separate offense. The relation to labor section of Art. 491 is not included to ensure that punishment is based on the culpability of the actor and the harm caused, as opposed to the status of the individual.

Sections (a)(1) and (2) of this draft Article codify Penal Code (1962) Art. 495 (Disfigurement and Contamination of Property). Section (a)(1) also codifies Art. 494 (Killing or Injuring of Animals), as animals are a person's property. Section (a)(3) corresponds to Art. 517 (Destruction or Defacement of Posters). Section (a)(4) corresponds to Art. 387. (Destruction of Raw Materials or Agricultural or Industrial Products or Means of Production). Sections (a)(5) and (b) correspond to Art. 492 (Trespass by Animals). Section (a)(6) codifies Art. 388 (Diffusion of Diseases of Plants or Animals). Section (a)(7) corresponds to Art. 499 (Fraudulent Destruction of One's Own Property and Fraudulent Self-Mutilation).

In accordance with Counterterrorism Law of 2014 Art. 20(1)(b), this draft Article covers destroying an aircraft in service or causing damage to such an aircraft. In accordance with Art. 20(1)(d) and Art. 21(1)(b) of the Counterterrorism Law of 2014, this draft Article outlaws criminal damage committed against an air navigation facility. As discussed above, this draft

Article provides a higher grade for criminal damage committed against an air navigation facility to punish the greater blameworthiness and danger of damaging an air navigation facility.

*Relation to Sharia Law.* Under traditional Islamic law, a perpetrator's intent is irrelevant because the victim of the property damage is to be compensated whether the property is destroyed intentionally or by mistake.<sup>108</sup> In either case, the usurper's punishment is to compensate the owner the value of his or her property.<sup>109</sup> Imam al-Shafi'i holds the usurper liable for the usurped property and requires the usurper to restitute the owner's loss.<sup>110</sup> Thus, the owner of the property has the option of proceeding against the offender in a civil action.<sup>111</sup> These standards established by the jurists, however, are more appropriate in a civil law context, where the victim sues the damager of property directly for compensation. The draft code articulates the obligations that individuals owe to the State, and the draft code does not affect the rights of parties in the civil context.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Art. 4103. Criminal Mischief**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 396 (Cheating), and 488 (Deflection of Waters and Alteration of Place Features)

*Generally.* A person commits an offense under this Article if he or she recklessly causes another to suffer pecuniary loss by deception or threat. It is graded as a Class [C] misdemeanor. It differs from draft Article 4402 in that the aim of the action is not to deceive another person but rather to cause a pecuniary loss. For example, altering a video recording to conceal an assault may be an offense under Article 4402, but is not under this Article. On the other hand, if someone temporarily shuts down a company's computer system to cause that company to lose that money, that would be an offense under this Article.

*Relation to Current Law.* Section (a)(1) corresponds to current Art. 396 (Cheating) in the Penal Code (1962). Art. 396 punishes cheating with up to five years imprisonment; it is therefore a Class E felony in this draft Code. The aggravating circumstances described in Section 2 of Art. 396 can be dealt with in sentencing.

Section (a)(2) corresponds to current Art. 488 (Deflection of Waters and Alteration of Place Features). Current law punishes this offense with up to three years imprisonment, and is therefore also a Class E felony.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Art. 4104. Criminal Trespass**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 391 (Unauthorised Occupation

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<sup>108</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 383.

<sup>109</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 384.

<sup>110</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 385.

<sup>111</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 386.

of Agricultural or Industrial Undertaking and Sabotage), 487 (Trespass), 489 (Trespass on Lands of Buildings), 493 (Wrongful Entry Upon Enclosed Property), 534 (Unauthorised Entry Into Places Where Admittance is Forbidden in the Military Interest of the State), 547 (Unauthorized Opening of Places or Objects)

**Comment:**

*Generally.* This draft Article defines, grades, and provides exceptions to the offense of criminal trespass, which criminalizes a person’s unlicensed presence on the property of another.

Section (a) defines the offense. A person commits an offense under this Article if he or she knowingly and without license to do so, enters or remains in a place or removes or alters the boundaries of another person’s property with intent to appropriate the property.

Section (b) defines two exceptions to liability under Section (a). Under Section (b)(1) it is not an offense to enter a building or occupied structure that has been abandoned. Section (b)(2) exempts from liability a person who enters or remains in a place under a reasonable belief that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain. Such a person may know his or her presence is formally unauthorized, but if his or her belief that he or she is licensed to enter or remain is objectively reasonable under the circumstances, then his or her conduct lacks the culpability and dangerousness this Article seeks to punish. For example, a person may know that they may not ordinarily enter another’s private residence without permission. However, if a person hears a scream for help from within a house, it would be reasonable for him or her to believe that he or she may enter even though the owner did not expressly authorize his or her entry.

Section (b)(2) also excepts from liability a person who enters or remains on premises open to the public, so long as he or she reasonably believes that the owner would have granted the public license to enter and remain on the property. Certain places, such as libraries and stores, are clearly open to the public. However, a locked entrance, a guard who screens visitors, or a visible sign reading “Private Property,” “No Public Access,” or something similar suffices to indicate that a place is not open to the public.

Section (c)(1) grades the offense as a Class [F] felony if it is committed in a dwelling, highly secured premises, or dangerous premises so marked or signed, in recognition of the special privacy and security interests at stake in such cases.

Section (c)(2) grades criminal trespass as a Class [A] misdemeanor when it occurs in any separately secured building, inhabited structure, storage structure, or any other place enclosed in a way as to manifestly exclude intruders. A “separately secured building” includes any building secured by locks or surrounded by fences or other barriers to entry. Where a person has enclosed his or her property so as to manifestly exclude intruders—for example, by erecting a wall or other barrier around his property—a trespasser’s defiance of the person’s effort to exclude intruders demonstrates greater blameworthiness than, for example, a person’s trespass onto another’s open field. Overall, the cases covered by Section (c)(2) reflect the common understanding that such trespasses involve less serious intrusions than those covered by section (c)(1), but more serious intrusions than all other trespasses, which Section (c)(3) grades as Class [B] misdemeanors.

*Relation to Current Law.* Article 4104 codifies the conduct described in Arts. 489 (Trespass on Lands or Buildings), 487 (Trespass), and 493 (Wrongful Entry Upon Enclosed Property) of the Penal Code (1962). Article 4104 does not require that the person have the object of occupying the lands or deriving gain; the draft code’s broader offense definition ensures that

the offense punishes the underlying harm of unlawful trespass. Additionally, Article 4104 does not require that the property be surrounded by a permanent boundary—as required by Article 493 (Wrongful Entry Upon Enclosed Property)—to ensure that the offense applies in all situations where a person satisfies the culpability and conduct elements of the offense. The person’s conduct and blameworthiness, not the characteristics of the property trespassed upon, determines whether the law will impose liability.

Section (a)(3) corresponds to Art. 391 (Unauthorised Occupation of Agricultural or Industrial Undertaking and Sabotage). Section (c)(1)(A) corresponds to Art. 534 (Unauthorised Entry Into Places Where Admittance is Forbidden in the Military Interest of the State). Section (a)(4) corresponds to 547 (Unauthorised Opening of Places or Objects).

*Relation to Sharia Law.* Sharia law punishes trespass and considers it to be any “action against another person’s right or against his ownership which is inviolable.”<sup>112</sup> It also means “an infringement of the rule of right and transgression against another person’s right.”<sup>113</sup> This provision, in accordance with Sharia law, makes an offense out of such a transgression.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4105. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

The definition of “property of another” protects the property of any person with a potentially greater property right as compared to the lawful owner. This expansive definition of “another” is intended to reach cases where the person having physical possession of the property is not the rightful owner. A person holding a temporary lease of property might be a holder of a greater right. Even where the person holding physical possession of an item has stolen the property from its rightful owner, the draft Code should still not allow a third person who is not the rightful owner to steal the item from the possessor. For example, if a thief has taken a person’s livestock without that person’s knowledge and subsequently a second thief steals the livestock, the second thief will still be liable for theft even if he or she has only deprived a possessor—rather than an owner—of the livestock.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>112</sup> Abdul Basir Bin Mohamad, *Strict Liability in the Islamic Law of Tort*, Islamic Studies, Vol. 39, No. 3 (Autumn 2000), p. 456.

<sup>113</sup> Abdul Basir Bin Mohamad, *Strict Liability in the Islamic Law of Tort*, Islamic Studies, Vol. 39, No. 3 (Autumn 2000), p. 456.



## Chapter 4200. Theft and Related Offenses

### Comment:

Article 26 of the Provisional Constitution (2012) provides that “Every person has the right to own, use, enjoy, sell, and transfer property.” Consistent with this right, the purpose of this Chapter is to punish and deter unlawful taking and misuse of the property of others. The Penal Code (1962) punishes theft and the taking of property, and this Chapter is designed with those aims in mind. Furthermore, recognizing that one of the primary harm caused by theft is the loss of what is taken, the penalties described in this Chapter are designed to correspond to the value of the taken property.

### Comment on Article 4201. Consolidation of Theft Offenses

**Corresponding Current Provision(s):** Penal Code (1962), Art. 480 (Theft), 481 (Aggravating Circumstances), 502 (Misappropriation), 503 (Misappropriation of Articles Lost, Treasure Trove, or Articles Obtained Through Error or Chance), 543 (Unjustified Possession of Valuables), and 544 (Unjustified Possession of Animals)

### Comment:

*Generally.* Section (a) of draft Article 4201 (Consolidation of Theft Offenses) is intended to facilitate the prosecution of theft: wrongful deprivation of the property of others with the purpose of permanently depriving them of it. Articles 4202 through 4206 define different ways of committing theft. If a prosecutor misstates the nature of a particular theft in an indictment or other initial proceeding, Article 4201 (Consolidation of Theft Offenses) is intended to allow him or her to alter the theory of the crime without having to withdraw and re-file the charges. But to be clear, the person can be charged with only one of the theft offenses outlined in Article 4202 to 4206.

Section (b)(1) protects those who take or use property reasonably believing that they have the right to do so or that they would likely receive permission from the owner for the use or taking. Disputes over property occur in all societies; those who act reasonably based on their perceived property rights should not be punished because another person was later held to be the rightful owner of the property. Section (b)(1) also protects the person who reasonably believes that the owner of some property would grant him or her permission to use the property, such as allowing him or her passage over land, allowing him or her to borrow a vehicle, or allowing him or her to use a tool. The trier of fact may rely on any number of sources to determine whether a reasonable person in the defendant’s situation would have believed that the owner would not have objected to use of his property, including, but not limited to: customs in the community, past grants of permission by the owner to the defendant or to others, the degree of amity between the two parties, and the steps that the owner has taken to secure his property.

Section (b)(2)(A) protects a parent from prosecution for the reasonable use or possession of their minor child’s property. The assumption is that the minor child still resides in the parental household and is considered a dependent. This provision requires a trier of fact determine whether the parent’s behavior would be considered reasonable based on any relevant factors, including communal custom. However, this provision does not create an absolute right to the child’s property. Section (b)(2)(B) protects a person from prosecution for the reasonable use or

possession of his or her spouse's property if it relates to maintaining the needs of the household. This provision is particularly relevant in cases where the spouse normally responsible for the financial upkeep of the family refuses to provide for the family's basic needs. It should be noted that the trier of fact will need to determine what is "reasonable" to meet the basic requirements of the family considering the family's accustomed standard of living.

Section (c) sets out the general grading scheme for theft offenses. The appropriate grade for an offense is determined by the value of the stolen property. For example, if the value of the stolen property is US\$100,000, the offense is a Class [E] felony, as provided by Section (c)(2). In addition, in line with section (h) of Art. 481 of the Penal Code (1962), theft of three or more cattle, bovine, or equine animals is incorporated as a Class [F] felony. Overall, this Chapter bases punishment on the value of the stolen property because this best differentiates the severity and impact of the theft.

Section (d) covers situations where a person commits theft in a single scheme or through a continuous course of conduct. The section provides that the conduct may be considered a single offense and that the value of the property or services may be aggregated for grading purposes. Such aggregation streamlines prosecution and allows a defendant to be convicted of a grade of theft that is truly proportionate to the defendant's blameworthiness.

Section (e) provides two general adjustments to the grade of a theft offense. Section (e)(1) imposes a higher grade for theft committed by extortion to reflect the greater blameworthiness of a person who commits theft by extortion rather than simply taking another person's property. Section (e)(2) imposes a higher grade where the property involved in the offense is public property, reflecting a greater blameworthiness because of the broader impact such offenses have against society as a whole.

*Relation to Current Law.* Article 4201(e)(2) corresponds to Art. 481(f) (Aggravating Circumstances) of the Penal Code (1962), which provides a greater penalty for theft of public property. Current Art. 543 (Unjustified Possession of Valuables) imposes a punishment on a person is in possession of valuable property and cannot show legitimate possession, while Art. 544 (Unjustified Possession of Animals) similarly applies when a person in possession of animals cannot show legitimate possession. In this draft Article, a person who cannot show legitimate possession of valuable property or animals commits an offense if he or she meets the offense and culpability requirements described in one of the offenses contained in this Chapter. Requiring a party to meet the culpability and offense requirements provided by this Chapter ensures that the law punishes sufficiently blameworthy persons on the basis of their culpability and conduct, not mere possession.

Penal Code (1962) Art. 481(g) (Aggravating Circumstances) provides a greater penalty for theft of luggage. This Chapter does not specifically target luggage, but generally grades theft by looking to the value of the property stolen, not the means by which the theft was committed.<sup>114</sup> The drafters consider property loss the primary loss resulting from theft and consequently base grading on the value of the stolen property.

The draft article also corresponds to current Arts. 502 (Misappropriation) and 503 (Misappropriation of Articles Lost, Treasure Trove, or Articles Obtained Through Error or Chance), as a person can commit a theft offense through misappropriation. However, as discussed below, the draft articles in this Chapter impose various culpability requirements to ensure that the law punishes sufficiently blameworthy people.

*Relation to Sharia Law.* Section (b)(2)(A) and (B) incorporate specific exceptions to the

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<sup>114</sup> Art. 4301(c)(2) provides a higher grade for theft committed by extortion.

punishment for theft mentioned in the hadith literature.<sup>115</sup> As Ibn Duyan notes, there is no *hudud* punishment for “stealing from the wealth of his offspring.” Furthermore, he notes that “neither of the two spouses” is subjected to punishment “for stealing from the wealth of the other,” a tradition attributed to ‘Umar b. Khattab. In both cases, Ibn Duyan argues that the punishment is averted because of the presence of “doubt” that these acts actually constituted theft.<sup>116</sup>

The grading in Section (c) is supported by Sharia law, which prohibits *hadd* punishment for theft of an item valued less than the maintenance of a man for one day.<sup>117</sup> In general, however, this Chapter defines theft less broadly than the *hadd* offense of theft (*sariqa*), which also includes offenses that would be in the nature of civil wrongs under the draft code.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4202. Theft by Unlawful Taking or Disposition**

**Corresponding Current Provision(s):** Penal Code (1962), Art. 480 (Theft), 482 (Theft Punishable on the Complaint of the Party Injured), 483 (Taking Movable Property in Joint Ownership), and 500 (Undue Influence on Persons Under Disability)

#### **Comment:**

*Generally.* Draft Article 4202 (Theft by Unlawful Taking or Disposition) criminalizes theft accomplished by a physical taking or by appropriating control over moveable or non-moveable property. To commit an offense, a person must act with intent to permanently deprive another person of that property, as provided by Section (a)(2).

It is not necessary under this definition to retain possession of the property; all that is necessary is to intend to permanently deprive the other person of possession. So, a person might take property of another and throw it into the sea, knowing that the owner will never recover the item. In cases like that, however, it is important that property damage not be added as an offense. As to a single possessed item, a person can commit property damage or theft, but not both in the same act. Theft should be the charge whenever a person manifests an intent to deprive another of his or her property and the value of the property is taken. Property damage will be an appropriate charge whenever some value remains in the property, or where the defendant does not meet the culpability requirements for theft, as when the defendant is only reckless as to causing damage.

A person exerts unauthorized control over property within the meaning of Section (a)(1) when the person seizes control of property in a way that undermines the other person’s ownership. For example, a person commits this offense by occupying land of another person with intent to deprive that person of the use of his or her land.

*Relation to Current Law.* Section (a) corresponds to Penal Code (1962) Art. 480 (Theft), which criminalizes taking another person’s property by depriving him or her of possession. The culpability requirement in Section (a)(2) does not overlap with the one in Art. 480 (Theft), which requires that the person act with purpose to derive wrongful gain. A person who acts with intent

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<sup>115</sup> For instance, *see* Sahih Bukhari No. 5364; Sahih Muslim No. 1714; Ibn Majah vol. 3, Book 12, No. 2291 and Sunan Abi Dawud No. 3528.

<sup>116</sup> Ibn Duyan, *Crime and Punishment under Hanbali Law (Manar al-Sabil)*, 97.

<sup>117</sup> El-awa, Mohamed. *Punishment in Islamic Law: A Comparative Study*. Plainfield: American Trust Publications, 2000 (El-Awa cites Ibn al-Qayyim who stated that the traditional value of one-quarter dinar as the minimum value was based on a value sufficient for the daily maintenance of an average man).

to deprive another person of his or her property may also have the purpose of attaining a wrongful gain for him or herself, but this will not always be the case. A person who has the purpose of attaining a wrongful gain will often act with intent to deprive another person of his or her property. The proper focus of this offense is on the loss to the victim, not the gain to the offender, if any.

Penal Code (1962) Art. 480(2) (Theft) provides that electric power and any other power that has economic value are deemed to be moveable property. This draft Article follows current law in this regard because property is defined very broadly, so that it includes electrical power and other seemingly intangible things that have economic value.

Penal Code (1962) Art. 481(d) (Aggravating Circumstances) provides a greater penalty for theft committed by snatching moveable property from the hand of another person. This Chapter generally grades theft by looking to the value of the property stolen, not the means by which the theft was committed, with the exception of extortion. See the Commentary to draft Article 4201 for a discussion of how the draft Code grades theft offenses. However, if force is used in a “snatching” of moveable property, the offender might be liable for robbery under draft Article 3201.

Penal Code (1962) Art. 482 (Theft Punishable on the Complaint of the Party Injured) can be dealt with through civil actions. As a general matter, this draft Code does not require the party injured to initiate a prosecution.

Penal Code (1962) Art. 483 (Taking Movable Property in Joint Ownership) is covered here where the exerted control is “unauthorized.”

Section (a)(2) corresponds to Art. 500 (Undue Influence on Persons Under Disability) to the extent that using undue influence over a person under disability would be exerting “unauthorized control” under Section (a)(1) of this draft Article.

*Relation to Sharia Law.* This Article, as discussed in the Commentary to draft Article 4200, is consistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4203. Theft by Deception**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 272 (Pretending to Have Influence With a Public Officer), 301 (Advocate Pretending to Have Interest), 480 (Theft), and 481 (Aggravating Circumstances), 496 (Cheating)

#### **Comment:**

*Generally.* This Article is concerned with theft performed by means of deception. A person commits an offense if he or she intentionally obtains the property of another person by deceit. Failure to reveal information, except as to legal impediments to clear ownership (see draft Article 4210, Section (c)(4)) and failure to correct a false impression created by the person (see draft Article 4210, Section (c)(3)), generally are not means of accomplishing theft by deception. Beyond those two cases, a person has no affirmative duty to correct the ignorance or mistake of the other party to a transaction, even if the person knows of the other party’s ignorance.

However, affirmative acts that mislead the other party generally support theft by

deception. The only two exceptions to that proposition are outlined in Section (b), which permits misleading statements that lack financial significance and statements unlikely to deceive persons of ordinary judgment. The latter are sometimes referred to as “puffery” – i.e., broad, often subjective statements of quality that are not easily verified. For example, stating that one’s product is “the best” is unlikely to deceive a reasonable consumer, and therefore does not constitute theft by deception when a consumer buys the product in reliance upon that statement, even if all agree that the product in question is the worst on the market. In contrast, false statements whose falsity is objectively demonstrable may give rise to a claim of theft by deception.

Section (c) precludes relying on a person’s failure to fulfill a promise as prima facie evidence of deception. Many people make promises honestly intending to fulfill them, but fail to do so for other reasons. Failure to fulfill a promise can only illustrate a person’s state of mind at the time of required performance. While a failure to perform is certainly important evidence tending to show intent to deceive, by itself it is not sufficient to show intent to deceive at the time the promise was made.

*Relation to Current Law.* This draft Article primarily codifies Penal Code (1962) Art. 496 (Cheating).

Additionally, Art. 481(b) (Aggravating Circumstances) of the Penal Code (1962) provides greater punishment if a person commits theft by employing violence against objects or avails himself or herself of any fraudulent means. This Chapter generally grades theft by looking to the value of the property stolen, not the means by which the theft was committed, with the exception of extortion. See the Commentary to draft Article 4201 for a discussion of how the draft code grades theft offenses.

This draft Article also codifies Penal Code (1962) Art. 272 (Pretending to Have Influence With a Public Officer), which describes the offense of a particular instance of deception—pretending to be a public officer. It also covers Art. 301 (Advocate Pretending to Have Interest) of the Penal Code (1962), which is another instance of theft by deception, committed by advocates pretending to have influence in judicial proceedings.

*Relation to Sharia Law.* The punishment of theft by deception has long historical precedent in Islamic law.<sup>118</sup> Al-Misri points out that if a seller knows of a defect in an article he must disclose it.<sup>119</sup> Islamic law also prohibits deceptive acquisition of property or wealth, which is often construed as a form of theft.<sup>120</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4204. Theft by Extortion**

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<sup>118</sup> Ahmad Ibn Naqib Al-Misri. *Reliance Of The Traveler* Nuh Ha Mim Keller trans. Beltsville: Amana Publications, 1994 (quoting the Qu’ran, “Allah Most High says, ‘Consume not one another’s property through falsehood. . . .’”); *id.* at 667-68 (“Oppression is of three types. The first is consuming property through falsehood. . . .”); *id.* at 55 (regarding the surreptitious changing of property-line markers: “The Prophet said, ‘May Allah curse whoever changes the land’s property-line markers.’”).

<sup>119</sup> *Id.*, at 92 (Nuh Ha Mim Keller trans., Amana Publications 1994) (citing the Prophetic tradition that: “He who cheats us is not one of us.”).

<sup>120</sup> *Id.*, at 667 (Nuh Ha Mim Keller trans., Amana Publications 1994) ( Al-Misri describes three examples of deception: “the cheater or adulterer of trade goods...the person who stints when weighing or measuring out goods...and the merchant who tells the buyer that the merchandise cost more than it did.”).

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 244 (Extortion by a Public Officer), 480 (Theft), 481 (Aggravating Circumstances), 485 (Extortion)

**Comment:**

*Generally.* A person commits theft by extortion if he or she intentionally deprives another of property by means of coercion. Coercion means economic, physical, political, or moral threats or force to influence another individual in the exercise of his or her rights, freedoms, or any other lawful activity. For example, a person commits theft by extortion by pointing a firearm at another person and demanding that he or she hand over an object of value. Whether an action constitutes moral threat or force is a judgment to be made by the court. The offense definition does not require that the person cause substantial physical or economic harm.

Section (a) requires that the person lack the legal authority to coerce another person into giving him or her something of value. Determining whether the person has the legal authority to use coercion requires a case-by-case determination. For example, a banker may threaten to foreclose on the house of a debtor unless payment is made to the bank on the debt. The banker does not commit theft by extortion because the property sought relates to his or her legal right to foreclose on the house. However, the same banker may not threaten to foreclose on a home unless the owner pays him or her a personal bribe. In other words, if the compensation requested is unrelated to the origin of the banker's right to foreclose on the house, he or she commits theft by extortion. Similarly, a police officer may legitimately threaten to detain a suspected criminal unless bail is paid, because seeking payment of bail comes from the same authority that permits him or her to continue to hold the suspect. But the officer is liable for theft by extortion if he or she requests a bribe before permitting the suspect to leave jail. Seeking payment or benefits beyond one's legal rights in exchange for not carrying out a threat of harm represents a serious evil.

Note that this Article addresses only theft accomplished by means of extortion. Where a person does not seek property, but instead seeks performance or omission of an act that does not constitute a "service," the person may engage in conduct similar to the conduct proscribed in this Article, yet commit the offense of criminal coercion in Article 3404. This Article only applies where the purpose of the threat is to obtain property, as defined in this Chapter.

*Relation to Current Law.* This Draft Article primarily codifies the offense of extortion in Penal Code (1962) Art. 485 (Extortion). Additionally, Art. 481(a)-(c) and (e) (Aggravating Circumstances) provide a greater punishment if the person commits theft employing violence against objects or carrying arms or narcotics on his or her person even if he or she does not use them. Article 4204 (Theft by Extortion) reflects these provisions to the extent that the person's conduct constitutes unlawful coercion. This Chapter provides a greater grade if theft is committed by extortion, as discussed in the commentary to Article 4201. This draft Article also corresponds to Art. 244 (Extortion by a Public Officer).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 4205. Theft of Property Lost, Mislaid, or Delivered by Mistake**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 543 (Unjustified Possession of Valuables), 544 (Unjustified Possession of Animals)

**Comment:**

*Generally.* This provision provides that a person commits an offense if he or she comes into possession of lost, mislaid, or mistakenly delivered property and fails to take reasonable measures to return the property to its owner. This Article does not impose a heavy burden on a person who receives or discovers the property of another. The person need only take reasonable efforts to restore the property to its rightful owner. If no reasonable means are available for returning property to its owner, a person may keep received or discovered property of another. For example, if a person were to find a single currency note on a busy street, it would be difficult (if not impossible) to find the rightful owner, so the person may keep the bill without fear of liability. In other cases, reasonable measures may exist to restore received or discovered property, such as posting a sign in the area in which the property was found or giving the property to an employee of the establishment in which it was found. In certain circumstances, especially if the item is distinctive or labeled with the owner's name or other information, the person may have a duty to attempt to contact the rightful owner and restore the property to him or her. A trier of fact should consider custom, the circumstances, the value of the property, the uniqueness of the property, the potential number of false claimants, and alternative means of restoration in determining whether a person's effort is reasonable.

Section (a)(3)'s requirement of intent to deprive another of his property is critical. A person may take possession of property by accident or with the purpose of keeping it safe without also having the intent of depriving the owner of his or her property. The reasonable efforts discussed above must also be analyzed to see if the efforts evince a purpose to deprive or instead a good faith effort to restore the property in question to its owner.

*Relation to Current Law.* Penal Code (1962) Art. 543 (Unjustified Possession of Valuables) and Art. 544 (Unjustified Possession of Animals) punish those in possession of property or animals who cannot show legitimate possession. Art. 4205 (Theft of Property Lost, Mislaid, or Delivered by Mistake) corresponds to these offenses, to the extent they apply to a person who cannot show legitimate possession because he or she received lost or mislaid property and failed to take reasonable measures to return it to its owner. Draft Article 4205 narrows Penal Code (1962) Art. 543 and 544 to ensure that the law punishes only sufficiently blameworthy people who meet the conduct and culpability requirements described in this Article.

*Relation to Sharia Law.* Sharia law prohibits keeping lost property without making an honest effort to restore it to its owner.<sup>121</sup> This Article imposes a minimal burden on the finder or receiver and only imposes liability where there is a purpose to deprive, and so should not sweep so broadly as to include innocent people. Instead, it ought to encourage the restoration of lost or wrongly delivered property.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 4206. Theft of Services**

**Corresponding Current Provision(s):** None.

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<sup>121</sup> *Id.* at 667 (Nuh Ha Mim Keller trans., Aman Publications 1994) (“The category of taking other’s property through falsehood includes such people as . . . the person who picks up lost and found property and does not give notice of having found it. . .”).

**Comment:**

*Generally.* The reliable provision of services is increasingly significant to the well-being of society. When a person defrauds a service provider, the cost of the theft is passed on to society as a whole, with the greatest harm being inflicted on those least able to pay for the services. For this reason, theft of services is an important offense, and is why the drafters included it, even though there is corresponding provision in the Penal Code (1962). What constitutes a “service,” as defined in Article 4209, is very broad, encompassing the array of activities that may constitute “service.” Any public utility service, such as electricity, gas, or water, when the service is provided by subscription and not incrementally (as by gas canisters or water bottles) constitute a service. Any communications program constitutes a service, including access to a communications network, such as telephone, internet, cable, or other means of communication, or receipt of information, as in a financial wire service. Professional, rental, and tourism services can also constitute a “service” under this Article, including car rentals, guide services, boat chartering, food service, housekeeping services, use of buses and taxis, rented real estate, hotel accommodations, and museum admissions. Essentially, any service for which one would expect to pay constitutes a service for the purpose of this Article.

The theft of services can be accomplished by two means under this Article. First, a person without legal access to a service could use deception, threats, or false representations to gain access to a service to which he or she is not entitled. Second, a person could install, rearrange, or tamper with equipment to avoid payment for services. If either of these actions is done knowingly and with the intent to avoid payment, the person commits an offense under this Article.

*Relation to Current Laws.* There is no specific provision in current law dealing with theft of service. However, Part XIII of the Penal Code (1962) widely criminalizes taking from another that to which one is not entitled. This provision is consistent with that principle.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 4207. Receiving Stolen Property**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 504 (Receiving), 545 (Failure to Declare Items Which Are Stolen Property), and 548 (Purchase of Articles Suspected to Be Stolen Property)

**Comment:**

*Generally.* The purpose of this Article is to punish and deter people who traffic in stolen goods. Because possessing stolen goods is likely a result of theft, this Article makes it an independent offense to receive stolen goods. Section (a) criminalizes the reception, retention, or disposition of property, but with two important, limiting culpability requirements: first, that the person knows the property has been stolen; and second, that the person intend to deprive the original owner of that property. Section (b) uses the grading and aggregation system in Article 4201 (Consolidation of Theft Offenses). The system is specifically included in this Article because receiving stolen goods cannot readily be defined as a form of theft.

Note that a person who commits theft (as defined in draft Articles 4202–06), and afterwards knowingly retains the stolen property, should not be charged with both the theft and



receiving stolen property. That would lead to disproportional, duplicative punishment of a single criminal act. Even if a person were charged with both offenses, the defendant could not be convicted of both under draft Article 303 (Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade).

*Relation to Current Law.* Penal Code (1962) Art. 504 (Receiving) criminalizes obtaining stolen goods, while Art. 545 (Failure to Declare Items Which Are Stolen Property) criminalizes failing to declare stolen goods to the authorities once the person knows they were originally stolen. In addition, Art. 548 (Purchase of Articles Suspected to Be Stolen Property) penalizes the purchase of objects that, although not known to be stolen, can reasonably be suspected as such. This draft Article reflects Penal Code (1962) Art. 504 by criminalizing the receiving of stolen property, while Art. 545 is covered by use of the word “retains” in Section (a)(2). Current Art. 548 is not specifically addressed because property that is suspected to be stolen is “known” to be stolen under Section (a)(1) with sufficient evidence.

Penal Code (1962) Art. 504 imposes a penalty of up to six years’ imprisonment, while Art. 545 and Art. 548 can only lead to imprisonment for up to six months. Draft Article 4207 includes a grading system based on the value of the property at issue. This allows the offense to be graded in a manner that more accurately reflects the harm caused: loss of property.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law. In addition, Islamic law broadly places responsibility for receipt of stolen goods on the receiver, regardless of whether he knows they were stolen or not.<sup>122</sup> The underlying principle of this Article is compatible with that understanding.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 4208. Unauthorized Use of Property or Facilities**

**Corresponding Current Provision(s):** None

### **Comment:**

*Generally.* This provision criminalizes the use or retention of a vehicle or other property, or use of another’s facilities, without authorization or while exceeding the conditions of authorization. Article 4209 covers cases where the offender lacks the intent to permanently deprive the owner of property, and therefore has not committed theft. However, the property of facility involved must be one for which the defendant would reasonably expect to have to pay. For example, a person would commit an offense under this Article by taking a vehicle from a facility that rents vehicles to the public, without payment, and returning it the next day. Although the defendant took property of another, it was not taken with intent to permanently deprive the owner of that property (as evidenced by the fact that the defendant returned the property), and no theft occurs. However, the defendant’s conduct still deserves to be punished.

Additionally, a person can commit an offense under this Article by substantially exceeding an authorization already given. Imagine, in the example given above, the person pays to rent the vehicle for one day, but returns the vehicle after three weeks. This would substantially exceed the authorization acquired by paying for a single day’s rental. By contrast,

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<sup>122</sup> *Id.* at 431 (“Anyone who obtains the wrongfully appropriated Art. from X, or subsequently obtains it from the person who got it from X...is financially responsible to Y for it, no matter whether such a person knows of its having been wrongfully appropriated or not.”).

returning the vehicle then minutes past than the time required by the rental contract would not be an offense under this Article, because although authorization was exceeded, it was not substantial. What constitutes “substantially exceeding authorization” is a case-by-case determination to be made by the courts.

Due to the fact that an actual theft does not actually occur under this Article, the offense is not graded according to the value of the property involved, and must be graded lower than most thefts. An offense under this Article is graded as a Class [C] misdemeanor.

*Relation to Current Law.* No specific provision in current law deals with the unauthorized use of property and facilities. However, Part XIII of the Penal Code (1962) widely criminalizes taking from another that to which one is not entitled.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4209. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* The definition of “owner” differs from the definition of “another” in “property of another” in draft Article 4105 (Definitions) to allow for situations where justice requires a person who receives or discovers property to return it to the rightful owner, not merely a person in possession. A person is not the “owner” of property unless he or she has a legal claim of right.

The definition of “value of the property” is important to the construction of the grading provisions. A default rule that holds a defendant strictly liable for the value of the property he or she steals would create perverse results and measure the defendant’s liability poorly. If a person were to steal a pair of pants, not knowing that a diamond necklace was in the pocket, what might otherwise have been a petty theft would then be punished with the most serious grade. However, if a person discovers that he or she has stolen property whose current market value is beyond his or her expectations and then fails to return it, he has manifested a purpose to deprive the owner of that value.

The definition of “property” is expansive. Other codes distinguish between real and personal, or moveable, property; the drafters find that a broad definition of property is better than making such distinctions, which usually have little practical effect. The nature of property is becoming more ephemeral, as people attach value to items representing rights, interests, and obligations, such as promissory notes, copyrights, usage agreements, and other items that do not resemble the traditional image of property. Therefore, this definition encompasses all types of property.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Forgery and Fraudulent Practices**

## Chapter 4300. Forgery and Fraudulent Practices

### **Introduction: Chapter 4300**

This Chapter punishes culpable, fraudulent conduct. It focuses on the harm caused by an actor's inducement of a victim to detrimentally rely upon the actor's deception or concealment. This Chapter protects the victim's right to assume that the representations of others are truthful and made in good faith. The Chapter finds support throughout the current Penal Code (1962) and in Sharia law. Broadly speaking, Sharia law states: "He who cheats is not one of us,"<sup>123</sup> and thus it prohibits the "speaking of falsehoods,"<sup>124</sup> and "taking people's property through falsehood."<sup>125</sup> The primary focus on individual harm allows this Chapter to exist in harmony with Chapter 5200 (Perjury and Falsification), which is primarily concerned with false statements in the course of official proceedings. But this Chapter also seeks to punish fraud that causes harm to the public and the administration of the state. Fraudulent conduct in this Chapter is graded more severely if the offense concerns public officers or is committed by a public officer exercising his or her official duties.

While the Chapter draws on current law, it consolidates conduct currently criminalized in many highly specific provisions by drafting fewer, much more broadly worded offenses. As a result, this Chapter condenses multiple current Articles into fewer draft Articles, while also expanding the scope of the law in certain instances to account for the possibility of new methods and techniques in committing similar harms. This expansion was achieved by designing the provisions to cover all conduct that creates certain underlying harms that the law intends to prevent rather than enumerating highly specific activities to be prevented, as done under prior law.

### **Comment on Article 4301. Forgery and Counterfeiting**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 348-359 (Counterfeiting Currency, Securities and Stamps); 360-365 (Counterfeiting of Seals, Instruments or Marks of Authentication, Certification of Identification); 366-382 (Falsification of Documents), 537 (Failure to Deliver Up Coins Recognized as Counterfeit)

#### **Comment:**

*Generally.* Draft Article 4301 criminalizes forgery, counterfeiting, and related offenses. These offenses aim to protect the authenticity of documents, writings, and objects of antiquity or other special value. This offense also covers the production of counterfeit money and other negotiable or valuable instruments. Forgery and counterfeiting are independent offenses, although both are contained in Section (a), recognizing that: (1) forged writings are often used to accomplish especially far-reaching fraudulent activities, (2) forged objects and simulated objects of special value may cause losses or injuries that are unquantifiable or of a non-pecuniary nature, and (3) beyond the specific theft achieved or attempted, forgery imposes the additional discrete

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<sup>123</sup> Sunan Ibn Majah, Bk. 12, Hadith 2309; Jami' al-Tirmidhi, 1315; Ahmad b. Naqib Al-Misri, *Reliance of the Traveler* ('*Umdat al-Salik*), 392.

<sup>124</sup> Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 113.

<sup>125</sup> Ahmad b. Naqib Al-Misri, *Reliance of the Traveler* ('*Umdat al-Salik*), 667.

harm of reducing public confidence in the forged item by, for instance, undermining trust in paper currency and the monetary system.

This provision comports with the convention of outlining all named offenses in the first Section rather than identifying the title of offenses in the grading section. Section (a)(1) is directed at the use of forged writings or simulated objects where the use does not cause a pecuniary loss or affect the intrinsic value the writing at issue, which would otherwise be punishable under this draft Article. This provision would thus include the use of forged writings or simulated objects that result in reputational harm, the assertion of false scientific theory, or other intangible injuries.

Section (a)(2) is directed at the simulation of objects of special value. This provision addresses situations where an object is altered such that it falsely purports to be an antiquity. This provision also addresses situations where a painting or cultural writing purports to be the creation of a particular author, but it is not. However, this provision does not overlap with Section (a)(1)—a person has either committed forgery or simulated an object of special value.

Section (a)(3) is directed specifically at the forgery of writings and also generally covers the substantive offense of counterfeiting. This offense is committed whenever one creates or issues an entirely new writing, or executes, authenticates, or transfers an existing writing such that it purports to be the act of another, or purports to be numbered or authenticated in a way that it is not. Section (a)(3)(D) criminalizes the forgery of any writing that does or may create, show, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status. Section (a)(3)(E) is aimed at criminalizing counterfeiting and covers writing issued or received by the government. Section (a)(3)(E)'s range of prohibited counterfeiting therefore includes, but is not limited to: currency (coin or paper), bonds, stocks and other securities, commercial letters of credit, and other instruments that could be easily exchanged on sight for other valuable instruments or goods, as long as they are issued or received by the government.

Section (b) separately criminalizes the knowing possession of counterfeit or forged materials. Possession is a lesser offense, and therefore is broken out separately to allow for more streamlined grading in Section (c). Section (b) also only criminalizes knowing possession, therefore immunizing those possessing counterfeit materials in good faith, consonant with a theme found in Art. 350 and several other articles of the Penal Code (1962).

Section (c) provides a grading scheme for draft Article 4301. The grading of the offenses differentiates punishment based on the harm caused by the forgery or counterfeiting. Consistent with the Penal Code (1962), harm is intensified when the forgery undermines confidence in the administration or the value of the national currency.

Section (c)(1) recognizes that undermining public confidence in the administration of the state causes the greatest harm. Therefore, any offense under Section (a) is graded as a Class [D] felony if committed by a public officer in the performance of his or her duties, regardless of whether the writing at issue is currency, an object of special value, or even a stamp or transit ticket. This grading scheme finds support in Arts. 366 through 373 of the Penal Code (1962), which punishes the falsification by public officers, acting under his or her official duties, more harshly than falsification or false certification by private individuals.

Section (c)(2) is aimed at punishing counterfeiting money. The rationale behind the grading is that the forgery of money is likely to cause greater harm than the forgery or simulation of other objects that do not undermine the value of the national currency. Counterfeiting money is therefore presumed to decrease the value of the national currency, and is punished as a Class [E] felony.

Consonant with Penal Code (1962) Arts. 352 and 358, falsified stamps or transit tickets warrant a lesser punishment, and therefore Section (c)(3) grades an offense involving stamps or transit tickets as a Class [A] misdemeanor.

Section (c)(4) provides that all other forgeries and simulations are punished as Class [F] felonies. This class of writings and objects would include, but is not limited to: letters; private notices or articles; and false antiquities, paintings, or other cultural objects.

*Relation to Current Law.* This draft Article incorporates the following provisions of the Penal Code (1962): Arts. 348-359 (Counterfeiting Currency, Securities and Stamps), 360-365 (Counterfeiting of Seals, Instruments or Marks of Authentication, Certification of Identification), and 366-382 (Falsification of Documents). This updated provision condenses more than 35 original Articles into one comprehensive draft Article. Article 356 (Exemption from Punishment) of the current Penal Code (1962), which offers an exemption from punishment if an act of counterfeiting or forgery is prevented “before the authorities obtain information thereof,” is not incorporated into the draft Article. It is excluded, because it is inconsistent with this draft Article’s aim to punish culpable conduct based on the harm it inflicts. Counterfeiting can cause harm well before the authorities are made aware of it, even if the execution or circulation of the counterfeit documents has been prevented.

The prohibition on possessing instruments of a crime in the previous articles of the Penal Code (1962) is covered by the General Part, Chapter 900 (Inchoate Offenses).

Section (b) of this draft Article also codifies Penal Code (1962) Art. 537 (Failure to Deliver Up Coins Recognized as Counterfeit) by making it an offense to possess the counterfeit writing or object. However, the draft Article does not require a possessor to give the objects to the authorities, but rather allows that dispossession, including destruction, would release the person for liability for possession. This is consistent with the general aim of this Draft Code to avoid imposing positive obligations on individuals without a recognized duty.

*Relation to Sharia Law.* This draft Article finds support in Sharia law. Sharia law supports this draft Article in that it prohibits fraudulent sales.<sup>126</sup> The State has traditionally exercised its police power under *hisba* jurisdiction to prevent fraud and deceptive practices of various kinds in the marketplace.<sup>127</sup> In addition, the offenses defined in this Chapter are generally consistent with the harms sought to be prevented by the *muhtasib* (market inspector who exercises *hisba* jurisdiction). Moreover, in accordance with the general Sharia law principle that “if a man does not know the deed which he performs is forbidden, no punishment should be inflicted on him,”<sup>128</sup> this draft Article does not punish those who possess a forged or fraudulent item in good faith.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4302. Tampering with a Writing, Record or Device.**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 275 (Tampering with Seals); 276 (Facilitation with Culpa); 379 (Suppression, Destruction or Concealment of Genuine Documents); 428 (Simulation or Suppression of Entries in Civil Register); Art. 429

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<sup>126</sup> Ibn Rushd, *The Distinguished Jurist’s Primer (Bidayat al-mujtahid)*, vol. 2, at 503, 198-202.

<sup>127</sup> Qur’an, Surah 3, Verse 104 (jurisdictional basis of *hisba*, providing that the Muslim community enjoins right and forbids wrong); Al-Mawardi, *The Ordinances of Government (al-Ahkam al-Sultaniyya)*, 260-80.

<sup>128</sup> Ahmed Hasan, *Principles of Jurisprudence: The Command of Shari’ah and Juridical Norm*, 363.

(Alteration of Entries in Civil Register)

**Comment:**

*Generally.* This draft Article criminalizes both tampering with a writing, record, or device and inviting reliance on writings, records, and devices that one knows to have been tampered with. As applied to “writings,” draft Article 4302 also complements draft Article 4301 (Forgery and Counterfeiting), and reaches conduct that is not forgery because the defendant either tampers with or alters a writing already created, executed, or authenticated.

Section (a)(1) defines the culpability requirement for the offense. The defendant’s intent to deceive or conceal wrongdoing is a key element of the offense. One who tampers with a document in good faith, or for purposes other than deceit or concealment of wrongdoing does not commit an offense under draft Article 4302. Furthermore, tampering with a document to conceal acts that are not “wrongdoing” (i.e., a criminal offense) is not punishable under this draft Article. This exception is included to protect the privacy of persons who are engaging in legal acts that they may not want publicly known, as well as to allow individuals to protect the confidentiality of commercial negotiations.

Section (a)(2) defines the conduct for the offense as the alteration, destruction, removal, or concealment of a writing, record, or object. This definition may include situations where a writing, record, or object is partially destroyed, or simply obscured from public detection. The routine filing of documents ordinarily is not punished because it does not constitute alteration, destruction, removal, or concealment, nor is it undertaken for the purpose of deceit or concealing any wrongdoing. The creation, execution, authentication, or issuance of fraudulent documents is punished under draft Article 4301 (Forgery and Counterfeiting).

Section (a)(3) exists in recognition that there are situations where tampering may be authorized or otherwise justified. However, authorization must be lawful and the reason should be legitimate, not arbitrary. Furthermore, the tampering must not be used to violate other provisions of law.

*Relation to Current Law.* Under current law, Art. 275 (Tampering with Seals) of the Penal Code (1962) prohibits tampering with seals affixed to preserve the identity of a document. Section (a)(2) expands upon current law by criminalizing the tampering of any record, writing, or object, including seals. This Article expands the offense because the alteration or destruction of non-monetary documents can inflict serious pecuniary and non-pecuniary damages on others and may allow others to obtain benefits to which they are not entitled. Furthermore, the criminalization of non-seal tampering is important because it allows people to rely on documents without questioning their authenticity.

*Relation to Sharia Law.* Sharia law generally prohibits fraudulent sales, including sales pursuant to a fraudulent method of authentication.<sup>129</sup> The culpability requirement in Section (a)(1) of knowledge is consistent with the general Sharia law principle that “if a man does not know the deed which he performs is forbidden, no punishment should be inflicted on him.”<sup>130</sup> A person who acts with the purpose of concealing wrongdoing or deceiving anyone satisfies a knowing culpability requirement. Further explanation of this support can be found in the Commentary to draft Article 4301 (Forgery and Counterfeiting).

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<sup>129</sup> Ibn Rushd, “The Distinguished Jurist’s Primer” (*Bidayat al-mujtahid*), Volume 2, at 503, 198-202.

<sup>130</sup> Ahmad Hasan, *Principles of Jurisprudence: The Command of Shari’ah and Judicial Norm*, p. 363 (Islamic Research Institute, Islamabad 1993)

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4303. Identity Fraud**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 383 (Substitution of Person), 384 (False Certification or Declaration to a Public Officer), and 386 (Usurpation of Titles or Honours)

#### **Comment:**

*Generally.* Draft Article 4303 criminalizes the unauthorized impersonation of others. Impersonation, like other conduct prohibited in Chapter 4300, is often used to effectuate other crimes, such as theft. Draft Article 4303 serves several functions that complement Chapter 4200's prohibitions against theft, and draft Article 4303 is aimed at both protecting those who are falsely impersonated as well as those who rely on outward manifestations of identity, like uniforms or honorific insignia.

Section (a)(2)(A) targets identity fraud. By punishing conduct that harms impersonated persons, such as injury to their reputation, it reaches conduct that theft offenses do not address. Section (a)(2)(A) also criminalizes conduct that may not constitute theft, such as an underage person's pretending to be of age (by claiming to be either a real or fictitious adult) for the purpose of voting. Where one impersonates another to steal property whose value is low or difficult to determine, Section (a)(2)(A) will allow the imposition of liability where the State would otherwise be unable to establish liability under one of the theft provisions in Chapter 4200.

Note that under draft Article 4303, it is not a defense to liability that the impersonated person cannot be identified. Representing one's self as a nonexistent person, or a person who cannot be identified, is as blameworthy as falsely representing oneself as another real person, as long as one of the prohibited result elements in Section (a)(1) are present.

Section (a)(2)(B) bars a person from representing that he or she is authorized to exercise official authority to which he or she is not entitled. Although the primary aim is to punish those who falsely claim public authority by impersonating government officials, like public safety or police officers, this section also criminalizes impersonation of other officials through falsifying academic or professional designations, such as degrees or certifications. This ensures that individuals who falsely assert official authority or designation are punished, even though they may not cause a direct injury to any specific person.

In general, Section (a)(1) qualifies the behavior mentioned in Section (a)(2). In particular, Section (a)(1) notes that in order for a person to be liable under this draft Article, he must act with reckless disregard for whether the conduct would (1) cause harm to another, (2) give the person a benefit to which he or she is not entitled, or (3) cause others to believe some form of authority exists for the behavior when it does not.

Section (b) criminalizes trafficking in stolen identities. It addresses crimes that are incidental to impersonation, such as the production, sale, or purchase of false identities. This ensures that individuals can be prosecuted for impersonation-related crimes before they actually engage in the impersonation or theft. The State can authorize private individuals to produce certain identity documents if it so chooses, because then the person will be entitled to the benefit, and will not satisfy the offense requirement in Section (b)(1)(B).

Section (c) grades the offenses in accordance with the harms to both impersonated persons and confidence in the public administration. Impersonation of a public officer, or impersonation of any individual in relation to a public officer, is a Class [F] felony under Section (c)(1). Impersonating any individual not in relation to a public officer qualifies as a Class [A] misdemeanor under Section (c)(2). The offense of identity trafficking is a Class [B] misdemeanor, recognizing the lesser harm in buying and selling identification materials, without using them. Note that Sections (a) and (b) criminalize different harms, and a person who (for example) both trafficks in identification materials and uses those materials to violate Section (a) commits two offenses, and may be convicted of both.

*Relation to Current Law.* This draft Article incorporates Penal Code (1962) Arts. 383 (Substitution of Person), 384 (False Certification or Declaration to a Public Officer), and 386 (Usurpation of Titles or Honours). The Articles currently found in the Penal Code (1962) provide that a person commits the offense by impersonating another person or attributing a false name, status, or capacity to himself or herself, and punishes the conduct more harshly if it is in relation to a public officer. Art. 386 of the Penal Code (1962) (Usurpation of Titles or Honours), is specifically reproduced in Section (a)(2)(B). Art. 385 of the Penal Code (1962) (False Statements as to the Identity or Personal Capacity), which criminalizes false statements of identity to public officers, is not specifically codified in this draft Article because the crime of uttering false statements is covered by Chapter 5200 (Perjury).

Section (a) of this draft Article incorporates the culpability requirement in current Art. 383, which requires that a person act with the “purpose of procuring for himself or another any advantage or of causing harm to another.” Art. 383’s requirement that a person be deceived by the offender’s conduct does not appear in draft Article 4303, because liability should hinge on the offender’s conduct and culpability, not another person’s response to the offender’s unlawful conduct.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4304. Deceptive Practices**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 279 (Interfering with Auctions); 281 (Fraud in Public Supplies), 364 (Use or Possession of Measures or Weights with False Stamp), 376 (Falsification of Paper Signed in Blank: Private Document), 378 (Use of False Document), 389 (Fraudulent Raising or Lowering of Prices in the Public Market), 393 (Infringement of Freedom of Industry and Commerce), 394 Fraud Against National Industries), 395 (Fraud in the Exercise of Commerce), 396 (Sale of Non-Genuine Food Products as Genuine), 397 (Sale of Industrial Products Under False Signs), and 535 (Holding of Illegal Measures or Weights)

### **Comment:**

*Generally.* This draft Article criminalizes dishonest dealing in commercial transactions. Draft Article 4304 applies to a whole host of dishonest commercial practices. For example, the following non-exhaustive list of practices is prohibited under draft Article 4304: making a false or misleading written statement to obtain property or credit, to sell securities, or in any advertisement; using a false weight or measure, or any other device for falsely determining or



recording any quality or quantity of a commodity to be sold; selling or delivering less than the represented quantity of any commodity or service; taking more than the represented quantity of any commodity or service when the buyer furnishes the weight or measure; or selling adulterated or mislabeled commodities. The language of this offense, however, is not limited to these practices, and involves any practice that involves deception related to commerce. An “established commercial practice” in Section (a)(2) is a practice derived from custom or law.

The minimum culpability required for supplying false or misleading information is recklessness. Recklessness was chosen because a person who acts negligently in supplying false information is unaware of the risk that the information is false, and thus should not be held liable. However, to require knowledge would exempt from liability any person who knows of a substantial risk that he is supplying false information and chooses to disregard it. Additionally, Section (a)(1) requires the information supplied to be materially false or misleading, which ensures that a person does not incur liability for the representation of minor inaccuracies.

*Relation to Current Law.* This Article incorporates multiple provisions under the Penal Code (1962) in one broader draft Article. The commonality in the Penal Code (1962) Articles that are incorporated into this draft Article is the use of fraudulent practices. For instance, current Arts. 364 (Use or Possession of Measures or Weights with False Stamp) and 535 (Holding of Illegal Measures or Weights) criminalize the use of altered or illegal measures or weights in the course of commercial activities. Under the draft Article, all deceptive commercial offenses are covered as long as the person has the required culpable state of mind. The draft Article removes result elements, such as “caus[ing] injury to the national industry,” from Art. 394 of the Penal Code (1962), because: (1) the resulting harm does not affect the blameworthiness of the actor engaging in the deceptive practice, and (2) proving such results can pose difficult evidentiary problems. Combining various articles from the Penal Code (1962) provides the advantages of: (1) ensuring that no fraudulent conduct escapes coverage under the penal code, and (2) making it easier for the State to locate the relevant penal provision.

This draft Article also codifies Penal Code (1962) Art. 393 (Infringement of Freedom of Industry and Commerce) by prohibiting fraudulent practices that disturb commercial practice. However, unlike Art. 393, this draft Article does not require the complaint of a party to initiate prosecution.

*Relation to Sharia Law.* This draft Article also finds support in Sharia law. If a seller knows of a defect in a good or service, he must disclose it based on the Prophetic tradition that “[h]e who cheats us is not one of us.”<sup>131</sup> Sharia law also prohibits “taking people’s property through falsehood” and Ahmad b. Naqib al-Misri has condemned “the cheater or adulterer of trade goods . . . the person who stints when weighing or measuring out goods . . . and the merchant who tells the buyer that the merchandise cost more than it did” as examples of such conduct.<sup>132</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4305. Commercial Bribery**

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<sup>131</sup> Sunan Ibn Majah, Bk. 12, Hadith 2309; Jami’ al-Tirmidhi, 1315; Ahmad b. Naqib Al-Misri, Reliance of the Traveler (*Umdat al-Salik*), 392.

<sup>132</sup> Ahmad b. Naqib Al-Misri, Reliance of the Traveler (*Umdat al-Salik*), 667.

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 245-251 (Corruption of a Public Officer, Bribery), and 274 (Abusive Exercise of a Profession)

**Comment:**

*Generally.* This draft Article criminalizes bribes designed to induce breaches of professional duties owed by persons in positions of trust. Section (a) applies to bribes accepted or sought by persons owing a duty of fidelity to others. This includes, but is not limited to, agents, fiduciaries, and professional advisors. Section (b) criminalizes paying, conferring or offering bribes prohibited by Section (a).

The language of this draft Article is written explicitly to limit the offense to truly blameworthy conduct. Section (a) requires knowledge as to all of the objective elements of the offense. This requirement limits the scope of the offense by excluding criminal liability for an individual who should have known but did not. Draft Article 4305 seeks to punish only the individual who knows of or intends to induce breaches of professional duties owed by persons in positions of special trust.

Section (a) requires that the defendant be subject to a duty of fidelity, but includes a list that encompasses a broad range of professional capacities. According to the list provided, commercial bribery covers agents, arbitrators, directors, employees, fiduciaries, partners, professional advisors, and officers. This list is intended to encompass a broad range of professionals, as all are capable of blameworthiness under this draft Article.

Section (b) criminalizes conferring, offering, or agreeing to confer a bribe prohibited by section (a). Section (b) is similar in scope to section (a), but applies to the individual on the other end of the bargain.

Section (c) grades this offense as a Class [D] felony.

*Relation to Current Law.* Arts. 245-251 of the Penal Code (1962) prohibit public officers from accepting any benefits for either performing official acts or acts contrary to their office. Art. 274 of the Penal Code (1962) addresses individuals who “abusively exercise” a profession which requires a special State qualification for practice. These Articles under the Penal Code (1962) recognize that certain professions and offices carry greater power and expertise, and thus forbid individuals in those roles from abusing that power. This principle is captured in the draft Article’s focus on the duty of fidelity inherent in the professions listed in Sections (a)(2)(A)-(E).

*Relation to Sharia Law.* Sharia law lends support for this draft Article. There is a Prophetic *hadith* which states: “cursed is the one who bribes and the one who takes a bribe.”<sup>133</sup> Ibn Hajar Haytami lists “taking a bribe for falsehood; or being an intermediary between the persons giving and accepting it” as an offense. In addition, he mentions the example of an official bribe by listing “a judge accepting a gift for having interceded for one of the litigants” as an offense.<sup>134</sup> Mohamed El-Awa cites the following Qur’anic verse in support of the prohibition against bribery: “Consume not your property among yourselves in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other men’s property intentionally.”<sup>135</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 4306. Rigging Publicly Exhibited Contest or Public Bid**

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<sup>133</sup> Jami’ al-Tirmidhi, 1337; Sunan Abi Dawud, 3580.

<sup>134</sup> Ahmad b. Naqib Al-Misri, *Reliance of the Traveler* (‘*Umdat al-Salik*’), 988.

<sup>135</sup> *Qur’an* 2:188; Mohamed S. El-Awa, *Punishment in Islamic Law: A Comparative Study*, 113.

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 245-251 (Corruption of a Public Officer, Bribery), 279 (Interfering with Auctions), and 281 (Fraud in Public Supplies)

**Comment:**

*Generally.* This draft Article criminalizes conduct that interferes with, and impairs confidence in, government bidding and contests. The purpose of this draft Article is to protect the integrity of governmental allocation of contracts and to encourage the conservation of public resources, but it applies with equal force to publicly exhibited contests or exhibitions. Contracts obtained by any means other than through independent non-collusive submission of bids or offers by individual contractors and suppliers are inherently deceptive and may lead to both higher costs and poorer quality of work in the execution of contracts.

Section (a)(1)'s culpability requirement is high. The defendant must act with the intent to prevent a publicly exhibited contest or exhibition from being conducted in accordance with the rules and usages purporting to govern it. Sections (a)(1)(A)-(C) detail the ways in which a defendant may go about corrupting a bid—i.e., through payment, threat, or interference.

Section (a)(2) requires that a defendant knowingly solicit or accept a benefit, and act with the purpose of bribing, threatening, tampering, or otherwise disrupting the legitimate nature of a publicly exhibited contest or exhibition.

Section (a)(3) explicitly criminalizes corruption in publicly exhibited contests, including sporting events. This section is designed to discourage gambling fraud and to protect the integrity of legitimate public contests. The term “publicly exhibited contest” includes, but is not limited to, sporting events, art and beauty competitions, lotteries, raffles, and television gaming. Beyond addressing the threat of gambling fraud, this broad definition is necessary to prevent the deception of the public and maintain its confidence in the integrity and legitimacy of public contests. The Section has two parts, requiring that a defendant knowingly participate in a public contest (Section (a)(3)(A)) and that the defendant know of the fraudulent nature of the contest (Section (a)(3)(B)). By requiring knowledge as to both of these elements, this draft Article ensures that an individual acts with sufficient culpability and does not merely happen to be an innocent participant in a fraudulent contest. At the same time, requiring proof of knowledge permits the conviction of those who assist others in deceiving the public by participating in a rigged contest, even though they may not satisfy the requirements of accomplice liability under Article 401 (Accountability for the Conduct of Another) of this draft code.

A defendant is liable under Section (b) if he knows his conduct violates the laws governing a bid or contest. Requiring the State to prove knowledge promotes the legitimacy of the public bidding process by creating liability for individuals who may not have intended to commit the fraud, but become aware that by their conduct they are in fact committing this offense. It is in the interest of society to prevent such individuals from delegitimizing the public bidding process. At the same time, requiring proof of knowledge protects individuals who only recklessly disregard the corrupt implications of their actions.

Section (c) grades arranging a rigged contest as a Class [D] felony and participating in a rigged contest as a Class [E] felony. The difference between the grading of these sets of offenses is derived from the further reaching implications of Sections (a)(1)-(2) and (b). These Sections involve the obstruction of fair competition for corporations, and are judged as more serious offenses. Unlike Section (a)(3), the conduct in Sections (a)(1)-(2) and (b) not only compromises

legitimacy and integrity in the eyes of the public, but also has serious economic implications that directly impact individuals' livelihoods.

*Relation to Current Law.* Arts. 245-251 of the Penal Code (1962) forbid individuals in public office from accepting benefits for engaging in acts either pertaining to or contrary to their office. In particular, Section 2 of Art. 246 of the Penal Code (1962) increases the punishment for an individual who grants public contracts in exchange for money or other benefits. This concern for the allocation of contracts and government resources is directly incorporated into this draft Article.

*Relation to Sharia Law.* Sharia law expressly prohibits bid-rigging (*najsh*).<sup>136</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4307. Defrauding Secured Investors**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 497 (Fraud in Insolvency); 498 (Issuing Cheques Which Will Not Be Honoured); and 501 (Usury)

#### **Comment:**

*Generally.* This draft Article defines the intentional obstruction of another's ability to enforce his or her security interest as a criminal offense. This draft Article covers any property that is subject to a secured interest, and criminalizes dealing with such property with the purpose of hindering enforcement of a security interest. It thus facilitates broad liability, as long as the person acts with the requisite purposeful mental state. Liability under this draft Article includes, but is not limited to, the transfer, destruction, removal, concealment or encumbering of collateral.

The grading in Section (b) varies according to resulting harm. Section (b)(8) covers instances of inchoate liability.

*Relation to Current Law.* Arts. 497 (Fraud in Insolvency), 498 (Issuing Cheques Which Will Not Be Honoured), and 501 (Usury) of the Penal Code (1962) are only tangentially related, and rather provide normative support for this provision. Otherwise, no similar offense exists in the current Penal Code (1962), but the offense has been added to punish an actor seeking to destroy others' property interests secured through the operation of investments. This draft Article covers culpable behavior equivalent to taking property from its rightful owner. It also recognizes the societal impacts of the prohibited conduct, such as reducing the availability of capital for economic growth and a well-functioning economy.

*Relation to Sharia Law.* This draft Article finds support in the Sharia law principles of *musharakah* (the sharing of asset ownership) and *mudarabah* (the sharing of risk) in Islamic finance. Because charging excessive interest on a loan or investment is prohibited in Sharia law,<sup>137</sup> an investor's or creditor's returns are often secured through joint ownership of assets, and the sharing of resulting profits, losses, or both. Therefore, the offense covers culpable behavior equivalent to taking property from its rightful owner.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>136</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 200-202.

<sup>137</sup> *Quran* 4:161 ("God hath permitted trade and forbidden usury"). Article 4307 of this draft penal code reflects the prohibition on charging interest and finds additional support in Article 501 of the current Penal Code (1962), which also criminalizes usury.

## **Comment on Article 4308. Fraud in Insolvency**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 497 (Fraudulent Insolvency)

### **Comment:**

*Generally.* This draft Article criminalizes fraudulent conduct by one who knows that certain proceedings for the benefit of creditors, such as a liquidation proceeding or a proceeding seeking the appointment of a receiver, have been or are about to be instituted.

Sections (a)(1)-(2) set out two threshold requirements before liability can be imposed. First, proceedings for the benefit of creditors must be pending or imminent, and second, the defendant must have knowledge that such proceedings are pending or imminent. The draft Article thus restricts criminality to circumstances where a creditor's interests are paramount, and by requiring the defendant's knowledge as to that objective element, the draft Article ensures that the defendant's conduct is sufficiently blameworthy to warrant criminal sanctions.

Section (a)(3)(A) prohibits undertaking obligations while knowingly concealing the fact that the person is or is about to be subject to the proceedings described in Sections (a)(1)-(2).

Section (a)(3)(B) broadly protects a creditor's interests by prohibiting dealing with even unencumbered property ("any property") with the purpose of defeating or otherwise obstructing creditor's claims.

Section (a)(3)(C) prohibits knowingly falsifying writings relating to property that one knows is, or is about to be, subject to insolvency proceedings. Section (a)(3)(D) similarly criminalizes knowingly misrepresenting or refusing to disclose information legally required to be given to a receiver.

The offense is graded in Section (c) at varying intervals according to resulting harm, tracking the same grading used for theft offenses in draft Article 4201.

*Relation to Current Law.* Art. 497 (Fraudulent Insolvency) of the Penal Code (1962) criminalizes fraud in insolvency, but it only addresses the situation covered in Section (a)(3)(A). The current statute requires that the person have "the intention of not performing" the obligation he undertakes. That requirement has been removed because it poses difficult evidentiary problems. Rather, the fact that a person has no intention of performing his obligation is inferred by the requirement that he has knowledge of the pending or current insolvency proceedings.

The current Penal Code (1962) also excludes criminal liability when a person satisfies an obligation undertaken in the circumstances described in Section (a)(3)(A) before conviction. Section (b) incorporates this feature as a normative principle, but changes the timeframe for removing criminal liability to before the person is charged with the offense. Changing the time frame where extinguishing the obligation would remove criminal liability to "before the person is charged with the offense" serves two functions. First, it removes the possibility the obligation was satisfied only to avoid criminal sanctions when such punishment is looming. Second, it rebuts the presumption that the person who undertook the obligation had no intention of satisfying it, since he or she did in fact honor the obligation.

The behavior in Sections (a)(3)(C)-(D) reflects the societal harm of interfering with fair and efficient insolvency administration.

*Relation to Sharia Law.* The entire Article finds support in Sharia law, wherein fraud by a debtor or other insolvent person is potentially punishable by imprisonment.<sup>138</sup>

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<sup>138</sup> Ibn Rushd, *The Distinguished Jurist's Primer (Bidayat al-mujtahid)*, vol. 2, at 350; *See also*, Mohamed

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 4309. Receiving Deposits in a Failing Financial Institution**

**Corresponding Current Provision(s):** None.

**Comment:**

*Generally.* This draft Article criminalizes receiving deposits and other investments by failing financial institutions. This offense is similar to draft Article 4304 (Deceptive Practices), insofar as receiving a deposit with knowledge that suspension of operations or receivership or reorganization is imminent will ordinarily amount to misleading information as to the institution's ability to pay the depositor on demand. However, because an individual could commit an offense under draft Article 4309 without *supplying* any information or acting contrary to any commercial practice, draft Article 4309 is distinguishable from draft Article 4304 (Deceptive Practices). It is also distinct from draft Article 4203 (Theft by Deception), because draft Article 4309 does not require proof that the offender obtained the property (or here, the deposit) by deception.

Section (a)(1) requires that the person be "directing or participating in the direction or management" of the financial institution in order to impose criminal liability. The rationale for this requirement is twofold. First, persons not involved in the direction or management of the financial institution would typically not have the requisite knowledge that such institution is in "serious financial difficulties," or the ability to influence the receiving of deposits. Second, lower level workers' conduct of receiving deposits on the instruction and reliance of their superiors does not fall within the culpable sort of conduct the draft Article seeks to punish.

Section (a)(2) requires that the defendant know that the institution is about to suspend operations or go into receivership or reorganization, rather than requiring knowledge of "insolvency." Insolvency is a vague term, and Section (a)(2)'s specificity dispels any ambiguity as to which circumstances fall within the scope of the draft Article. The phrase "serious financial difficulties" should not be construed to include every business downturn that a financial institution experiences; it should be limited to those difficulties that substantially threaten the survival of the institution in its present form as expressed in Section (a)(2).

Section (a)(3) requires that the defendant be "reckless as to the possibility that the person making the deposit or investment is unaware of the institution's serious financial difficulties." The mental state of recklessness is included in the draft Article to capture and criminalize implicit misrepresentations as to the institution's ability to meet its deposit obligation.

This draft Article is graded based on the amount of resulting harm.

*Relation to Current Law.* This provision has no direct counterpart in the current Penal Code (1962). However, the normative values expressed herein are well recognized in current law. For instance, Art. 496 of the Penal Code (1962) prohibits cheating.

*Relation to Sharia Law.* Sharia law prohibits "speaking falsehoods," and "taking people's property through falsehoods," as discussed in the Introduction to Chapter 4300 above.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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S. El- Awa, Punishment in Islamic Law: A Comparative Study, 407.

## **Comment on Article 4310. Definitions.**

**Corresponding Provision(s):** None

### **Comment:**

*Generally.* The definition of “benefit” is broad and encompasses more than just money and material goods. Also included in this definition are advantages, such as preference in a contracting scheme, or the opportunity to purchase goods or services at a price lower than normal. Compensation may also be non-pecuniary. For example, a promise to arrange a marriage may be a “benefit,” as the term is defined.

A “writing” is defined as any symbol of value, right, privilege, or identification, regardless of medium. It is irrelevant whether the writing exists in physical form or electronic form. This may include but is not limited to: printing; electronically recorded data or any other method of recording information; money; coins; stamps; tokens; seals; credit cards; badges; trademarks; digital signatures; or other encrypted identifiers or electronic mail routing information.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Crimes Against Public Administration**

### **Chapter 5100. Bribery, Improper Influence, and Official Misconduct**

#### **General Comment on Chapter 5100. Bribery, Improper Influence, and Official Misconduct**

### **Comment:**

Provisional Constitution (2012) Art. 33 states that “Every person has the right to administrative decisions that are lawful, reasonable and conducted in a procedurally fair manner.” Chapter 5100 is intended to address crimes against public administration and which may affect that right. Therefore, this Chapter covers corrupt practices by and towards the government and public officials. Corruption can occur in two ways. First, corruption occurs when a public official benefits from his position in a way not sanctioned by law—in essence, a dishonest way of making money. Second, corruption occurs when a person attempts to “proffer” their wealth to a public official in an attempt to induce them to act illegally or for the benefit of the profferor.

Sharia law generally prohibits bribery, especially in the administrative context. Muslim jurists cite the following verse of the Qur’an as a prohibition against dishonest ways of making money: “Consume not your property among yourselves in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other men’s property intentionally.”<sup>139</sup> In addition,

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<sup>139</sup> Qur’an 2:188

they also point to the *hadith* where the Prophet cursed the one who bribes and the one who takes a bribe.<sup>140</sup>

This draft code merges all bribery offenses into one statute for the purpose of efficiency and ease of reference. Prohibitions against corruption eliminate a wide range of harms including undermining of government legitimacy and disruption of the political process.

### **Comment on Article 5101. Bribery**

**Corresponding Provision(s):** Penal Code (1962) Arts. 245 (Corruption for Performing an Official Act), 246 (Corruption for Performing an Act Contrary to the Duties of Office), 247 (Corruption of a Person Entrusted with a Public Service), 248 (Punishment of Persons Giving or Promising Money or Other Benefit), 249 (Instigation of Corruption), 250 (Abuses of Office in Cases not Specifically Provided for by Law).

#### **Comment:**

*Generally.* The purpose of Article 5101 is to criminalize bribery. Section (a) criminalizes offering a bribe, while Section (b) criminalizes accepting a bribe. A bribe is defined as an exchange with two components: (1) the soliciting, accepting, or agreement to accept a benefit not lawfully authorized; and (2) the public official influencing or agreeing to influence the use of official authority, or the exchange of a benefit for the use or omission of use of official authority. Article 5101 criminalizes both sides of this arrangement, regardless of whether the transaction is fully consummated.

The minimum culpability requirement for these acts is knowledge, and the culpability requirement applies to all elements. This means that a public official or candidate for public office who innocently accepts a present that the giver believes to be a bribe would not be guilty of a crime under this Article. The same would be true for a private individual who offers a present to a public official that the public official believes to be in exchange for certain future official actions, but the private individual has no such belief.

Offering a Bribe is criminalized under Section (a). Under Article 5101(a), a person commits an offense if the person knowingly offers, confers, or agrees to confer a personal benefit in order to influence an act of a public officer, party officer, or witness. Furthermore, under Section (a)(2)(C), the person who would accept that benefit must not be legally authorized to do so. This is intended to except services for which there is an authorized fee.

Section (b) defines the offense of Accepting a Bribe. Under Article 5101(b), the public official, party official, or witness must solicit, accept, or agree to accept a benefit not lawfully authorized. The inclusion of “not lawfully authorized” is intended to except services for which there is an authorized fee.

Section (c) assigns the same grade for offering and accepting a bribe. The relative severity of punishment (a Class [E] felony) is based on the current Penal Code (1962). Art. 245 (Corruption for Performing an Official Act) of the Penal Code (1962) allowed for punishment up to three years while Art. 246 (Corruption for Performing an Act Contrary to the Duty of Office) allowed for punishments ranging from two to five years. While other Articles allow for reductions based on who commits the crime, i.e. Art. 247 (Corruption of a Person Entrusted with a Public Service), making an offense under Article 5101 punishable by up to four years imprisonment seemed the best approximation of the Penal Code (1962).

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<sup>140</sup> *Sunan Abu Dawud*, 3580; *Jami' al-Tirmidhi*, 1337.



Additional mitigating factors suggested by the Penal Code (1962) were removed due to their lack of relation to the culpability of the actor. For example, Art. 249 (Instigation of Corruption) reduces the potential punishment to a person who offers a bribe to an official but the bribe is not accepted. Because the act of the person is not any different than if the bribe were accepted, such mitigating factors are not included.

Finally, recognizing the importance of maintaining the propriety of the Somali government, Article 5101(c)(2) provides that any public officer of Somalia convicted under this Article will be removed from public office or employment.

*Relation to Current Law.* Somalia has numerous provisions related to bribery (listed above). This provision seeks to combine the numerous provisions into one, simplified provision, with a best approximation of the penalty suggested by current law.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Article 5102. Improper Influence**

**Corresponding Provision(s):** Penal Code (1962) Arts. 299 (Unfaithful Advocates or Technical Advisor), 300 (Other Acts of Betrayal of Trust by Advocates or Technical Advisors), 301 (Advocate Pretending to Have Influence); Counterterrorism Law of 2014 Art. 20 (Offenses Against the Safety of Civil Aviation)

#### **Comment:**

*Generally.* This offense criminalizes the use of coercion with intent to influence another person's decision, opinion, vote, or other exercise of discretion as a public officer, party officer, voter or witness.

Article 5102(a) defines two types of improper influence. Section (a)(1) requires the use of coercion and that the person intend that the coercion influence another person's decision, opinion, vote, or other exercise of discretion as a public officer, party officer, voter, or witness. Section (a)(2) criminalizes conduct by which a professional representing another person knowingly acts contrary to that person's interests before a tribunal.

Section (b) grades the offense as a Class [F] Felony. The reason for using this grade is that while the offense is less serious than bribery, it should still be treated as a felony. Defining Improper Influence as a felony makes this offense punishable by up to two years' imprisonment.

*Relation to Current Law.* Somalia does not currently have a provision similar to Section (a)(1). However, this is consistent with the 1962 Code's general aim to criminalize unlawful conduct by public officers against the public administration. For example, is supported by Art. 301 (Advocate Pretending to Have Interest) of the Penal Code (1962), which punishes an advocate pretending to have influence with a public official. Although that provision is codified in this draft Code under 4203 (Theft by Deception), the person who pays the money in exchange for the perceived benefit could be charged for an attempted complicity offense under Section (a) of draft Article 5102.

Article 5102(a)(2) corresponds to Art. 299 (Unfaithful Advocates or Technical Advisor) and Art. 300 (Other Acts of Betrayal of Trust by Advocates or Technical Advisors) of the Penal Code (1962).

This Article covers conduct criminalized by Counterterrorism Law of 2014 Article (20)(b), including any threats against an officer or judge to compel the officer or judge to do or refrain from doing an act. These threats are considered coercion under this draft Article.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Article 5103. Official Misconduct and Profiteering**

**Corresponding Provisions(s):** Penal Code (1962), Arts. 251 (Private Interest in Official Acts), 207 (Unfaithfulness in Handling State Matters), 241 (Peculation), 242 (Misappropriation to the Prejudice of Private Persons), 243 (Peculation by Taking Advantage of the Error of Another Person), 252 (Utilisation of Inventions or Discoveries Known By Reason of Office), 255 (Omission or Refusal to Perform Official Acts), 256 (Collective Abandonment of Public Offices, Employments, Services or Works), 257 (Interruption of a Public Service or a Service of Public Necessity), 258 (Failure to Perform Duties of Office on the Occasion of Abandonment of a Public Office or of Interruption of a Public Service), 259 (Individual Abandonment of Public Office, Service, or Work), 260 (Cases Not Punishable), 261 (Removal or Damage of Property Subjected to Attachment or Sequestration), 262 (Violation with Culpa of the Duties Inherent in the Custody of Property Attached or Sequestered), 462 (Abuse of Authority toward Person Arrested or Detained), 463 (Arbitrary Personal Search and Inspection), and 285 (Refusal of Service Legally Due).

#### **Comment:**

*Generally.* Article 5103 criminalizes behavior by public officials acting in their official capacities in ways that are not legally authorized. Generally, Article 5103 is not intended to address the harm caused by the illegal behavior, but rather, the harm that results to public administration and government operations from the use of official authority and resources to affect the illegal act. To determine whether a public official has acted in his official capacity, factors to consider include whether the action was within the scope of employment. It is possible that when dealing with higher government officials, it would be sufficient to limit the inquiry to whether the transaction was within the scope of the defendant's employment.

Section (a) defines the offense of Official Misconduct. First, Article 5103(a)(1) requires that the person be a public officer. If the person is not a public officer, he or she cannot be convicted of this offense. Second, Article 5103(a)(2) imposes an intent requirement. The public officer cannot simply obtain a personal benefit or harm another person—indeed most public actions are likely to have both positive and negative effects; rather the intent of the public officer has to be to specifically harm another or help oneself. Third, Article 5103(a)(3) is the act requirement. All acts listed in Section (a)(3) can lead to a conviction of Official Misconduct.

Section (b) defines the related act of Profiteering. In order to be convicted of Profiteering, Section (b) requires that the defendant be a public officer and that the conduct prohibited by Section (b)(1)–(2) be performed knowingly. If there is knowledge, Section (b)(1) makes the public officer's knowing acquisition of a pecuniary interest in any property, transaction, or enterprise that may be affected by official action or information punishable, while Section (b)(2) criminalizes a public officer's speculation or wager on the basis of official action

or information. The Penal Code (1962) contains similar prohibitions on the use of such methods, as Art. 251 punishes the taking of “a private interest in any act of the Public Administration under which [the public officer] serves.”

Official Misconduct and Profiteering have different grades. Official Misconduct is a Class [F] felony, meaning it is punishable with up to two years imprisonment, while Profiteering is a Class [A] misdemeanor, meaning it is punishable with up to a year of imprisonment. Official Misconduct is graded higher than Profiteering, because Official Misconduct involves performing one’s duties in a way specifically designed to further one’s own interests, whereas Profiteering involves the lesser conduct of acquiring an interest by virtue of one’s position or duties. The difference has to do with which comes first; a public officer’s alteration of official acts to further personal interests, i.e. official misconduct, deserves greater punishment than the alteration of personal interests to coincide with official actions.

In addition to these punishments, there is also a forfeiture provision that provides for any public officer convicted under this Article to be removed from public office or employment.

*Relation to Current Law.* Penal Code (1962), Art. 251 (Private Interest in Official Acts) criminalizes speculation on official acts. This provision incorporates the desire to bar such actions, but also makes the penalty more proportional to other anti-corruption measures. By providing that a person can commit an offense by performing an act the person knows is in excess of his or her authority or by performing official functions in a way intended to benefit the person’s own property or financial interests, the draft Article incorporates Arts. 241 (Peculation), 242 (Misappropriation to the Prejudice of Private Persons), 243 (Peculation by Taking Advantage of the Error of Another Person), and 252 (Utilisation of Inventions or Discoveries Known By Reason of Office).

Section (a)(3)(F) corresponds to Article 261 (Removal or Damage of Property Subjected to Attachment or Sequestration) and Article 262 (Violation with Culpa of the Duties Inherent in the Custody of Property Attached or Sequestered). Section (a)(3)(G) corresponds to Article 262 (Abuse of Authority toward Person Arrested or Detained). Section (a)(3)(H) corresponds to Article 263 (Arbitrary Personal Search and Inspection).

In criminalizing a public officer’s failure to perform his or her duties, Section (a)(3)(B) corresponds to Art. 255 (Omission or Refusal to Perform Official Acts), Art. 256 (Collective Abandonment of Public Offices, Employments, Services or Works), Art. 258 (Failure to Perform Duties of Office on the Occasion of Abandonment of a Public Office or of Interruption of a Public Service), Art. 259 (Individual Abandonment of Public Office, Service or Work), and Art. 285 (Refusal of Service Legally Due). Section (a)(3)(E) corresponds to Article 257 (Interruption of a Public Service or a Service of Public Necessity).

The draft Article requires that the person intended to obtain a personal benefit to ensure that the law penalizes only people who are sufficiently blameworthy.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

#### **Comment on Article 5104. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 5200. Falsification Offenses**

### **Introduction: Chapter 5200**

#### **Comment:**

This Chapter criminalizes a broad range of conduct relating to giving false statements, falsifying documents, and tampering with public records. Article 4203 (Tampering with Writing, Record, or Device) criminalizes tampering with non-public writings, records, or devices.

### **Comment on Article 5201. Perjury**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 290 (Perjury by Party to a Suit), and 303 (Cases Which Are Not Punishable)

#### **Comment:**

*Generally.* Article 5201 (Perjury) criminalizes making false statements of fact, or affirming false statements of fact, that a person does not believe to be true while under oath during an official proceeding.

Section (a)(2) states the required culpability as to the falsity of the statement made. The “does not believe to be true” standard does not require proof of knowledge or belief that the statement is false. A person satisfies the culpability requirement if he or she makes a statement without addressing in his or her own mind its truth or falsity. However, a person will escape liability if the person believes the truth of the false statement(s) and will not be held liable for false statement(s) that are inadvertent misstatements made as a result of his or her misunderstanding of the question or a slip of the tongue.

Sections (a)(3) and (a)(4) require that the false statement be made under oath during an official proceeding. See Article 5202 for false statements made while the person is not under oath or in an official proceeding.

Section (b) grades the offense as a Class [A] misdemeanor.

Section (c) provides automatic forfeiture of office for any public officer convicted of perjury

Section (d) provides a defense when the person making the false statement retracts his or her statement. The purpose of this section is to incentivize people to correct the false statement(s) they made during an official proceeding. However, a person must retract his or her false statement before final judgment has passed on the matter at issue. Limiting the defense ensures that people do not purposely commit perjury with the intent of retracting their testimony after final judgment has passed.

Section (e) states that a person cannot escape liability if the oath was administered

improperly or the person was not qualified to make the statement. This provision ensures that a person who satisfies the offense elements and culpability requirement does not escape liability because of technical irregularities. A person who satisfies the offense definition is not less blameworthy because of his or her lack of qualification or the improper administration of the oath.

Section (f) requires that the proof presented to convict a person of this offense must exceed the testimony of one person. For example, if a person has lied under oath as to the price he or she paid for livestock, the testimony of the seller would not provide sufficient proof of his or her guilt. However, sufficient proof would consist of the seller and another witness testifying that the person has lied, or the prosecution presenting physical evidence (such as a record of the sale) in addition to the seller's testimony.

*Relation to Current Law.* Article 5201 is parallel to Art. 290 (Perjury by a Party to a Suit), which criminalizes making false statements under oath. Sections (a)(1) and (a)(3) correspond to this offense by criminalizing making false statements under oath and affirming false statements of fact previously made.

Art. 290 does not specify a culpability requirement for the offense. Section (a)(2)'s "does not believe to be true" culpability requirement falls short of requiring that a person know the statement is false. The essential difference between a perjury offense and any other offense involving truth and falsity is that, in the case of perjury, the perpetrator affirmatively swears that the proposition is actually true, not that it is most likely true. For this reason, Section (a)(2) punishes a perjurer not simply when he or she actually knows his statement to be false, but also when he or she does not believe in the truth of his statement. If a person testifying under oath had doubts regarding the truth of his or her statement, he or she could express such doubts during his or her testimony.

Art. 290(2) provides a defense if a person retracts his or her false statement "before final judgment is passed on the matter at issue." Section (c) corresponds to this defense and current Art. 303 (Cases not Punishable).

Art. 290 applies only to parties to in a civil suit, while Article 5201 applies to any person who testifies under oath during an official proceeding. Article 5201 has a broader application because, as discussed below, Sharia law generally condemns bearing false witness.

Section 1 of Art. 303 in the Penal Code (1962) excuses a person from liability under Penal Code (1962) Art. 290 if he or she was forced to commit the act by the necessity of saving himself or a near relative from a serious and unavoidable injury to liberty or honor. This excuse defense is covered in this draft Code by the General Part provisions, which excuse a person from liability if the person committed it in order to avoid a lesser evil under draft Article 501 (Lesser Evil), or if he or she committed the offense under duress, in accordance with draft Article 605 (Duress).

Section 2 of Art. 303 excuses a person from liability when that person should not have been called as a witness or was not warned of his right to refrain from giving evidence. That excuse is not incorporated into this draft Code because of the harm caused by false testimony.

*Relation to Sharia Law.* Sharia law generally condemns bearing false witness. Muslim jurists cite the following Prophetic tradition to demonstrate the offensive nature of false testimony: "On the Day of Judgment, the feet of the person who bore false witness will not stir from their place before their owner is condemned to hell." In addition, jurists demonstrate the severity of this offense by noting that it appears in the Qur'an (22:30) alongside idolatry: Shun

the abomination of idols, and shun false testimony.<sup>141</sup> Finally, sworn statements or oaths are punished more severely in Sharia law and have been recorded by Ibn Hajar Haytami in his “List of Enormities.”<sup>142</sup>

Both the Maliki and Hanafi schools of thought support the required culpability under Section (a)(2).<sup>143</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5202. Written Falsification; False Statements**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 384 (False Certification or Declaration to Public Officer), 385 (False Statements as to the Identity or Personal Capacity), 286 (Simulation of Offence), 287 (False Accusation), 288 (False Self-Accusation), 289 (Simulation or False Accusation for an Act Constituting a Contravention), 291 (False Evidence), 292 (False Opinions of Experts or False Interpretation), 295 (Retraction), 327 (Giving False Alarm to Authorities)

#### **Comment:**

*Generally.* Article 5202 (Falsification Under Penalty) criminalizes making false statements, written or oral, to public officers or law enforcement. With respect to written falsification, Sections (a)(2)(A) and (B) define the offense conduct as making a false written statement or omitting information necessary to prevent a statement from being misleading. A person can be held liable only if he or she acted with the intent to mislead a public officer or law enforcement officer in performing his or her official function. A person may not be held liable if he or she intentionally or knowingly made a false written statement but did not seek to mislead a public official or law enforcement.

Section (a)(2)(A) contains the “does not believe to be true” standard. See the Commentary for Article 5201 for a discussion of this standard.

As to false statements, Section (b) defines the offense conduct as making false statements intended to mislead a public officer or law enforcement officer. This offense differs from Article 5201 (Perjury) because it applies to false statements made during investigations while the person is not under oath. Section (b)(2) contains the “does not believe to be true” standard. See the commentary for Article 5201 for a discussion of this standard and the corroboration requirement in section (c).

*Relation to Current Law.* Arts. 384 and 385 of the Penal Code (1962) criminalize making false statements to a public officer regarding a person’s identity or status. Art. 384 (False Certification or Declaration to a Public Officer) criminalizes falsely stating in a public document, or a declaration intended to be reproduced in a public document, the identity or status of himself or herself or another person. Section 5202(a) codifies and broadens this offense by criminalizing making any false statement, including a statement regarding the identity or status

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<sup>141</sup> Ahmad Ibn Naqib Al-misri. *Reliance of the Traveler*. Nuh Ha Mim Keller trans. Beltsville: Amana Publications, 1994.

<sup>142</sup> *Id.* at 987.

<sup>143</sup> Ibn Rushd. *The Distinguished Jurist’s Primer II*. Imran Ahsan Khan Nyazee trans. Reading: Garnet Publishing, 1994 (“It (laqhw) is an oath that is sworn by naming a thing which the person swearing believes to be true, but it turns out to be opposite of what he swore the oath for.”).

of any person, in a written document. Furthermore, Section 5202(a) criminalizes knowing omissions of information necessary to prevent a written statement from being misleading.

Art. 385 (False Statements as to the Identity or Person Capacity) criminalizes making inaccurate statements to a public officer, in the performance of his or her duties, regarding the identity, status, or capacity of himself or herself or another person. Section 5202(b) reflects this offense by criminalizing making any false statement to a public officer or a law enforcement officer in performing his or her official function. This draft Article broadens the offense such that it applies to any statement, including one regarding a person's identity, status, or capacity. The draft penal code broadens the offense in light of Sharia law's condemnation of bearing false witness.

Sections (a) and (b) criminalize making an unlawful omission or false statement to a public officer or law enforcement officer. This corresponds to Art. 286 (Simulation of Offence), Art. 287 (False Accusation), Art. 288 (False Self-Accusation), Art. 291 (False Evidence), and Art. 327 (Giving False Alarm to Authorities).

Sections (a) and (b) apply to any person, including an expert, and thus incorporates Art. 292 (False Opinions of Experts or False Interpretation).

Section (c) corresponds to Art. 295 (Retraction). Section (e)(2) corresponds to Art. 289 (Simulation or False Accusation for an Act Constituting a Contravention).

*Relation to Sharia Law.* See Commentary in Article 5201 (Perjury) for a discussion of Sharia law's condemnation of bearing false witness.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5203. Tampering with Public Records**

**Corresponding Current Provision(s):** Penal Code (1962), Art. 275 (Tampering with Seals)

#### **Comment:**

*Generally.* Article 5203 (Tampering with Public Records) criminalizes tampering with any public record, writing, or object.

Section (a)(1) defines the culpability requirement for the offense. A person can be held liable for the offense only if he or she has the purpose of concealing wrongdoing or deceiving another person. Tampering with a public record in good faith, or for purposes other than deceit or concealment of wrongdoing, is not an offense under Article 5203.

Section (a)(2) defines the conduct for the offense as the alteration, destruction, mutilation, removal, or concealment of any public record, writing, or object. A person may satisfy the offense's conduct element if he or she partially destroys a public record, writing, or object or simply conceals the record, writing, or objection from public detection. The routine filing of documents ordinarily is not punished because it does not constitute alteration, destruction, removal, or concealment, nor is it undertaken for the purpose of deceit or concealing any wrongdoing.

Section (a)(3) signals that there are situations where a person may be authorized to tamper with public records. For example, a government official may have the lawful authority to expunge a criminal's records. However, the authorization must be lawful and cannot be used to violate any other provision of Somali law.

Section (b) grades the offense as a Class [F] felony.

*Relation to Current Law.* Art. 275 (Tampering with Seals) criminalizes tampering with seals affixed to preserve the identity of a document. Section (a)(2) corresponds to this provision by criminalizing tampering with any public record, writing, or object, including seals. This Article expands the offense because the alteration or destruction of non-monetary documents can inflict serious pecuniary and non-pecuniary damages on others and may allow others to obtain benefits to which they are not entitled. Furthermore, the criminalization of non-seal tampering is important because it allows people to rely on documents without questioning their authenticity.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5204. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 5300. Obstruction of Governmental Operations; Escape**

### **Introduction: Chapter 5300**

This Chapter defines offenses that interfere with the operation of government functions. It is important for the criminal law to punish actors who prevent the effective implementation of governmental functions, as this impedes the safety and prosperity of society in general. Acts covered by this Chapter include resistance or interference with the duties of government actors, providing assistance or aid to fugitives, and acts, that impede the successful operation of government.

This Chapter is supported by Sharia law, which generally encourages actors to respect authority and be law-abiding citizens.<sup>144</sup> The following Qur’anic precept is used as justification for this: “Obey God and obey the Prophet and those of authority among you.”<sup>145</sup> In addition, they also use various ahadith to support this Chapter, including one stating that “it is obligatory for you to listen to the ruler and obey him in adversity and prosperity, in pleasure and displeasure . . . .”<sup>146</sup>

### **Comment on Article 5301. Obstructing Justice**

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<sup>144</sup> Ahmad b. Naqib Al-Misri, *Reliance of the Traveler* (‘Umdat al-Salik), 24; Javed Ahmad Ghamidi, *The Balance* (Mizan), 482.

<sup>145</sup> *Qur’an* 4:59.

<sup>146</sup> *Sahih Muslim* 1836.



**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 33 (Just Administrative Decisions); Penal Code (1962) Arts. 277 (Violation of the Public Custody of Articles), 293 (Fraud in Proceedings), 294 (Aggravating Circumstances), 296 (Subordination), 297 (Assistance to a Suspected Person), 306 (Assisting Escape), 308 (Willful Disobedience to Execute an Order of the Judge), 310 (Facilitating Non-observance of Punishment), and 311 (Facilitating Non-observance of Measures of Detentive Security).

**Comment:**

*Generally.* This Article defines the offense of obstructing justice. In every instance, it requires intentional interference with law enforcement. It builds on the prohibitions on offering false statements in Chapter 5200 (Falsification Offenses) by prohibiting other conduct in addition to false statements that can impede successful criminal investigation and prosecution. Moreover, this Article combines with Article 3404 (Criminal Coercion) to criminalize threatening or intimidating a witness or other person involved in criminal investigation or prosecution.

Section (a)(2) lists different activities that, when the person has the requisite intent, constitute an offense. Sections (a)(2)(A)-(D) prohibit activities that aid another in evading capture, including harboring, concealing, warning, or otherwise supplying the person seeking to evade capture. Section (a)(2)(D) prohibits interfering with any other party—including individuals and the government—from discovering, apprehending, or bringing claims against another person.

Sections (a)(2)(E)-(G) prohibit altering or suppressing evidence and providing false evidence. Providing false evidence covers more than the prohibitions on perjury or false statements in Chapter 5200 (Falsification Offenses) because it may involve offering items, rather than statements, that are falsified. Intimidating or retaliating against a witness would be an offense under both this Article and draft Article 3404 (Criminal Coercion).

Section (a)(2)(H) prohibits corruption in criminal prosecutions by criminalizing soliciting, conferring, or accepting any benefit in exchange for dropping prosecution. However, the exception under Section (b) allows settlements and plea-bargains by excepting from the prohibition any payment that another believes him or herself to be due in restitution or indemnification for the harm caused by the offense.

*Relation to Current Law.* This draft Article helps protect the right to a lawful and fair trial guaranteed by the Provisional Constitution (2012) Art. 33 (Just Administrative Decisions).

This draft Article also incorporates several provisions of the Penal Code (1962). The prohibition on concealing evidence in Penal Code (1962) Art. 291 (False Evidence) is incorporated at Section (a)(1)(E). The additional prohibitions in Art. 291 are incorporated into draft Chapter 5200 (Falsification Offenses). The prohibition on altering evidence in Penal Code (1962) Art. 293 (Fraud in Proceedings) is incorporated into Section (a)(2)(E)-(G). The prohibition on removing, destroying, or wasting evidence in Penal Code (1962) Art. 277 (Violation of the Public Custody of Articles) is incorporated into Section (a)(2)(E).

Penal Code (1962) Art. 297 (Assistance to a Suspected Person) is incorporated into this draft Article in Section (a)(2), which more specifically defines what Art. 297 describes as assisting another in evading the investigation of the authorities. It similarly incorporates the

prohibition in Penal Code (1967) Art. 311 (Facilitating Non-Observance of Measures of Detentive Security) on aiding an escapee. Penal Code (1962) Art. 296 (Subordination) is incorporated under the general provision prohibiting aiding and abetting the commission of an offense under this draft Article.

The exception in Penal Code (1962) Art. 297 for those who participated in the commission of the offense being investigated is not included in this draft Article in order to reflect the additional harm done when one both commits a crime and subsequently obstructs its investigation. This is supported by the fact that no such exception exists under Penal Code (1962) Art. 296 (Subordination).

Both Penal Code (1962) Articles 294 (Aggravating Circumstances) and 297 (Assistance to a Suspected Person) grade the offense in accordance with the crime being covered up. That is reflected in Section (c) of this draft Article.

*Relation to Sharia Law.* Sharia law supports this Article with its broad condemnation of “sheltering” or “protecting” the “guilty” because such conduct could prevent people from being compensated for the rights that were taken from them.<sup>147</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with International law.

### **Comment on Article 5302. Obstructing Administration of Law or Other Government Function**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 267 (Interruption of a Public Office or Service or a Service of Public Necessity), 273 (Usurpation of Public Functions), and 538 (Unauthorized Publication of Documents or Information Relating to Criminal Proceedings)

#### **Comment:**

*Generally.* This draft Article criminalizes intentionally obstructing the administration of law or government functions by force, physical interference, or any other unlawful conduct.

Section (a)(1) defines the culpability requirement as intent. Section (a)(2) defines the conduct as using force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act. Section (b) grades the offense as a Class [E] felony if the person leads the commission of the offense; as a Class [F] felony if the person usurps the provision of a public function; and otherwise, as a Class [A] misdemeanor. The usurpation of a public function needs further definition in the law. This definition should accord with the current understanding of the meaning of this conduct in the Penal Code (1962).

*Relation to Current Law.* This draft Article codifies Penal Code (1962) Art. 267 (Interruption of a Public Office or Service or a Service of Public Necessity). It reflects the grading in both Arts. 267 and 273 (Usurpation of Public Functions).

This draft Article also codifies Penal Code (1962) Art. 538 (Unauthorized Publication of Documents or Information Relating to Criminal Proceedings), because, where the person does so in violation of a legal or other employment obligation not to do so, the unauthorized publication

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<sup>147</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 985 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“sheltering the guilty, meaning to protect them from those who want to obtain their rights from them, guilty meaning those who commit an offense that entails a consequence...”).

of materials relating to a criminal proceeding may be an instance of distorting the administration of law through breach of official duty.

*Relation to Sharia Law.* The act of obstruction is prohibited based on the justification discussed in the commentary to Section 5301. Sharia law further prohibits carrying out such an act against a representative of the government. The offense described in this provision is consistent with Sharia law, which urges Muslims to be law-abiding citizens.<sup>148</sup> The following Qur’anic precept is used as justification for this: “Obey God and obey the Prophet and those of authority among you.” (Qur’an 4:59).

*Relation to International Law.* Nothing in this Article is inconsistent with International law.

### **Comment on Article 5303. Failure to Report a Felony or Dangerous Person**

**Corresponding Current Provisions:** Penal Code (1962) Arts. 282 (Omission or Delay on the Part of a Public Officer or a Person Entrusted With a Public Service to Give Information of an Offence), 283 (Omission by a Citizen to Give Information Regarding an Offence), 284 (Omission to Report by a Member of the Medical Profession), and 552 (Failure to Declare Dangerous Mental Infirmities); Counterterrorism Law of 2014 Art. 16 (Duty to Disclose Information Relating to Offenses and Terrorist Acts).

#### **Comment:**

*Generally.* This Article defines three offenses of failing to report a felony: The offense in Section (a) imposes criminal liability on anyone who fails to take reasonable measures to report conduct that is a Class A felony, or fails to report information related to a Class A felony, where that person knows he or she has the obligation to report. Thus, if a person is unaware of this obligation, the person is not liable. Similarly, if the person does not have reasonable access to government officials, the person is not liable. Furthermore, if a person is afraid that reporting the crime would endanger himself, his family, or another, the person is excused under the excuse of lesser evil in Article 501 (Lesser Evil).

The offense in Section (b) imposes criminal liability on public officers who learn about a felony offense in the course of exercising their public duties and fail to report that offense. The “appropriate law enforcement authorities” is meant to refer to the regular chain of command and oversight of public officers.

The offense in Section (c) imposes criminal liability on medical professionals who learn that another has committed a felony offense, or learn that a patient is dangerous, and fail to report it. However, there is no obligation to report offenses under Section (c)(3) when doing so would expose the patient to criminal liability. This exception allows people to seek medical attention when they need it without fear of repercussions. Notably, however, this draft Article requires medical professionals who are therapists or otherwise speaking with patients to report information learned from those patients. As this may chill patient disclosure—for example, in cases of domestic violence, victims may be unwilling to speak for fear of repercussions against his or her abuser—it may be worth limiting the reporting requirement for medical professionals to crimes learned about from observing physical injuries.

Section (d) indicates that Article 5303 does not require the disclosure of information

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<sup>148</sup> JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 98-99 (Dar ul-Ishraq, 2001); AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 24 (Nuh Ha Mim Keller trans., Amana Publications 1994).

protected by privilege, including attorney-client privilege.

Section (e) prevents prosecution for another offense implicated by disclosure of information under Section (a) when a person in good faith discloses the information.

*Relation to Current Law.* Section (a) of this draft article corresponds to the offense in Penal Code (1962) Art. 283 (Omission by a Citizen to Give Information Regarding an Offense) and the offense in Counterterrorism Law of 2014 Art. 16 (Duty to Disclose Information Relating to Offenses and Terrorist Acts). Section (b) corresponds to the offense in Penal Code (1962) Art. 282 (Omission or Delay on the Part of a Public Officer or a Person Entrusted With a Public Service to Give Information of an Offense). Section (c) corresponds to the offenses in Penal Code (1962) Arts. 284 (Omission to Report by a Member of the Medical Profession), and 552 (Failure to Declare Dangerous Mental Infirmities). Sections (d) and (e) correspond to sections (2) and (3) of Art. 16 of the Counterterrorism Law of 2014 . The grading in Section (f) reflects the grading of punishments in the Penal Code (1962) provisions.

*Relation to Sharia Law.* This section is consistent with Sharia law. Ibn Duyan notes that it is obligatory to report the equivalent of felony crimes.<sup>149</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with International Law.

#### **Comment on Article 5304. Refusal to Give Information about Identity**

**Corresponding Current Provisions:** Penal Code (1962) Art. 506 (Refusal to Give Particulars Regarding One’s Personal Identity).

#### **Comment:**

*Generally.* This Article defines the offense of knowingly refusing to give information about one’s identity to a law enforcement officer.

*Relation to Current Law.* This Article corresponds to Penal Code (1962) Art. 506 (Refusal to Give Particulars Regarding One’s Personal Identity). Art. 506 criminalizes refusing to give particulars regarding one’s “personal identity, status, or other personal capacity.” This draft article attempts to define the information a person is required to give with greater specificity, and therefore criminalizes refusing to provide only one’s name, occupation, or residence.

*Relation to Sharia Law.* This Article may contain a potential conflict with privacy rights under Sharia Law, but is a departure codified in prior law, as mentioned above.

*Relation to International Law.* Nothing in this Article is inconsistent with International Law.

#### **Comment on Article 5305. Acting Contrary to the Enforcement of Law or Safety**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 264 (Resistance to a Public Officer), 505 (Non-Observance of Orders of the Authorities), and 507 (Refusal to Lend Assistance on the Occasion of a Riot).

#### **Comment:**

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<sup>149</sup> Ibn Duyan, Crime and Punishment under Hanbali Law, 50.

*Generally.* Section (a) of this draft Article defines the offense conduct of resisting law enforcement. It serves to cover behavior that is not already covered by Art. 5306 (Escape) and Art. 5301 (Obstructing Justice). Examples of resistance or obstruction include running away from an officer who is trying to make an arrest, going limp during an arrest, or drawing a weapon during a stop.

Resistance can also amount to assault under draft Article 3202 (Assault) or reckless endangerment under draft Article 3204 (Reckless Endangering Another Person). If death results, the person can also be charged under the homicide provisions in Chapter 3100. Finally, flight from official detention once arrest is effected may be punished as an escape under draft Article 5306 (Escape), or attempted escape for continued, but ineffectual, resistance. Occasionally, circumstances may blur the difference between flight from arrest and escape from official detention once arrest is effected, but generally the escape provision becomes relevant only after the arresting officer has successfully taken the arrestee into custody.

Although the principal focus of this Section is resistance to arrest, the offense is not limited to that conduct. It also reaches obstructing “any authorized act within the course and scope of employment” of a law enforcement officer, firefighter, or correctional officer. These other duties include, for example, a policeman executing a search warrant or a fireman putting out a blaze. In these cases, as in resisting arrest, the purpose is to deter the breach of the peace.

This Section requires the person to have knowledge with respect to each element of the offense.

Section (b) defines the offense conduct of refusing to assist law or public safety enforcement upon request. It requires that a person have been asked to assist, and that the person declines to assist with the intent to further an ongoing felony or other public danger. It would not be an offense to refuse to assist because one fears that assisting would endanger oneself or another. It is not enough to know that one’s refusal to assist could further the felony or public danger. Rather, the person must actually intend that result.

*Relation to Current Law.* This draft Article corresponds to Penal Code (1962) Art. 264 (Resistance to a Public Officer), Art. 505 (Non-Observance of Orders of the Authorities), and Section 2 of Art. 507 (Refusal to Lend Assistance on the Occasion of a Riot). This draft Article also codifies the prohibition in Penal Code (1962) Art. 264 (Resistance to a Public Officer) of resisting any person assisting a public officer under Section (a)(2).

Penal Code (1962) Art. 507 (Refusal to Lend Assistance on the Occasion of a Riot) is incorporated into Section (b). Because the commission of a riot is a felony, refusal to assist in a riot is codified here. Rather than excuse refusal to assist when the person has a “valid reason,” as under the Penal Code (1962), this draft Article excuses refusal to assist whenever the person does so for a reason other than furthering the commission of the felony or the public danger. The purpose of this adjustment is to eliminate ambiguity about what counts as a valid reason, and to ensure that people are not conscripted into law enforcement when doing so would burden them unfairly.

Penal Code (1962) Art. 505 (Non-Observance of Orders of the Authorities), which punishes failing to observe a lawful order of an officer with imprisonment up to three months, is incorporated in this draft Article, and is graded a Class [C] misdemeanor.

Penal Code (1962) Art. 264 (Resistance to a Public Officer) allows for five years imprisonment where resistance is accomplished by force or threats. The draft Article reflects that grading by making that offense a Class [E] felony.

*Relation to Sharia Law.* This act of obstruction is prohibited based on the justification

discussed in the Introduction to Chapter 5300. Sharia law further prohibits carrying out such an act against a representative of the government. The offense described in this provision is consistent with Islamic law, which urges Muslims to be law-abiding citizens.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5306. Escape**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 305 (Escape), 307 (Custodian Acting with Culpa), 549 (Failure to Retain in Custody or Unauthorized Custody of Persons of Unsound Mind or Minors in Asylums or Reformatories), 551 (Failure to Notify the Authorities of the Escape or Flight of persons of Unsound Mind or Minors).

#### **Comment:**

*Generally.* Section (a) criminalizes illicit departure from official detention, including departure from certain kinds of constructive custody such as work-release programs, court appearances, and release to attend funerals or to visit sick relatives.

Section (b)(1) punishes a public officer who recklessly permits an escape. The reduced culpability required (as compared to aiding and abetting) of a public officer applies only within his sphere of official responsibility or influence. This limitation is implicit in the word “permits.” There are two reasons for this decrease in culpability. First, there is a special danger in failure by custodians to maintain control over persons confined to their supervision. Second, custodians are so clearly charged with the duty to prevent escape that punishment of a reckless failure to do so is an appropriate judgment on the blameworthiness of the individual. The custodian who is not concerned in the detention of the particular prisoner who escapes stands in the same relation to that prisoner as does any person and he commits an offense only if he or she would be criminally liable under the general aiding and abetting provision in relation to the escape.

Section (b)(2) makes it an offense for a public officer to discharge a person without permission.

Section (b)(3) makes it an offense for a public officer to fail to notify law enforcement authorities when the person knows that another has escaped.

Section (c) grades the offense. Section (c)(1) separates out the grades for an offense under Section (a) depending on the amount of force used or threatened and the severity of the sentence for which the escapee was imprisoned. Sections (c)(2)-(4) grade the offenses that can be committed by a public officer.

*Relation to Current Law.* Section (a) and Section (b)(1) of this draft Article largely follow Art. 305 (Escape) and 307 (Custodian Acting with Culpa) of the Penal Code (1962).

Additionally, Section (b)(2) corresponds to Section 3 of Penal Code (1962) Art. 549 (Failure to Retain in Custody or Unauthorized Custody of Persons of Unsound Mind or Minors in Asylums or Reformatories), and Section (b)(3) corresponds to Penal Code (1962) Art. 551 (Failure to Notify the Authorities of the Escape or Flight of persons of Unsound Mind or Minors).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law and support for this Article is derived from the general principles stated in the introduction to this Chapter.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5307. Implements for Escape; Other Contraband**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article complements and, to a limited extent, overlaps with draft Article 5306 (Escape). As to inmates, the prohibition of procuring or making an implement of escape reaches conduct that may be preparatory to an actual escape attempt but need not be designed for that end. This Article thus performs the double duty of reaching dangerous preparatory behavior that has not yet ripened into an actual escape attempt and limiting the possibility that such an attempt might be undertaken once the implement becomes available. The rationale, therefore, is that procuring, making, or possessing the implements independently merits criminal sanctions, although at a lesser degree than an escape or an actual attempt to escape. The grading of this Article reflects that.

As to persons who supply the implement to a prisoner, Section (a) operates in much the same way. There will be many cases where this Article could overlap with Article 5306 (Escape). The lower misdemeanor charge of this Article will be available for a correctional officer who gives lesser assistance than that required in permitting the escape, as in just supplying the implement for an escape. With regard to persons other than correctional officers, supplying an implement of escape will often be seen as aiding in an escape under draft Article 5306 (Escape). However, there will be instances where this Article can operate independently and where in any event problems of proof for the prosecutor will be lessened. An example would be a friend or relative who gives an inmate a weapon but who argues that the purpose was not to facilitate an escape but rather to allow the inmate to defend himself from other prisoners. In that case, this Article would permit conviction without regard to the actor's purpose, a result that is justified because of the special dangerousness of weapons in the hands of prisoners.

Section (c) sets the grade of the offense based on the dangerousness of the item that was either provided, procured or possessed. If the item was a weapon, tool or other thing that may be useful for escape, then the offense is a Class [B] misdemeanor. Otherwise, the offense is a Class [C] misdemeanor, which covers items, for example, that are considered contraband under prison regulations. This distinction is thus designed to prevent the presence within the prison facility of materials which, given the incentive in many prisoners to escape, are useful for that purpose. The grading of this offense as a misdemeanor is warranted because this offense is more remotely preparatory in nature compared to actual escape and in most instances will fall considerably short of an actual attempt to escape.

One potential issue with this Article is that almost anything can arguably be "useful for escape" in the hands of a prisoner. However, the bracketing of "other thing that may be useful for escape" with the specification of weapon and tool suggests a sensible limitation of the language to things directly suited to escape efforts.

*Relation to Current Law.* Nothing in this Article is inconsistent with current law.

*Relation to Sharia Law.* Islamic law supports this Article with its broad condemnation of "sheltering" or "protecting" the "guilty" because such conduct could prevent people from being

compensated for the rights that were taken from them.<sup>150</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5308. Bail Jumping; Default in Required Appearance**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* The purpose of this Article is to deter those who would obstruct justice by failing to appear for trial or service of sentence. The provision is not limited to persons released on bail, but applies rather to anyone set at liberty by court order upon condition that he will subsequently appear at a specified time and place. This language thus anticipates the greater use of pre-trial release mechanisms other than traditional bail.

This Article also extends to release of a convicted defendant prior to service of sentence, since the required appearance “at a specified time and place” is not limited to appearance in court. However, as the concluding sentence explains, this provision does not apply to appearance required incident to release under suspended sentence, probation or parole. Default in those instances may warrant revocation of suspension, probation, or parole under appropriate procedures, but does not merit independent criminal sanctions.

This Article does not require that the defendant be given notice of the exact time and place of subsequent appearance at the time of the release. It is enough that a court sets the defendant at liberty upon such a condition, with the date of appearance to be set in the future and notification accomplished by the usual means. A defendant who leaves town or takes other evasive action to avoid receiving notification is likely to be at least reckless as to his failure to appear and therefore would be guilty under this Article. This Article also requires that the defendant have been physically capable of making the required appearance. This means that if the defendant, for example, is suddenly physically disabled, or prevented by an unforeseen disaster from making the appearance, the person would not have committed an offense. Note also that any defenses available in the General Part, including any excuses in Chapter 600 (Excuse Defenses).

Section (b) grades the offense depending on two conditions: (1) the gravity of the original offense, and (2) the nature of the person’s conduct by requiring proof that the person took flight or went into hiding to avoid apprehension, trial, or punishment.

*Relation to Current Law.* Nothing in this Article is inconsistent with current law.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law and support for this Article is derived from the general principles stated in the introduction to this Chapter.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 5309. Definitions**

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<sup>150</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (“UMDAT AL-SALIK”), 985 (“sheltering the guilty, meaning to protect them from those who want to obtain their rights from them, guilty meaning those who commit an offense that entails a consequence...”).



**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Crimes Against Public Health, Order, and Decency**

### **Chapter 6100. Public Order and Safety Offenses**

**Comment:**

This Chapter defines offenses that are damaging to public order and safety. This Chapter assumes that the government should play a role in suppressing activities that threaten the safety and well-being of the general public. The similar but distinct offenses of Public Indecency are covered by Chapter 6200, which defines, among other things, Prostitution, Promoting Prostitution, Obscenity, Abuse of Corpse, and Sale of Human Body Parts.

The Public Drunkenness and Drug Incapacitation offense is included in this Chapter. The offense for consuming alcohol is defined in Article [6113] (Unlawful Consumption).

Some offenses that may have secondary effects on public safety that are contained in other Chapters of this draft penal code. Quarantine, Hazardous Food, Drink, Drug, or Medical Substance offenses are covered by Article [3204], governing Recklessly Endangering Another Person. Importing Weapons is found in Chapter [7100], governing Weapons Offenses. Resisting arrest or obstructing law enforcement is governed by Chapter 5300 (Obstruction of Government Operations).

#### **Comment on Article 6101 – Rioting; Failure to Disperse**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 444 (Affray).

**Comment:**

*Generally.* This provision defines and grades the offenses of rioting and failure to disperse, giving sufficient guidance to police and courts about what constitutes an offense, and also avoiding punishing peaceful assembly or protest.

Section (a) requires that the person be engaged in disorderly conduct with others, thereby increasing the penalty for disorderly conduct where the number of participants makes the behavior especially alarming or dangerous, and which therefore creates additional dangers to the public and additional problems for police enforcement. Under all three subsections of the riot offense, it is necessary to prove that the defendant participated in the course of disorderly conduct and not merely that he or she was present at the scene of the disturbance.

The number of participants necessary to elevate disorderly conduct to rioting is arbitrary,

and was set to three total persons based on the norms in Somalia.

Section (a)(1) requires intent to commit a crime, rather than mere risk of causing public alarm. It thus precludes any temptation to invoke the crime of riot where lawful assembly or protest may provoke others to violent reaction.

Section (a)(2) covers mob agitation against the lawful workings of the government. It does not make it an offense to protest peacefully against the government, as through picketing, silent vigil, or other protest not committed “in a course of disorderly conduct.”

Section (c)(3) covers disorderly conduct committed as a group when the person knows that he or she or another uses a deadly weapon, without regard to the purpose of the participants. For the person who uses or plans to use a deadly weapon, this section is duplicative of section (a); therefore, this section chiefly concerns those individuals who do not plan personally to use a deadly weapon but who knowingly accompany those who do.

The normal defenses apply to this offense; one attacked by a group of individuals engaged in disorderly conduct can bring a claim of self-defense against a charge of rioting.

Section (b) makes it an offense for a person to disobey a lawful police order directing a disorderly crowd to disperse. This covers people who did not personally participate in the disorderly behavior but are in the immediate vicinity, so as to relieve the police of need to identify precisely the conduct of individuals present.

*Relation to Current Law.* This draft provision implements the offense of found in Art. 444 of Penal Code (1962) (Affray), which prohibits “tak[ing] part in an affray.” This Article provides a definition for that offense. Section (c)(1) incorporates as a grading factor the second clause of Section 2 of Penal Code (1962) Art. 444 by increasing the grade of the offense if the riot injures or kills someone. This draft penal code leaves the accentuated punishment when the riot is caused for political reasons found in Section 3 of Art. 444 as a factor for sentencing.

*Relation to Sharia Law.* This draft Article is also in line with Muslim jurists’ condemnation of organized criminal activity as a form of “waging war against society” (hirabah).<sup>151</sup> Some Muslim jurists have considered this to be any activity by an “individual or group” who take the “law into their own hands” or wishes to disrupt the “communal order.”<sup>152</sup>

*Relation to International Law.* International law protects the rights of people to engage in peaceful protest.<sup>153</sup> That right is protected here by covering only group disorderly conduct conducted with certain purposes, defined in Sections (a)(1) and (2), or the use or planned use of a deadly weapon in Section (a)(3). An offense under Section (b) similarly requires disorderly conduct under Section (b)(1).

### **Comment on Article 6102 – Disorderly Conduct**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 268 (Insult to a Public Officer), 269 (Insult to a Political, Administrative, or Judicial Body), 270 (Insult to a Judge During a Hearing), 271 (Offense Against the Authorities by Means of Damaging Posters), 402

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<sup>151</sup> Islamic legal opinion (Fatwa) issued on September 27, 2001 by various Islamic scholars including Shaykh Yusuf al-Qaradawi (Chairman of the Sunna and Sira Council, Qatar), Mohammad Al-Awa (Professor of Islamic Law and Sharia, Egypt), and Shaykh Taha Jabir al-Alwani (Chairman, Fiqh Council of North America). <http://www.islamfortoday.com/terrorism.htm>.

<sup>152</sup> JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 284 (Dar ul-Ishraq, 2001).

<sup>153</sup> See the European Convention for the Protection of Human Rights; International Covenant of Civil and Political Rights.

(Obscene Acts), 403 (Obscene Publications and Performances), 513 (Molestation or Disturbance of Individuals), 514 (Abusing the Credulity of the Public), 526 (Dangerous Throwing of Articles), and 527 (Dangerous Placing of Articles).

**Comment:**

*Generally.* This provision defines the offense of disorderly conduct, which covers a wide range of conduct that is disruptive or disrespectful to public safety, convenience, or propriety. It is necessary to prove that the person acted with intent to harm the public to be guilty of violating any of the paragraphs of the offense. Conduct under this provision is not a violation merely because others may create disorder in response to it.

Section (a)(1) covers fighting, threatening, violent behavior, and tumultuous behavior. Although it overlaps with assault, the assault provision would not cover situations in which the person neither injures nor intends to injure another person. This Section is concerned with protection of the public generally, rather than harm to any of the participants. It therefore requires *mens rea* as to the public impact of the violent, threatening, or tumultuous behavior.

Section (a)(2) prohibits unreasonable noise. It allows sanctions for someone using a loudspeaker in a public park, or making loud noise at 3 a.m. However, it gives significant discretion to courts and police that should not be abused.

Section (a)(3) and (4), which cover using abusive language to an individual and creating a hazardous environment, similarly can be faulted for giving significant discretion to police. In order to ensure that this provision is used to protect the public, and not as a form of personal power for police officers, guilt under this provision still requires proof of intent to cause *public* harm.

Section (a)(5) covers miscellaneous other conduct that is publicly harmful, including strewing garbage, nails, or noxious substances in public, turning off lights in an occupied theater, and many other actions.

*Relation to Current Law.* This draft codifies Art. 402 (Obscene Acts) and 406 (Incitement to Lewd Acts) of the Penal Code (1962), which prohibit obscene acts in public, in Section (a)(3). Section (a)(5) corresponds to Penal Code (1962) Art. 513 (Molestation or Disturbance of Individuals), which criminalizes disturbance to anyone in a public place with improper motive; however, rather than covering disturbance “to anyone,” this draft only covers intent to disturb the public. Disturbance of individuals is dealt with in Article 6103 (Harassment), as are some of the other activities covered by Art. 513 of the Penal Code (1962).

This draft Article covers Penal Code (1962) Arts. 268 (Insult to a Public Officer), 269 (Insult to a Political, Administrative, or Judicial Body), 270 (Insult to a Judge During a Hearing), 271 (Offense Against the Authorities by Means of Damaging Posters), and 514 (Abusing the Credulity of the Public) in its general criminalization of abusive language in Section (a)(4). Draft Article 6103 (Harassment) also criminalized some of this conduct.

This draft Article does not codify the special protections for public officials in the Penal Code (1962). For example, Art. 271 prohibits damaging posters as a “sign of contempt towards the authorities.” These prohibitions are not codified here because they contradict Article 18 (Freedom of Expression and Opinions) of the Provisional Constitution (2012).

Lastly, this draft Article incorporates Arts. 526 (Dangerous Throwing of Articles), and 527 (Dangerous Placing of Articles) by prohibiting any public hazard in Section (a)(5).

*Relation to Sharia Law.* Sharia law generally supports this Article.<sup>154</sup> Specifically,

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<sup>154</sup> JAVED AHMAD GHAMIDI, *The Penal Law of Islam*, RENAISSANCE, Sept. 2002

Section (a)(1) is supported by Muslim jurists who consider striking another a form of unlawful behavior.<sup>155</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6103 – Harassment**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 268 (Insult to a Public Officer), 269 (Insult to a Political, Administrative or Judicial Body), 513 (Molestation or Disturbance of Individuals), and 451 (Insult).

#### **Comment:**

*Generally.* This provision defines harassment. Intent to harass is required for an offense under this provision. The offense includes making telephone calls; insults, taunts, and challenges; repeated anonymous communications; offensive touching; and any other alarming conduct that serves no legitimate purpose. It is defined to complement Article 6102 (Disorderly Conduct). While that provision covers public-nuisance aspects of comparable behavior, this provision covers harassment of another individual.

Section (a)(4) is a lesser offense than sexual assault, and is more general in that it proscribes any offensive contact with another's body or clothing. Whether the touching is offensive is an objective determination that does not depend, except in an evidentiary sense, upon the other person's actual reaction. However, what is offensive depends on the facts of the situation and the victim's particular characteristics.

Section (a)(5) is meant to cover the myriad forms of harassment that are not easily listed. It includes harassment on the Internet that would not otherwise fall within this provision. It invites judicial exploration and occasionally may require delicate judgments.

*Relation to Current Law.* Art. 451 (Insult) Section 1 covers the subject matter in Section (a)(2). Section 2 of that provision is not incorporated here, but rather it is dealt with in the offense of Defamation, in draft Article 6105. This draft Article covers more than Penal Code (1962) Art. 451 (Insult), describing conduct that is obnoxious in addition to conduct that is offensive. Moreover, this draft Article prescribes a lower punishment for that conduct than does Art. 451 (Insult), because this draft Article allows prosecution for any of these offenses to be initiated by the State, unlike in Art. 451 (Insult), which requires that an injured party initiate the complaint. More serious violations, or conduct that falls within Section 2 of Art. 451 (Insult), will generally fall within the offense definition in draft Article 6105 (Defamation).

Penal Code (1962) Art. 451 (Insult) Section 4 allows for a defense that the insult is reciprocal. This defense is not included here, in order to reflect the blameworthiness of those who respond to harassment with further harassment. This furthers public safety by requiring that individuals end, rather than escalate, confrontations.

This provision also implements Penal Code (1962) Art. 268 (Insult to a Public Officer), and Art. 269 (Insult to a Political, Administrative or Judicial Body). This provision does not provide separate offenses for this conduct, but includes it under the general provision prohibiting insults.

Section (a)(1) implements the criminalization of telephone harassment in Penal Code

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<sup>155</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 667 (Nuh Ha Mim Keller trans., Amana Publications 1994).

(1962), Art. 513.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6104 – Public Alarms**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 327 (Giving False Alarm to Authorities)

#### **Comment:**

*Generally.* The purpose of this Article is to proscribe conduct that creates serious alarm for public safety and can result in public inconvenience. Section (a)(1) requires that the person have initiated or circulated such reports or warnings. Under Section (a)(2), the person must communicate the warning of harm knowing that it is false and that it is likely to cause serious public inconvenience. Section (a)(2) includes examples of what would constitute a public inconvenience—“evacuation of a building, place of assembly or facility of public transportation.”

*Relation to Current Law.* Section (a) corresponds to Penal Code (1962) Art. 327 (Giving False Alarm to Authorities). Art. 327 allows a defendant to be sentenced to a maximum punishment of one year.

*Relation to Sharia Law.* There is nothing here that is inconsistent with Sharia law. Muslim jurists support the criminalization of alarms for the purpose of frightening or annoying others. For example, Imam Najm al-Din al-Ghazzi supports this by stating that it is unlawful to “frighten, annoy, or alarm.”<sup>156</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6105 – Defamation**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 18 (Freedom of Expression and Opinions); Penal Code (1962) Arts. 220 (Offending the Honor or Prestige of the Head of the State), 269 (Insult to a Political, Administrative or Judicial Body), 270 (Insult to a Judge During a Hearing), 271 (Offense against the Authorities by Means of Damaging Posters), 328 (Publication or Circulation of False, Exaggerated or Tendentious News Capable of Disturbing Public Order), 451 (Insult), 452 (Defamation), 453 (Proof of Truth), and 454 (Provocation).

#### **Comment:**

*Generally.* This draft Article defines the offense of defamation. Defamation is a communication, including a writing, drawing, or oral statement, that is false and that substantially harms the target’s reputation. This can include lowering a person’s social standing in the community, as well as pecuniary harms like loss of employment. In order to fall within the offense definition, the person must have represented the communication as a fact. Comedic, satirical, sarcastic, or hyperbolic writings or images do not fall within this definition. Neither do

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<sup>156</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (‘Umdat al-Salik ), 763.

opinions or arguments about facts. This helps ensure that the right to freedom of expression guaranteed in Article 18 of the Constitution is not abridged. Finally, the mental state with respect to each element in this offense is knowledge.

The defense in Section (b) will generally apply to oral communications; however, it could also apply to Internet writings or drawings, or any other communication.

*Relation to Current Law.* This draft Article incorporates Penal Code (1962) Art. 451 (Insult) Section 2, Art. 452 (Defamation), and Art. 328 (Publication or Circulation of False, Exaggerated or Tendentious News Capable of Disturbing Public Order). Section (c)(2)(A) and (B) correspond to the aggravating factors in Penal Code (1962) Art. 451 (Insult) Section 2. Section (c)(2)(C) corresponds to Penal Code (1962) Art. 452, Section 3.

Penal Code (1962) Art. 453 is incorporated here at section (a)(1), which requires the prosecution to prove that a statement is false, and therefore allows the defense that the statement was true.

Penal Code (1962) Art. 454 corresponds to Section (b).

Penal Code (1962) Arts. 269 (Insult to a Political, Administrative or Judicial Body) and 270 (Insult to a Judge During a Hearing), correspond to Sections (c)(1). Penal Code (1962) Art. 220 (Offending the Honor or Prestige of the Head of the State) corresponds to Section (c)(1)(B). Although none of these provisions in the Penal Code (1962) exclude making true statements from criminal liability, this draft Article includes the requirement that the statements be false in order to comply with the right to freedom of expression and opinions provided by Article 18 of the Provisional Constitution (2012).

Penal Code (1962) Art. 271 (Offense against the Authorities by Means of Damaging Posters) is incorporated into this draft Article to the extent that the conduct falls within the offense definition; however, there is no provision here that specifically criminalizes damaging government posters. Such conduct would fall within the offense definition of draft Article 4103 (Criminal Mischief).

*Relation to Sharia Law.* Defamation in the context of false accusations relating to fornication is severely punished in Islamic law.<sup>157</sup> Moreover, Islamic law encompasses a wide range of actions and speech that constitute defamation. Thus, the broad nature of this Section is encompassed within Islamic law.<sup>158</sup> While Sharia law looks unfavorably upon defamation, it considers criticism based on facts to be legitimate discourse. Hence, as constructed, there is nothing here that is inconsistent with Sharia.

*Relation to International Law.* The definition of the offense in this Article is compatible with International law, which recognizes that defamation creates a limited exception to the general principle of freedom of opinion and expression. This draft Article makes certain changes to the Penal Code (1962), which criminalizes various insults to public figures and bodies without regard to whether the statements are true, in order to bring it into compliance with international law.<sup>159</sup> Under this draft Article, in order for any communication to constitute defamation, it must

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<sup>157</sup> Aly Aly Mansour, *Hudud Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 199 (M. Cherif Bassiouni, ed. 1982).

<sup>158</sup> AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 584-585 (Nuh Ha Mim Keller trans., Amanat Publications 1994)(Including slander by “allusion and innuendo” and “in published works”).

<sup>159</sup> U.N. Human Rights Committee, *General Comment no. 34, Article 19, Freedoms of Opinion and Expression*, CCPR/C/GC/34 (Sept. 12, 2011) at ¶ 38 (“[T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant.”)

be false, and made with knowledge of its falsity.<sup>160</sup>

The grading of the offense in this Article has been reduced from the grading in current law to comply with international law. For example, the United Nations Human Rights Committee (HRC) advises states to apply this law only in the most serious cases, and never to use imprisonment as a penalty.<sup>161</sup>

### **Comment on Article 6106 – Obstructing Highways or Other Public Passages**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 20 (Freedom of Assembly, Demonstration, Protest, and Petition); Penal Code (1962) Art. 267 (Interruption of a Public Office or Service or a Service of Public Necessity).

#### **Comment:**

*Generally.* This Article defines the offense of obstructing public highways or other public passages. It also accommodates freedom of assembly and speech when such assembly or speech leads to the obstruction of a public passageway by requiring members of such a gathering to move upon a reasonable request or order to do so. A request or order is only reasonable if it there is no ready alternative remedy for the obstruction caused by the gathering, as defined in Section (c)(2).

*Relation to Current law.* This draft Article recognizes and protects the right to free assembly, demonstration, and protest, provided by the Provisional Constitution (2012) Art. 20 (Freedom of Assembly, Demonstration, Protest, and Petition).

This draft Article implements Penal Code (1962) Art. 267 (Interruption of a Public Office or Service or a Service of Public Necessity), which proscribes interrupting or disturbing the regularity of a public office or service.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6107 – Disrupting Meetings and Processions**

**Corresponding Provisions:** Provisional Constitution (2012) Art. 16 (Freedom of Association); Penal Code (1962), Arts. 314 (Disturbance of Religious Functions), 511 (Cries or News Capable of Disturbing Public or Private Tranquility), 512 (Disturbing the Occupations or the Repose of Individuals), and 513 (Molestation or Disturbance of Individuals).

#### **Comment:**

*Generally.* This Article prohibits the purposeful disruption of any lawful meeting, procession, or gathering. The phrasing of this Article is broad enough to include holiday parades

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<sup>160</sup> *Id.* at ¶ 47 (“All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.”).

<sup>161</sup> *Id.* (“Care should be taken by States parties to avoid excessively punitive measures and penalties. . . . States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”)

or concert audience, as well as gatherings of persons to participate in religious, political, or other activities.

There are two distinct kinds of disruption that may be punished under this Article. A person commits an offense if the person does any act tending to physically obstruct or interfere with a meeting or if he makes any utterance, gesture, or display designed to outrage the sensibilities of the group.

Most conduct that would physically disrupt a meeting will likely also be punishable under the Article 6102 (Disorderly Conduct). Therefore, the scope of Section (a)(2)(A) will be limited. It does perform an important function, however, by extending the protection of the law to private meetings and gatherings, where the Disorderly Conduct provision criminalizes conduct creating a public inconvenience. Another significant difference is in the grades of those offenses. Disorderly Conduct is usually a violation. By contrast, disrupting a meeting is a misdemeanor in every case.

Section (a)(2)(B) also criminalizes any “utterance, gesture, or display designed to outrage the sensibilities of the group.” In addition to also increasing the authorized sanction for disruptive conduct over Article 6102 (Disorderly Conduct), Section (a)(2)(B) extends liability to an offensive utterance that is not unreasonably loud, especially abrasive, or personally abusive, which is required under Article 6102 (Disorderly Conduct). For example, an atheistic speech made at a meeting of the devout may be punished under this Article. It is important to emphasize that not every disruption is punishable. The actor making the interruption must have the intent to disrupt or obstruct the meeting. Therefore, if someone performs an action at a meeting that is unwelcome, reliance would be placed on the right to eject that person, with prosecution for assault or disorderly conduct if he resisted. Section (a)(2)(B) implicates freedom of speech concerns. It could be argued that the right to assemble could be rendered meaningless if outsiders could freely disrupt and prevent meetings, and therefore the government may find it important to protect against such actions.

The offense in this Article is a misdemeanor, rather than a violation. The heavier penalties are an appropriate recognition of the importance of protecting lawful assembly, unhindered religious practice, and freedom of association.

*Relation to Current Law.* This draft Article helps protect the right to freedom of assembly provided in the Provisional Constitution (2012) Art. 16 (Freedom of Association).

The Penal Code (1962) also protects specific types of meetings from disruption. For example, Penal Code (1962) Art. 314 (Disturbance of Religious Functions) prohibits the disruption of religious functions. The Penal Code (1962) also made illegal certain types of conduct that could disturb meetings. For example, Art. 511 (Cries or News Capable of Disturbing Public or Private Tranquility) prohibits disruptive cries, Art. 512 (Disturbing the Occupations or the Repose of Individuals) criminalizes the disruption of one’s occupation, and Art. 513 (Molestation or Disturbance of Individuals) prohibits disturbing others. This draft Article generalizes the particularistic provisions of prior law into a general ban on the disruption of meetings, whereas Article 6102 (Disorderly Conduct) prohibits the other disruptive conduct included in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* This provision could be seen as violating Art. 19(2) of the International Covenant on Civil and Political Rights, allowing for freedom of expression, by restricting speech that disrupts meetings. However, Art. 19(3) restricts the freedom of Art. 19(2) as necessary “[f]or respect of the rights and reputations of other.” Therefore, this provision is in



accordance with international norms whereby one person's speech is intending to disrupt another person's right to express him or herself.

### **Comment on Article 6108 – Desecration of Venerated Objects**

**Corresponding Provisions:** Penal Code (1962), Arts. 316 (Violation of or Bringing Contempt upon Tombs or Disturbance of Funerals or Funeral Service)

#### **Comment:**

*Generally.* This Article prohibits the intentional desecration of venerated objects. The Article expressly mentions public monuments or structures, places of worship or burial, but the list is not exclusive. Section (a)(3) applies to all other publicly venerated objects. This formulation extends the coverage of the law to reach defilement of objects that may be venerated only by particular groups.

This Article explicitly requires that the desecration be intentional. The actor must intend to desecrate and be aware that the object involved is a public monument or structure, a place of worship or burial, or other honored object. The actor must not only treat a venerated object improperly. He or she must realize that doing so will be an affront to a substantial portion of the public. This concept is also captured by the definition of “desecrate,” which is physically mistreating the object in “a way that the actor knows will outrage the sensibilities” of the public.

This rationale for the offense—to prevent outrage to popular sensibilities—is also reflected in the Article's requirement that the desecration be public.

*Relation to Current Law.* This Article generalizes the Penal Code (1962) Art. 316 (Violation of or Bringing Contempt upon Tombs or Disturbance of Funerals or Funeral Service), which only covers the defilement of burial markers, into a comprehensive ban against desecration of all venerated objects. This Article keeps the current punishment of a maximum two-year imprisonment by making the offense a Class [F] felony.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6109 – Cruelty to Animals**

**Corresponding Provisions:** Penal Code (1962) Art. 562 (Cruelty to Animals)

#### **Comment:**

*Generally.* This Article prohibits a person from subjecting an animal that he owns or any animal in his custody to cruel neglect or mistreatment. The definition of cruel mistreatment would not encompass any appropriate action of resistance to an animal attack, infestation by vermin, or other offensive animals, or any action generally in keeping with the common practice of animal care (such as punishment in the course of training an animal).

Cruel mistreatment would be found when a person causes pain to any animal either without any legitimate purpose (such as torturing a cat) or beyond the scope of the use of force appropriate to the purpose of the force's use (such as setting a cat on fire while attempting to train it).

The rationale of this law is to prevent outrage to the sensibilities of the community. This is reflected in the notion that “cruel mistreatment” should be determined in light of the general views of the ordinary Somali about what constitutes cruel mistreatment. Similarly, the “cruel neglect” offense should be determined by the common standard of what the ordinary Somali should expect of an ordinary animal owner. Taking custody of an animal makes one responsible for the reasonable care of that animal. Cruel neglect includes failing to provide the basic necessities for an animal, such as food, shelter, and medical care.

The offense excludes persons who are acting according to accepted veterinary practice or who are doing scientific research, according to practices accepted by the scientific community, on animals. Lenity should be shown when determining the standards of the scientific community, as different schools of thought may consider different practices appropriate. It is not necessary that all scientists or veterinarians should think a particular action appropriate; however, a generally accepted group of scientists or veterinarians should think it appropriate.

*Relation to Current Law.* This Article parallels Penal Code (1962), Art. 562 (Cruelty to Animals). Art. 562 specifically lists what constitutes mistreatment of animals. However, this Article allows the interpretation of cruelty and neglect to develop alongside societal determinations of what should be criminally punished as cruel. This is similar to the change made to Art. 562(2) outlawing public experiments on animals. This Article allows an exception for scientific research and allows the interpretation to change with society’s views of what accepted practices and procedures should be.

Art. 562 also provides something resembling a necessity defense, allowing a person to overwork an animal if necessary. This was excluded from the draft Article because of the greater concern of creating disgust and a public outcry.

There is a strong public policy argument in favor of protecting animals from cruelty and mistreatment. Animals subject to such abuse can often become dangerously violent, and thus it is in the public interest to criminalize abusive behavior towards them.

*Relation to Sharia Law.* This Article is supported by Muslim jurists who agree that cruelty towards animals is forbidden in Islam. This prohibition includes mutilation, “branding animals on the face”, and “killing them for other than food.”<sup>162</sup> The prevention of mistreatment of animals is also within the jurisdiction of the muhtasib (market supervisor).<sup>163</sup> Various Prophetic hadith prohibit torturing, mistreatment and cruel behavior towards animals.<sup>164</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6110 – Operating a Regulated Business or Importing Without a License**

**Corresponding Provisions:** Penal Code (1962), Arts. 518 (Unauthorised or Prohibited Business Agencies and Public Trading Concerns), and 533 (Unlawful of Opening of Places of Public Show or Entertainment)

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<sup>162</sup> Ibn Rushd, *The Distinguished Jurist’s Primer (Bidayat al-mujtahid)*, vol. 2, at 960.

<sup>163</sup> Mawardi, *The Ordinances of Government (al-Ahkam al-Sultaniyya)*, 267-268.

<sup>164</sup> *Sahih al-Bukhari* 2365 & 5541; *Mishkat al-Masabih*, Book 6, Chapter 7, 8:178.

**Comment:**<sup>165</sup>

*Generally.* A person commits an offense under Section (a) when a person operates a business regulated by law without a license or other permission from the relevant authorities. It is also an offense to import regulated items without a license or permission from the relevant authorities. Regulated items include firearms, catastrophic agents, controlled drugs, and alcohol. This offense may also apply to other items that are outlawed or restricted by regulatory laws.

Section (b) grades the offense at a Class [C] felony if someone imports or sells a firearm, catastrophic agent, or controlled drug. The offense is a Class [A] misdemeanor if the person imports or sells alcohol without a license. An unlicensed business, or importing without a license, is graded as a Class [B] misdemeanor.

*Relation to Current Law.* This Article parallels Penal Code (1962), Art. 518 (Unauthorised or Prohibited Business Agencies and Public Trading Concerns). However, this draft Article is written more generally than Art. 518, which lists several examples of regulated areas of law (i.e., hotels and doctors' offices). This Article, in contrast to Art. 518, also gives a harsher penalty for operating without a license when dealing with dangerous material. There is a strong public policy argument in favor of expanding liability in this way. It is in society's interest that businesses are operated in a safe and responsible manner so that public health is not put at risk. Public safety concerns also merit that persons involved in importing items, particularly weapons and alcohol, do so in a safe and responsible manner. The issuance of licenses ensures that those who are involved in these activities abide by the appropriate regulations. Therefore, criminalizing operating a business without a license, importing without a license, and the improper pursuit of other licensed activities deters individuals from undertaking those activities without abiding by appropriate regulations.

Art. 518 does have a section that punishes the "failure to comply with the other directions of the law or the authorities," even if a license is obtained. However, if the person does not comply with other laws, that violation is most appropriately addressed under that separate law.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 6111. Alcohol Manufacture; Sale; Distribution**

**Corresponding Current Provision(s):** Federal Republic of Somalia Provisional Constitution (2012), Arts. 2 (State and Religion), 17 (Freedom of Religion and Belief); Penal Code (1962) Arts. 411 (Supply or Sale of Alcoholic Beverage), 412 (Consumption of Alcoholic Beverages), 414 (Causing a State of Drunkenness in Other Persons), 415 (Supply of Alcoholic Beverages to a Person in state of Manifest Drunkenness), 416 (Unlawful Manufacture of or Trade in Liquors or Substances Intended for the Preparation of the Same)

**Comment**

*Generally.* This draft Article criminalizes the unauthorized import, manufacture, sale, and distribution of alcoholic beverages and alcohol-based products by a Muslim. Section (a)(1)

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<sup>165</sup> If there is no other Article in this code that prohibits doing a regulated action without a license, perhaps that offense should be included here, in the same way the Maldivians constructed their criminal code.

criminalizes importing, manufacturing, and possessing for the purpose of manufacture, alcoholic beverages or alcohol-based products.

Section (a)(2) criminalizes the sale and distribution of alcoholic beverages and of alcohol-based products when the person selling or distributing the alcohol-based product knows that the purchaser or recipient intends to use the alcohol-based product for its intoxicating effect. Notably, a person must know that the purchaser or recipient of an alcohol-based product such as cough syrup or mouthwash will use the product for its intoxicating effect in order to be found liable under this draft Article.

The knowledge culpability requirement is designed to protect, for example, the pharmacy owner or clerk who lawfully sells mouthwash to customers from being liable for an offense when one of his customers drinks the mouthwash rather than uses it as an oral cleansing agent. On the other hand, if a potential purchaser is talking to his friend at the counter about who will bring the soda to mix with the mouthwash so they can drink it that night, the seller cannot sell to that purchaser without being guilty of the offense described in Section (a)(2)(B). The requirement of knowledge as to the recipient's intent only applies to the sale and distribution of alcohol-based products, because knowledge that the purchaser or recipient of alcoholic beverages intends to use the alcoholic beverages for their intoxicating effects is presumed.

Section (a) specifies that the conduct only triggers criminal liability when it is “without legal authorization,” because there will be circumstances where the import, manufacture or sale of alcoholic beverages or alcohol-based products will be legally authorized. For instance, neither a distribution company that imports cough syrup in accordance with Somali regulations, nor a pharmacy owner who then sells that cough syrup for medical use would be liable under this draft Article. [Similarly, where alcoholic beverages are imported, sold, or distributed exclusively for religious use, this also would not trigger liability.]<sup>166</sup>

This offense is graded depending on the circumstances under which the conduct was performed and assigns offense grades as close to the sentences provided in the Penal Code (1962) as possible within the confines of a modern grading system. Under Section (b), the conduct in Section (a)(1) (manufacture, import, and possession for manufacture) is a Class [A] misdemeanor. The conduct in Section (a)(2) (sale or distribution) is a Class [B] misdemeanor if it is performed in public or if the purchaser or recipient is under 14 years of age, is mentally disabled, or is manifestly intoxicated, because the conduct is more blameworthy in those instances. In all other instances, the conduct in Section (a)(2) is a Class [C] misdemeanor.

Additionally, Section (c) of this draft Article provides that public permits will be suspended if the keeper of a public establishment is found criminally liable under this draft Article.

Note that this provision does not apply to non-Muslims. However, if a non-Muslim imports alcohol for the purposes of public, rather than private, consumption, he or she would be guilty of complicity to commit an offense of unlawful public consumption.

*Relation to Current Law.* This draft Article condenses and incorporates four provisions from the Penal Code (1962): Arts. 411 (Supply or Sale of Alcoholic Beverage); 414 (Causing a State of Drunkenness in Other Persons); 415 (Supply of Alcoholic Beverages to a Person in State

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<sup>166</sup> If choosing to include an exemption from liability for legitimate religious practice under Article 6113 (Unlawful Consumption), that exemption should carry over into this provision as well, either through an explicit exemption in the draft Article or through other governmental regulations that would allow the conduct to fall under the “legal authorization” protection in Section (a).

of Manifest Drunkenness); 416 (Unlawful Manufacture of or Trade in Liquors or Substances Intended for the Preparation of the Same).

Section (a)(1) incorporates the prohibition on the importation, sale, or possession of alcohol from Art. 416 of the Penal Code (1962) with more precise language. The possession of alcohol or alcohol-based products for the purpose of manufacturing carries the same Class [A] misdemeanor offense grade as actually manufacturing those substances, reflecting commensurate grading for the same conduct found in Art. 416 of the Penal Code (1962).

The sale and supply of alcoholic beverages, prohibited under Art. 411 of the Penal Code (1962), is reflected in Section (a)(2) of this draft Article. Section (a)(2) also criminalizes the sale and supply of alcohol-based products when the person knows that the purchaser or recipient intends to use the product for its intoxicating effect, because there is no meaningful difference in blameworthiness when such knowledge exists. Articles 414 and 415 of the Penal Code (1962) are incorporated into Section (b)(2)(A), which provides a higher penalty of Class [B] misdemeanor when the sale or distribution is public and the recipient of the alcohol or alcohol-based substance is under 14 years of age, is mentally disabled, or is manifestly intoxicated. In all other instances, the conduct described in Section (a)(2) is a Class [C] misdemeanor, which provides a penalty of up to three months imprisonment, a close approximation of the penalty of four months imprisonment under the relevant provisions of the Penal Code (1962).

Section (b)'s grading provisions incorporate the range of penalties set out in Arts. 411, 412, 414, and 415 as closely as possible within the confines of a modern grading scheme. Finally, Section (c) of this draft Article incorporates section 2 of Art. 415 of the Penal Code (1962), which provides that public permits will be suspended if the keeper of a public establishment is found criminally liable under the draft Article.

*Relation to Sharia Law.* There is consensus on the fact that consuming alcohol is prohibited for Muslims under Sharia law. For instance, Al-Misri forbids consumption, in large or small quantities, of “any beverage that intoxicates when taken in large quantities.”<sup>167</sup> Also, as stated above, Sharia law generally prohibits eating during daylight hours during the month of Ramadan.<sup>168</sup> The limitation of criminalization to public eating during the daylight hours of Ramadan is also consistent with Sharia law, because it allows non-Muslims, and those who are exempt from the fasting requirement under Sharia law, to eat in private. Similarly, the draft Article restricts criminalization for consumption of alcohol or alcohol-based products to public conduct, because although consuming intoxicating substances is a sin under Sharia law, it only warrants criminal sanction when performed in public. Sharia law supports this position based on Umar b. al-Khattab's behavior in his role as the Muslim head of state. In one famous incident, Umar came upon a private gathering where alcohol was being consumed. Realizing he had spied on individuals in the privacy of their own home, Umar left without charging them for the consumption of alcohol.<sup>169</sup>

*Relation to International Law.* This draft Article would result in significant restriction on the freedom of religion that Somalia is required to safeguard as a party to the ICCPR, because this draft Article would vitiate the availability of alcoholic beverages for religious practice unless

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<sup>167</sup> AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER*, 617 (Nuh Ha Mim Keller trans., Amana Publications 1994).

<sup>168</sup> IBN RUSHID, *THE DISTINGUISHED JURIST'S PRIMER I*, at 331 (Imran Ahsan Khan Nyazee trans., Garnet Publishing, 1994).

<sup>169</sup> Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam 70 in THE ISLAMIC CRIMINAL JUSTICE SYSTEM* (M. Cherif Bassiouni, ed.).

other regulations authorize the importation, manufacture, sale, and/or distribution of alcoholic beverages for those purposes. For instance, non-Muslims present in Somalia as part of a diplomatic or non-governmental organization would be unable to perform religious ceremonies, such as Catholic mass and communion, without access to wine, an alcoholic beverage. Thus, to ensure more robust compliance with Somalia's obligations under ICCPR as well as international norms, an exemption for religious practice or regulations that authorize the importation, manufacture, sale or distribution of alcoholic beverages for legitimate religious practice is recommended.

### **Comment on Article 6112. Unlawful Consumption**

**Corresponding Current Provision(s):** Federal Republic of Somalia Provisional Constitution (2012), Arts. 2 (State and Religion), 17 (Freedom of Religion and Belief); Penal Code (1962) Art. 412 (Consumption of Alcohol)

#### **Comment:**

*Generally.* This draft Article criminalizes certain types of consumption in public when Sharia law would generally prohibit that consumption. Section (a)(1) prohibits public consumption or acquisition of alcoholic beverages and alcohol-based products when the latter is obtained or consumed for the purpose of intoxication. The purpose requirement protects individuals who consume an alcohol-based product, such as cough syrup, but who do not consume it for the purpose of intoxication. The culpability requirement of “knowingly” also explicitly protects the innocent individual who does not realize that he or she is drinking a beverage spiked with alcohol. The culpability requirement is “knowing” as opposed to “reckless” to reflect the idea that individuals should generally be able to rely on representations that the beverage they are consuming is non-alcoholic.

The alcohol-related offenses in Section (a)(1) constitute a Class [B] misdemeanor.

*Relation to Current Law.* This draft Article incorporates Article 412 of the Penal Code (1962), which criminalizes all consumption of alcohol, and increases the penalty for public consumption. This draft Article restricts the offense, however, to public consumption or acquisition for three reasons. First, not criminalizing private violations of Sharia law keeps this draft Article consistent with protections of privacy inherent in Sharia.<sup>170</sup> Second, the societal harm from this offense is greatest when performed in public. Third, because the Somali Constitution protects freedom of religion in Article 17, ensuring that non-Muslims whose religious practice involves the blessing and consumption of alcoholic beverages are able to maintain such practices, at the very least in private, helps Somalia maintain compliance with its internal laws and its obligations to international law.

Article 412 of the Penal Code (1962) provides a penalty of up to four months for alcohol consumption. This draft Article grades the alcohol consumption offenses under Section (a)(1) as a Class [B] misdemeanor, which has a maximum penalty of up to three months' imprisonment.

*Relation to Sharia Law.* The general support in Sharia law for this Article is found in the discussion for Article 6112 (Alcohol Manufacture; Sale; Distribution).

*Relation to International Law.* This provision does not criminalize the private consumption of alcoholic beverages, which would allow private religious practice involving such

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<sup>170</sup> See, e.g., YUSUFAL-QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM (*Al-Halal wal-Haram fi'l Islam*), 312 (noting that “prying into other people's private affairs and spying on their secrets is not permitted”).

consumption. However, this draft Article would still result in significant restriction on the freedom of religion that Somalia is required to ensure under its ICCPR obligations, because consumption of alcoholic beverages in a religious center, such as a church, could constitute public consumption and could therefore be criminalized. For instance, non-Muslims present in Somalia as part of a diplomatic or non-governmental organization would be unable to perform religious ceremonies, such as Catholic Mass and Communion, without access to wine, an alcoholic beverage. Thus, to ensure more robust compliance with Somalia's obligations under ICCPR, as well as with international norms, an explicit exemption for legitimate religious practice is recommended.

### **Comment on Article 6113 – Public Drunkenness; Drug Incapacitation**

**Corresponding Provisions:** Penal Code (1962) Art. 413 (Drunkenness)

#### **Comment:**

*Generally.* This draft Article prohibits public intoxication. This Article sets two conditions for a person to be guilty of an offense. First, under Section (a)(1), the person must be clearly intoxicated, and that intoxication must not be the result of therapeutic administration. The word “manifestly” is intended to preclude those who are only slightly intoxicated or who are able to sufficiently control themselves so that their behavior is not abnormal.

Second, under Section (a)(2), the person's incapacitation must be of a certain degree. The person must be so intoxicated that he is at risk for endangering himself or others, damaging property, or annoying persons in the vicinity.

This draft Article criminalizes a person's conduct only if he or she is exhibiting this behavior in public. It is not the state of intoxication or incapacitation that is condemned, but its public manifestation in ways that may endanger the person or inconvenience others.

*Relation to Current Law.* Penal Code (1962) Art. 413 (Drunkenness) prohibits one from being in a manifest state of drunkenness in public, or in a place accessible to the public. Art. 413 does not require a degree of drunkenness, but merely prohibits any manifest drunkenness in public. This draft Article requires a certain degree of drunkenness in order to be consistent with the public nuisance rationale of this law. Furthermore, this Article expands the scope of coverage over current law by criminalizing public intoxication caused by drugs other than alcohol.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6114 – Unlawful Begging**

**Corresponding Provisions:** Provisional Constitution (2012) Art. 27 (Economic and Social Rights); Penal Code (1962) Art. 523 (Begging)

#### **Comment:**

*Generally.* This provision defines the offense of unlawful begging. Section (a)(1) requires the person to request a donation of goods or money. A “donation” includes the purchase of an item for an amount far exceeding its value, under circumstances where a reasonable person

would understand that the purchase is in substance a gift. The request must be for an immediate donation. Fundraisers who request contact information to later solicit money are not covered by this draft Article.

Section (a)(2) requires the begging be in a public place. This includes any place that is open to the public, even if it is privately owned.

Begging is not unlawful unless it additionally satisfies one of the requirements in Section (a)(3). Section (a)(3) describes various ways in which begging may be performed that are obnoxious to the public. It is only an offense to passively stand or sit with a sign without addressing any solicitation to any specific person.

*Relation to Current Law.* This draft Article is carefully circumscribed in recognition that those who beg are generally unable to satisfy their basic needs, and that the State has an obligation to provide these needs in accordance with the Provisional Constitution (2012) Art. 27 (Economic and Social Rights).

This draft Article corresponds to Penal Code (1962) Art. 523 (Begging).

The aggravating factor in Penal Code (1962) Art. 523 of committing the crime in a vexatious manner is reflected in Section (a)(3)(A)-(C). By describing the specific conduct that is vexatious, this provision is clearer and will be applied more consistently.

Penal Code (1962) Art. 523 punishes this offense with up to six months' imprisonment. Because this punishment is significantly harsher than the punishment for disorderly conduct under draft Article 6102 (Disorderly Conduct), the punishment in this draft Article has been reduced to a Class [D] misdemeanor. This grade reflects the relatively harmless nature of the conduct, as well as its parity with like conduct described in Article 6102 (Disorderly Conduct).

*Relation to Sharia Law.* While Nothing in this Article is inconsistent with Sharia law, aggressive prosecution of this Article is not encouraged, as the state is responsible for the welfare of each of its citizens.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6115 – Refusal to Accept Legal Tender**

**Corresponding Provisions:** Penal Code (1962) Art. 536 (Refusal of Coins Which are Legal Tender)

#### **Comment:**

*Generally.* This provision makes it a violation to refuse to receive legal tender. However, it allows sellers to refuse legal tender where receiving it would pose an inconvenience. For example, where a customer presents a very large bill to make a small purchase, the seller may refuse to accept the bill, as acceptance would create an inconvenience for the seller by requiring him or her to give an unreasonably large amount of change. Similarly, where a customer attempts to pay for a large purchase with a large quantity of coins, a seller may refuse this legal tender. The existence of an inconvenience besides those listed would also excuse a seller from liability under Section (a)(3).

*Relation to Current Law.* This provision corresponds to Penal Code (1962) Art. 536 (Refusal of Coins Which are Legal Tender), and adds the requirement that the legal tender not be unreasonable so as to pose an inconvenience to the seller.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.



*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6116 – Failure to Render Assistance**

**Corresponding Provisions:** Penal Code (1962) Art. 450 (Failure to Render Assistance)

**Comment:**

*Generally.* This draft Article defines the offense of refusing to assist another in need. Under Section (a)(1)(A), the duty to assist applies where a person finds another in grave danger and knows of that danger. It also applies where a person finds an abandoned person who cannot care for himself or herself. In addition to any child under the age of 10, this also includes a disabled or elderly person. The culpability requirement for this element is knowledge. A person must know (and not merely be reckless as to) the danger the other is in, or the fact that the other is lost or abandoned, before criminal liability will be imposed. However, only recklessness is required as to an abandoned child's age or an abandoned person's state of incapacity.

Section (a)(1)(B) limits this offense to people who could assist without endangering themselves, or otherwise impairing their duties to another. However, those duties must be important in order to excuse the failure to render assistance. Note also that the General Part applies to prevent liability if the person could not have performed the assistance under Article 206 (Requirement of a Voluntary Act; Omission Liability; Possession Liability) Section (a), or if the person would have been liable for another offense had he or she committed the act under Article 601 (Involuntary Act and Omission) Section (b)(2).

Section (a)(1)(C) requires a person to render reasonable assistance. This will often involve alerting governmental authorities, medical services, or others who are trained to assist. In some cases, it may involve personal intervention in order to assist in an immediate emergency.

Where a person makes a mistake in providing such assistance, Section (b) limits that person's liability. This prevents the law from holding people liable for damages when they were acting under to this draft Article.

This offense is graded as a Class [B] misdemeanor where helping would have prevented the other's death. Otherwise, the offense is a Class [C] misdemeanor.

*Relation to Current Law.* This provision corresponds to Penal Code (1962) Art. 450 (Failure to Render Assistance).

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

### **Comment on Article 6117. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 417 (Definition)

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. Many are also used elsewhere in this Code.

*Relation to Current Law.* The definition of “alcoholic beverage” corresponds to the same definition in Penal Code (1962) Art. 417 (Definition). This Article is otherwise consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 6200. Public Indecency and Obscenity Offenses**

### **Introduction: Chapter 6200**

This Chapter defines offenses that offend public decency. The underlying assumption of this Chapter is that the government should play a role in suppressing activities that contravene public morals. Thus, Prostitution, Promoting Prostitution, Distribution and Possession of Obscene Material and Child Pornography, Abuse of Corpse, and Bestiality are all offenses defined in this Chapter. For related offenses, see Chapter 6400 (Offenses of the Family), which criminalizes illegal marriage, adultery, and incest.

### **Comment on Article 6201. Indecent Exposure**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 402 (Obscene Acts), and 406 (Incitement to Lewd Acts)

#### **Comment:**

*Generally.* A person commits indecent exposure if he or she exposes his or her sex organs in public under circumstances likely to cause affront or alarm. A person who exposes his or her sex organs in the privacy of his or her home does not commit an offense under this Article. The offense is a Class [B] misdemeanor.

*Relation to Current Law.* Section (a) incorporates Penal Code (1962) Art. 402 (Obscene Acts)’s prohibition into the draft code. The penalty is in line with the lower end of the penalties provided under existing Somali law so as to comport better with the other offenses in this Chapter.

Penal Code (1962) Art. 406 (Incitement to Lewd Acts) penalizes the incitement of another person to commit lewd acts in public. This draft Code accomplishes this offense definition when Section (a) of this draft Article is combined with Article 401 (Accountability for the Conduct of Another), Section (a)(1) and (2) of the General Part. The accompanying penalty is in line with that offense.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6202. Engaging in Prostitution**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 405 (Prostitution)

#### **Comment:**

*Generally.* A person commits an offense if he or she engages in sexual intercourse or sexual contact in exchange for anything of value. The offense is a Class [F] felony.

*Relation to Current Law.* Penal Code (1962) Article 405 (Prostitution) makes prostitution an offense punishable with up to two years imprisonment and is largely incorporated into this draft Article.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6203. Promoting Prostitution**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 407 (Instigation, Aiding, and Exploitation Prostitution), and 408 (Compulsion to Prostitution)

#### **Comment:**

*Generally.* Section (a) defines the offense of Promoting Prostitution. A person commits an offense if he or she compels, encourages, arranges, or otherwise facilitates an act of prostitution under draft Article 6202, or allows the use of a place, over which he or she exercises control, for an act of prostitution.

Section (b) grades the offense. If a person promotes prostitution through the threat or use of force, the offense is a Class [D] felony. If the person who is being promoted into prostitution is a minor, incapable of giving consent, or the offender is an ascendant, spouse, sibling, guardian, or someone otherwise entrusted to care for, educate, or supervise the other person, the offense is a Class [E] felony. Otherwise, the offense is a Class [F] felony.

*Relation to Current Law.* The definition of the offense mirrors the language in Penal Code (1962) Arts. 407 (Instigation, Aiding, and Exploitation Prostitution) and 408 (Compulsion to Prostitution). The penalties also reflect the range of sentences provided by those provisions.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6204. Distribution and Possession of Obscene Material and Child Pornography**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 560 (Trade in Writings, Drawings, or Other Articles Contrary to Public Decency)

#### **Comment:**

*Generally.* A person commits under this Article if he or she does one of the following: (1) sells, delivers, or provides any obscene material; (2) offers or agrees to sell, deliver, or provide any obscene material; (3) possesses any obscene material for purposes of sale or other commercial dissemination; or (4) sells, advertises, or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene. Material is obscene if it appeals to a prurient interest in nudity, sex, or excretion, and goes substantially beyond customary limits of candor in describing or representing those matters. Pornography, for example, is obscene material.

Section (b), however, provides a notable exception to the defined offense. A person does not commit an offense under this Article if the distribution is only to an institution or an individual having scientific or other special justification for possession of such material. For example, if a person delivers sexually explicit pictures to a social scientist for use in his or her research, then that person has not committed an offense.

Section (c) sets two levels of grading for the offense. If the obscene material involves minors, such as child pornography, the offense is a Class [A] misdemeanor. Otherwise, the offense is [a violation].

*Relation to Current Law.* Penal Code (1962) Art. 560 (Trade in Writings, Drawings, or Other Articles Contrary to Public Decency) criminalizes trading in materials that violate common public decency. The draft Article provides a higher grade for material involving minors in order to further protect minors, in accordance with Art. 29 of the Provisional Constitution (2012) (Children).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6205. Obscene Performance**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 402 (Obscene Acts), 403 (Obscene Publications and Performances), 404 (Definition of Obscene Acts and Objects), and 561 (Acts Contrary to Public Decency; Foul Language)

#### **Comment:**

*Generally.* A person commits an offense if her or she presents or directs an obscene play, dance, or performance, or participates in that portion thereof that makes it obscene, or publishes or exhibits obscene material. If these obscene acts involve minors, the offense is a Class [E] felony. Otherwise, it is a Class [F] felony.

Section (b) defines the lesser offense of Obscene Language. A person commits this offense if he or she uses obscene language in public. This offense is [a violation].

Language or acts are considered obscene if they appeal to a prurient interest in nudity, sex, or excretion, and go substantially beyond customary limits of candor in describing or representing those matters.

*Relation to Current Law.* The Penal Code (1962) punishes obscene acts (Art. 402) and obscene publications and performance (Art. 403). The physical acts of these Articles are incorporated into this draft Article, while the publication provision is incorporated into draft Article 6204.

The language prohibition of Art. 561 (Acts Contrary to Public Decency; Foul Language) is incorporated into Section (b) of this draft Article.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6206. Abuse of a Corpse**

**Corresponding Current Provision(s):** Penal Code (1962), Arts. 317 (Bringing into Contempt Dead Bodies), 318 (Destruction, Concealment, or Removal of Dead Bodies), 319 (Unlawful Use of Dead Bodies)

**Comment:**

*Generally.* Section (a) defines the offense of abusing a corpse. A person commits an offense if he or she, knowing that he or she does not have legal authority to do so, disfigures, mutilates, or commits acts of obscenity or brutality upon a corpse; or destroys, removes, or conceals a corpse or any part thereof in a manner which would violate ordinary family sensibilities. “Ordinary family sensibilities” is a standard to be determined by the courts in each case, and has the flexibility to evolve with the attitudes of the Somali people.

Section (b) grades the offense. The offense is a Class [A] misdemeanor if the person dissects or uses a corpse for any scientific or medical purpose without legal authorization. This means that there is a lesser penalty for those who, for example, dissect a corpse for legitimate medical purposes without first receiving prior legal authorization. Hobbyists who do not have legal authority, however, cannot fit into this lesser category. If a person uses a corpse without some legitimate purpose (i.e., as a hobbyist), the offense is a Class [F] felony.

*Relation to Current Law.* Penal Code (1962) Art. 317 (Bringing into Contempt Dead Bodies) and Art. 318 (Destruction, Concealment, or Removal of Dead Bodies) are incorporated into the definition of this offense, and also gives a greater penalty for those who abuse a corpse without legitimate authorization. Art. 319 (Unlawful Use of Dead Bodies) criminalizes the unlawful use of dead bodies; to distinguish this provision from other forms of abusing a corpse, the scientific or medical purpose clause was included in the draft Article.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 6207. Bestiality**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* A person commits an offense if he or she engages in sexual intercourse or sexual contact with an animal. An animal is defined as a living being that is not a human or a plant. The offense is a Class [D] felony.

*Relation to Current Law.* There is no provision in current law dealing with this subject; however, it is in accordance with current code’s aim to protect public decency.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 6208. Definitions**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 29 (Children)

**Comment:**

*Generally.* This Article defines terms that are first used in this Chapter. These terms may be used elsewhere in this draft Code as well.

*Relation to Current Law.* The definition for “minor” is based on Section 8 of Article 29 (Children) of the Provisional Constitution (2012), which defines “children” as a person under age 18. This also corresponds with the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 6300. Invasion of Privacy Offenses**

### **General Comment on Chapter 6300. Invasion of Privacy Offenses**

#### **Comment:**

This Chapter punishes intrusions into the privacy of the individual and the home. It directly incorporates current provisions in the Penal Code (1962) and consolidates them into fewer Articles, while maintaining a focus on the underlying harm addressed in the current code. This draft Chapter also broadens the scope of the previous Articles to account for the possibility of new methods and techniques used to commit similar harms.

There is general support for this Chapter in Sharia law. The Prophet (pbuh) “prohibited listening clandestinely to people’s conversation without their knowledge or approval.”<sup>171</sup>

### **Article 6301. Unlawful Eavesdropping or Surveillance**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art.19 (Inviolability of the Home); Penal Code (1962) Arts. 470 (Violation of the Privacy of the Home), 471 (Violation of the Privacy of the Home Committed by a Public Officer)

#### **Comment:**

*Generally.* This provision defines the offense of unlawful eavesdropping or surveillance. It prohibits improper intrusions made for the purpose of hearing or seeing things within private places. In contrast to draft Article 6302 (Voyeurism), this offense targets unlawful listening, and primarily targets doing so through the use of recording devices. This is similar to draft Article 6303 (Unlawful Use or Disclosure of Private Information), but it covers improper intrusions into private physical spaces rather than improper interceptions of private communications. Where conduct constitutes a violation of both this Article and 6303—that is, if it included physical intrusion and interception of private communication—both offenses could be charged.

The culpability of the offense is “knowingly,” meaning that the offender must intend to record private information and must knowingly act without consent of all parties to the communication. Acquiescence operates as consent. Therefore when one party to a communication informs the other of his intent to intercept or record subsequent communications, and the subsequent communication falls within the scope of the notice, consent is established that absolves that party from liability.

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<sup>171</sup> Sahih Buhari 7402, Book 91, Hadith 56; YUSUF AL-QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM (AL-HALAL WAL-HARAM FI’L ISLAM), 313.

Section (a) defines offense and outlines the methods by which intercepting or surveilling communications is unlawful. Prosecution under this Article requires intrusion on the physical property, but not necessarily trespass as defined by Article [4202]. Section (b) exempts whistleblowers from liability to encourage persons, when they are parties to the communication, to record information they reasonably and in good faith believe is evidence of wrongdoing by others. This exception also works as an exemption from Article 6303, Unlawful Use of Disclosure of Private Information, because liability under that draft Article requires that the gathering of information be unlawful under this draft Article 6301.

The base offense of unlawful surveillance is graded as a Class [F] felony, carrying imprisonment up to two years. This comports with the current Penal Code (1962) Article 471, which punishes trespasses of the home with up to three years' imprisonment. Section (c)(1) enhances the grade of the offense to a Class [E] felony if the recorded conduct is sexual in nature, reflecting increased culpability for recordings made with the intent to provide sexual gratification to any person.

*Relation to Current Law.* This draft Article is derived from Arts. 470 and 471 of the current Penal Code (1962), which criminalize trespasses within the home. However, this draft Article updates the offense by significantly expanding it to criminalize any intrusion onto the property of another for the purpose of recording information. Criminal trespass for other purposes is covered by draft Article [4202]. This Article is therefore in harmony with Arts. 472 through 479 of the current Penal Code (1962), the Crimes Against Secrecy, but it is updated to reflect more modern methods of gathering and recording information and communications. This draft Article is also in compliance with the general principle of inviolability of the home, memorialized in Art. 19 of the Provisional Constitution.

*Relation to Sharia Law.* This Article is supported by Sharia law. The Prophet (pbuh) “prohibited listening clandestinely to people’s conversation without their knowledge or approval.”<sup>172</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Article 6302. Voyeurism**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art.19 (Inviolability of the Home)

#### **Comment:**

*Generally.* This Article complements Article 6301 by criminalizing observations that may not be recorded, but are nonetheless unlawful. To cabin the scope of this offense, this Article punishes nonconsensual observation of those who are in a state of indecency, like dressing or undressing, or engaged in sexual activity. This Article is aimed at punishing those who view or listen to others without their consent even if a physical trespass onto property has not occurred. In this way, a person who uses binoculars to unlawfully observe others is liable and so is a person who inappropriately views others in public places like restrooms. Observation of one’s own minor children is exempted from liability, for obvious reasons, as long as the observation is not undertaken to provide sexual gratification to any person.

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<sup>172</sup> Sahih Buhari 7402, Book 91, Hadith 56; YUSUF AL-QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM (AL-HALAL WAL-HARAM FI’L ISLAM), 313.

*Relation to Current Law.* There are no corresponding provisions of this nature in the current Penal Code (1962). Similar existing offenses like Arts. 470 and 471, which concern violation of the privacy of the home, are punished in line with Class F felonies under this draft code. As a lesser offense that requires no physical trespass nor recording of any kind, Art. 6302 is punished as a Class [A misdemeanor]. This draft Article expands, but is in compliance with, the general Article 19 of the Provisional Constitution (Inviolability of the Home).

*Relation to Sharia Law.* This Article is generally supported by the Sharia. Yusuf al-Qaradawi notes that “prying into other people’s private affairs and spying on their secrets is not permitted.”<sup>173</sup> The Prophet (pbuh) strictly forbade “peeping” into other people’s homes without their permission.<sup>174</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Article 6303. Unlawful Use or Disclosure of Private Information**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 474 (Disclosing the Contents of Correspondence), 476 (Disclosure of Contents of Correspondence by a Person Employed in the Postal, Telegraph or Telephone Services), 477 (Disclosing the Contents of Secret Documents), 478 (Disclosing Professional Secrets), and 479 (Disclosing Scientific or Industrial Secrets)

#### **Comment:**

*Generally.* This provision defines the offense of unlawful use of information. The offense prohibits a person from disclosing or using information that the person knows was obtained in a manner prohibited by Articles 6301 (Unlawful Eavesdropping or Surveillance) or 6302 (Voyeurism).

Section (a) prohibits the disclosure of fraudulently obtained information by any method that constitutes an offense under draft Article 6201 or 6202. If a person is absolved from liability under one of those Articles—for instance, by means of the whistleblower exception in Article 6301(b)—the person is also immune from liability under Section (a)(1) of this Article. However, disclosure of information obtained through the conduct prohibited under draft Articles 6301 and 6302 is not the only way to incur liability under this draft Article. Disclosure of information otherwise required by law to be kept confidential is criminalized under Section (a)(2).

Section (b) grades the offense.

*Relation to Current Law.* This draft Article expands the liability found in Arts. 474 and 476-479 of the current Penal Code (1962), but is nonetheless in harmony with those provisions. This offense updates the concept of communication to include more than just mail correspondence, and, consonant with Arts. 478 and 479 of the current Penal Code (1962), punishes disclosure more harshly than mere access or interception (which is covered by draft Article 6304 (Unlawful Access to Private Information)). Current Art. 474’s punishment enhancement for fraudulent interception or disclosure of information by postal officials is reflected in the grading scheme under Section (b) of this draft Article. Conduct that constitutes an offense under this grade provision is punished more harshly if the offender is a person

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<sup>173</sup> YUSUF AL-QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM (AL-HALAL WAL-HARAM FI’L ISLAM), 312.

<sup>174</sup> Sahih al-Bukhari 6242, Book 79, Hadith 16.



entrusted with transmitting private communications, like persons employed in the postal, telegraph, or telephone services industry.

*Relation to Sharia Law.* Muslim jurists are in agreement that “revealing anything whose disclosure is resented” is forbidden.<sup>175</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

#### **Article 6304. Unlawful Access to Private Information**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 472 (Interception, Removal and Suppression of Correspondence), 473 (Fraudulent Ascertainment, Interruption and Prevention of Telegraphic or Telephonic Communications of Conversations), and 475 (Interception, Removal and Suppression of Correspondence Committed by a Person Employed in the Postal, Telegraph or Telephone Services)

#### **Comment:**

*Generally.* This provision defines the offense of unlawful access to private information. The offense prohibits a person from accessing or causing to be accessed information, electronic programs, or data when the person is not authorized to do so. The offense recognizes that even if a person does not steal or alter information, unauthorized access to information is, by itself, an invasion of privacy that the law ought to punish, much like a criminal trespass that results in no harm to the property.

*Relation to Current Law.* This draft Article comports with Arts. 472, 473 and 475 of the Penal Code (1962), which punish unlawful interception and ascertainment of telegraphic and telephonic correspondence. This Article updates and expands the definition of the communications at issue to include any sound, image, writing, signal, or datum transmitted over any medium. This offense is graded as a Class [C] misdemeanor. The grading reflects Arts. 472 and 473 of the current Penal Code (1962), which provide lesser punishments for secretly ascertaining and intercepting communication.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

#### **Comment on Article 6305. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international

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<sup>175</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (Nuh Ha Mim Keller trans., Amana Publications 1994), 771.

law.

## Chapter 6400. Offenses Against the Family

### General Comment on Chapter 6400. Offenses Against the Family

This Chapter criminalizes certain conduct within the context of familial and other interpersonal relationships. This Chapter is intended to reflect society's need for social order and the necessity of penalizing conduct harmful to individuals and families, and also to enforce familial obligations that people undertake with respect to one another. Article 6401 penalizes illegal marriages. Articles 6402 and 6403 penalize certain sexual conduct. Article 6404 and 6405 penalize wrongful acts and omissions as to dependent children or other family members.

### Comment on Article 6401. Unlawful Marriage

**Corresponding Current Provision(s):** Penal Code (1962) Art. 425 (Illegal Marriage)

#### **Comment:**

*Generally.* This Article criminalizes certain types of marriages. Section (a)(1) makes it an offense to marry a close relative. Because the definition of a "close relative" includes "a person who, by virtue of marriage, has become a relation" such as a step-sibling or in-law, Section (a)(1) includes situations where a man marries his wife's sister.

Section (a)(2) makes it an offense to marry someone of the same sex.

Section (a)(3)(A) makes it an offense for a man to marry more than four wives. Section (a)(4) makes it an offense for a woman to marry more than one husband. Section (a)(3)(B) makes it an offense for a man to marry a woman who is in her post-marital waiting period.

If an individual knows his or her marriage is unlawful, sexual intercourse between the two unlawfully married parties is illegal and subject to punishment under Article 6402 (Unlawful Sexual Intercourse).

Section (b) grades this offense as a Class [F] felony.

*Relation to Current Law.* This draft Article incorporates Art. 425 (Illegal Marriage) of the current Penal Code (1962). Art. 425 penalizes marriages that are unlawful due to a person's "personal status." The draft Article further defines the offense of unlawful marriage.

*Relation to Sharia Law.* The common view among Muslim jurists is that a man may marry up to four women at the same time, while also indicating a preference for marrying only one. Ahmad b. Naqib al-Misri states that "it is unlawful for a free man to marry more than four women. It is fitter to confine oneself to just one."<sup>176</sup> This is supported by the following Qur'anic verse: "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one."<sup>177</sup> In addition, Section (a)(1)(B) and (a)(3)(A) are both based on guidelines found in the Qur'an regarding marriages that would be considered incestuous and prohibitions on marrying a woman observing her *iddah* (post-marital waiting period).<sup>178</sup>

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<sup>176</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER ('UMDAT AL-SALIK), 530.

<sup>177</sup> QUR'AN 4:3.

<sup>178</sup> YUSUF QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM, p. 173-177.

*Relation to International Law.* This Article is in tension with Article 16 of the Convention on the Elimination of Discrimination Against Women (CEDAW), which obligates states to take appropriate measures to ensure the equal treatment of women to enter into and dissolve marriage. However, Somalia is not a signatory to CEDAW.

### **Comment on Article 6402. Unlawful Sexual Intercourse**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 410 (Homosexuality), and 426 (Adultery)

#### **Comment:**

*Generally.* This Article criminalizes sexual intercourse between two people who are not legally married. The rationale informing these draft provisions is that intercourse of this kind promotes social disorder. This Article addresses individuals who “engage” in sexual intercourse, meaning that the individuals perform the conduct of their own volition.

Section (a)(1) criminalizes sexual intercourse between a married person with another person who is not his or her spouse. The requirement of a lawful marriage ensures that a person who is in an unlawful marriage cannot claim that he or she is “married” under Section (a)(1). An unlawfully married person has committed the offense of unlawful sexual intercourse under Section (a)(2) if he or she has sexual intercourse.

Section (b)(1) grades the offense as a Class [F] felony if the person engages in sexual intercourse with someone of the same sex. This section punishes male homosexual acts the same as female homosexual acts. Section (b)(2) grades the offense as a Class [A] misdemeanor if the person engages in heterosexual sexual intercourse.

Section (c)(1) requires that a prosecution for unlawful sexual intercourse must be initiated by the injured spouse. Generally, the public does not have a sufficiently compelling interest in the integrity of a married couple’s sexual relations to have the power to prosecute an adulterous spouse independently of the injured spouse’s wish to do so. Section (c)(2) requires the proof of four eyewitnesses in order to convict a person of adultery. To be an eyewitness, a person must witness the act of penetration.

*Relation to Current Law.* This draft Article incorporates Art. 426 (Adultery) of the current Penal Code (1962). This draft Article expands the definition of adultery to include sexual intercourse between two unmarried persons. Section (b)(1) of this draft Article codifies Penal Code (1962) Art. 410 (Homosexuality).

*Relation to Sharia Law.* This Article is supported by Sharia law, which restricts lawful sexual intercourse to a husband and wife.<sup>179</sup> Islamic law has defined sexual intercourse as the insertion of the penis into the vagina.<sup>180</sup> The following verse of the Qur’an (17:32) is cited in support of this: “Approach not fornication, it is surely an indecency and evil.”

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<sup>179</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 660 (Nuh Ha Mim Keller trans., Amana Publications 1994).

<sup>180</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 638 (Nuh Ha Mim Keller trans., Amana Publications 1994).

Section (b)(1) is supported by Muslim jurists who proscribe sodomy based on Qur’anic injunctions and Prophetic tradition.<sup>181</sup> Support for the prohibition of lesbianism exists within Islamic law based on particular Prophetic traditions.<sup>182</sup>

The four-witness restriction for a conviction for unlawful sexual intercourse is a principle found in Sharia law.<sup>183</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6403. Incest**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 427 (Incest)

#### **Comment:**

*Generally.* This Article prohibits engaging in sexual intercourse between close relatives. “Close relative” is defined in Article 6406. A person who is coerced, or under duress as defined in draft Article 605, has not chosen to “engage” in the sexual intercourse and has not committed an offense under this Article. Under Section (b)(1), the offense is a Class [E] felony if the defendant is a parent, grandparent, or great-grand parent of the close relative. Parents, grandparents, and great-grandparents are punished more harshly because they have a special duty to their children and grandchildren, and violation of this relationship is especially damaging to the victim and society.

*Relation to Current Law.* This draft Article incorporates Art. 427 (Incest) from the current Penal Code (1962). Art. 427 forbids sexual intercourse between persons who are forbidden to marry based on their personal status. This Article relies on the term “close relative” to capture the same idea.

*Relation to Sharia Law.* Since Sharia law only permits sexual intercourse within a marital relationship, the commentary on Article 6401(a)(3)(A) applies here as well.

*Relation to International Law.* Nothing in this Article is inconsistent with international law

### **Comment on Article 6404. Endangering the Welfare of a Child**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Art. 29 (Children); Penal Code (1962) Arts. 431 (Abuse of Measure of Correction or Discipline), 432 (Ill-treatment of Children and Members of the Family), 448 (Abandonment of Minors or Incapable Persons), and 449 (Abandonment of Newly-Born Child for Reasons of Honour)

#### **Comment:**

*Generally.* This draft Article criminalizes the endangerment of children caused by abandonment and neglect. The offense reflects the duty parents and legal guardians owe to their children. This draft Article criminalizes child endangerment in two ways. Section (a)(1) makes

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<sup>181</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 664-665 (Nuh Ha Mim Keller trans., Amana Publications 1994) (“There is consensus among Muslims...that sodomy is an enormity.”).

<sup>182</sup> AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELER 665 (Nuh Ha Mim Keller trans., Amana Publications 1994) (Relating the Prophetic tradition: “Lesbianism by women is adultery between them.”).

<sup>183</sup> QUR’AN 24:4.

it an offense for a parent or guardian to leave or abandon a child in circumstances that would unreasonably endanger the child's wellbeing, including their safety, health, or welfare. Section (a)(2) expands parental duty to include preventative measures. This Section makes it a crime for a parent or guardian to fail to take reasonable measures to prevent the commission of a violent offense against his or her child if he or she knows such an offense is likely to occur. Violent offenses include, but are not limited to, those contained in draft Chapters 3100 (Homicide Offenses), 3300 (Sexual Offenses) and 3400 (Kidnapping Offenses).

For example, suppose that a father sexually assaults one of his children, that the mother is aware of the assault, and that the mother is an ordinary adult who is not incapacitated. To avoid liability under Section (a), the mother must take reasonable measures to prevent the father's conduct. This includes reporting the father's offense to law enforcement authorities as soon as practicable, or attempting by affirmative action to prevent commission of the underlying offense.

Section (b) grades the offense commensurate with the harm caused. The offense is a Class [D] felony if the conduct results in death, and a Class [E] felony if it results in serious bodily injury. In all other instances, the offense is a Class [A] misdemeanor.

*Relation to Current Law.* This draft Article creates criminal enforcement for the principles laid out in Article 29 (Children) of the Provisional Constitution (2012). It also streamlines four offenses of the Penal Code (1962): Arts. 431 (Abuse of Measure of Correction or Discipline), 432 (Ill-treatment of Children and Members of the Family), 448 (Abandonment of Minors or Incapable Persons), and 449 (Abandonment of Newly-Born Child for Reasons of Honour). By broadening the definition of endangerment, Arts. 431 and 432 of the Penal Code (1962) are both covered by this draft Article. Additionally, the inclusion of the word "abandons" in Section (a)(1) of this draft Article incorporates the offenses in Arts. 448 and 449 of the Penal Code (1962). Finally, commensurate with each Penal Code (1962) provision, this draft Article are graded more harshly if death or serious bodily injury occurs.

Section 2 of Art. 449 (Abandonment of Minors or Incapable Persons) of the Penal Code (1962) is not included in this draft provision. That section, which criminalizes the abandonment of minors in a foreign territory for the purposes of work, is covered by the human-trafficking provisions in draft Chapter 2100. Additionally, Art. 433 (Abduction of Persons Under Legal Incapacity) of the Penal Code (1962) is not included here but instead codified in draft Article 3401 (Kidnapping).

*Relation to Sharia Law.* Islamic law generally supports this draft Article by prohibiting "neglecting one's dependents."<sup>184</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6405. Persistent Non-Support of a Family Member**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 430 (Violation of Duty Towards Family)

#### **Comment:**

*Generally.* This draft Article criminalizes financial non-support of persons who are unable to provide for themselves and to whom one owes an affirmative familial duty of support.

This draft Article requires three conditions to be met before non-support becomes an

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<sup>184</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER ('*Umdat al-Salik*) 983

offense. First, the actor must have the ability to provide financial support. This is intended to exempt from liability those who, through no fault of their own, cannot afford to provide for another person. Second, Section (a)(1) limits application of this draft Article to non-support of minor children, parents over the age of 50, and incapacitated parents and spouses. A spouse who is not incapacitated is excluded from the list of persons to whom one owes support because such a spouse is not considered unable to provide for himself or herself. Non-support of a non-incapacitated spouse could potentially be a civil violation. Third, Section (a)(2) requires that the family member be in need of such support. Needing support can be established generally, or, under draft Section (a)(2)(B), through court or administrative order of support that has been ignored.

Section (b) grades the offense as a Class [F] felony if the non-support is flagrant—meaning that the person ignores a court or administrative order for eight months. The offense is a Class [A] misdemeanor in all other instances.

*Relation to Current Law.* This draft Article streamlines and provides more detail to Art. 430 (Violation of Duty Towards Family) of the Penal Code (1962). Rather than broadly criminalizing general conduct that “avoids the obligations relating to the exercise of parental authority, legal guardianship or marriage,” this draft Article outlines specific conduct that will give rise to a criminal offense.

*Relation to Sharia Law.* Islamic law generally supports this draft Article by making it obligatory to support one's parents and children.<sup>185</sup> The condition of being able to provide support is also supported by Islamic law, which exempts violations of familial duty for reasons of “poverty.”<sup>186</sup> The age for support of a child under Sharia law is tied to puberty, which of course varies depending on the person, and is determined by the signs of puberty. If no such signs manifest, then most Sharia scholars presume puberty at the age of 15 for both males and females.<sup>187</sup> This draft Code uses the age of 14 in order to remain consistent with the Penal Code (1962). (See, for example, Penal Code (1962) Art. 59 (Persons Under Fourteen Years of Age)).

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 6406. Definitions.**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 304 (Definition of Near Relative)

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962), including the definition of “near relative” in Art. 304, though expanded to include those covered by the Sharia definition for the purposes of incest. For example, section (a)(5) is added based on Sharia law. Section 2 of Art. 304 is reflected in draft section (a)(6), which applies only to current marriages.

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<sup>185</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (*‘Umdat al-Salik*), 547

<sup>186</sup> AHMAD B. NAQIB AL-MISRI, RELIANCE OF THE TRAVELER (*‘Umdat al-Salik*) 548.

<sup>187</sup> IMRAN AHSAN KHAN NYAZEE, GENERAL PRINCIPLES OF CRIMINAL LAW: ISLAMIC AND WESTERN 128-28 (Advanced Legal Studies Institute 2000).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law. Additionally, the definition of “close relative” is consistent with the Sharia definition of this term for the purposes of incest.<sup>188</sup> By virtue of Section (a)(6), “close relative” includes a mother-in-law, father-in-law, sister-in-law, brother-in-law, and step-child or step-parent.

The definition of “post-marital waiting period” is also consistent with the definition in Sharia law.<sup>189</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 6500. Crimes Against Religion**

### **Introduction: Chapter 6500**

This Chapter differs from other Chapters in the draft Code in that it is largely a response to the Somali government’s requests for additions to current law. The scope of these provisions creates conflicts with current rights provided in the Provisional Constitution (2012), Sharia law, and international law.

### **Comment on Article 6501. Apostasy**

**Corresponding Current Provision(s):** None.

#### **Comment:**

*Generally.* This draft Article makes it an offense for a Muslim to publicly declare the adoption of a religion other than Islam. It includes an exception under Section (b) for a person who, at any point, recants the declaration.

*Relation to Current Law.* This offense is not in current law.

*Relation to Sharia Law.* There is disagreement among Muslim jurists as to whether apostasy is a *hadd* offense.<sup>190</sup> In the opinion of many well-established Islamic scholars and institutions, there is no basis for punishment of apostasy today.<sup>191</sup> In fact, there is no punishment for apostasy mentioned in the Qur’an; it is simply something that will be punished in the “next

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<sup>188</sup> YUSUF AL-QARDAWI, AL-HALA WAL-HARAM FI’L ISLAM (“THE LAWFUL AND PROHIBITED IN ISLAM”) (American Trust Publications) (See section on “In-Law Relationships”); see also; Javed Ahmed Ghamidi, Law of Society, ISHRAQ, January 2003, at 15-16.

<sup>189</sup> See *supra* note 178.

<sup>190</sup> See JAVED AHMAD GHAMIDI, MIZAN (“Balance”) 282 (Dar ul-Ishraq, 2001) (“The verdict (of apostasy)... does not have a general application but is only confined to the people toward whom the Prophet (sws) was directly assigned.”).

<sup>191</sup> See MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 49-56 (American Trust Publications, 1993); KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW 32 (Cambridge University Press, 2001); Haneen Dajani, *Outdated religious laws must be changed, UAE forum hears*, THE NATIONAL|UAE (April 29, 2015), available at <http://www.thenational.ae/uae/outdated-religious-laws-must-be-changed-uae-forum-hears> (noting the views of Abdullah bin Bayyah and Ahmed Al-Tayyeb).



life.”<sup>192</sup> Moreover, punishing apostasy contradicts the Qur’anic principle that there is “no compulsion in religion.”<sup>193</sup>

In medieval times, many jurists saw apostasy as an act of treason because religion was the basis for one’s allegiance to the state; thus, changing faiths was seen as an act of war. Hence, jurists did not simply punish the lack of belief, but what they considered the “mischief of war.”<sup>194</sup> As a result, female apostates were often not punished like male apostates because they lacked agency to fight. Furthermore, jurists like Mohamed El-Awa have qualified the punishment stating that it is “inflicted in cases in which the apostate is a case of harm to the society, while in those cases in which an individual simply changes his religion the punishment is not to be applied.”<sup>195</sup>

*Relation to International Law.* International resolutions define freedom of religion as including freedom to change one’s religion or belief.<sup>196</sup> International law considers this a fundamental human right. The United Nations General Assembly incorporated this right into the International Covenant on Civil and Political Rights, to which Somalia became a signatory in January 1990.<sup>197</sup> The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief reaffirmed this right in 1981. Additionally, allowing the death penalty for this offense violates international law, which recommends sparing use of this harsh penalty.<sup>198</sup>

### **Comment on Article 6502. Disparaging Islam**

**Corresponding Current Provision(s):** Provisional Constitution (2012), Arts. 2 (State and Religion), 17 (Freedom of Religion and Belief); Penal Code (1962) Arts. 313 (Bringing the Religion of the State into Contempt); 314 (Disturbing Religious Functions); 315 (Crimes Against Forms of Worship Permitted in the State); 417 (Definition), and 559 (Blasphemy and Offensive Acts Towards the Dead)

#### **Comment:**

*Generally.* The draft Article criminalizes both the interference with Islamic religious practice, and disparaging criticism of the fundamental tenets of Islam.

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<sup>192</sup> TAHA JABIR AL-ALWANI, APOSTASY IN ISLAM 32 (International Institute of Islamic Thought, 2011)(“none of the...verses...makes any mention of an earthly punishment for the sin or crime of apostasy.”); MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 49-56 (American Trust Publications, 1993)(“the Qur’an prescribes no punishment in this life for apostasy.”); INTISAR RABB, DOUBT IN ISLAMIC LAW 33 (Cambridge, 2015)(“the Qur’an unequivocally condemned apostasy as an egregious moral-spiritual wrong, but attached no specific criminal punishment to it or to blasphemy.”).

<sup>193</sup> QUR’AN 2:256.

<sup>194</sup> This view is particularly present among Hanafi scholars. See, MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 63-64 (American Trust Publications, 1993).

<sup>195</sup> See MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 64 (American Trust Publications, 1993).

<sup>196</sup> See Chapter 18 of the United Nations Declaration of Human Rights (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”).

<sup>197</sup> *International Covenant on Civil and Political Rights* Art. 18 (“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”).

<sup>198</sup> U.N. Human Rights Committee, *General Comment no. 34, Article 19, Freedoms of Opinion and Expression*, CCPR/C/GC/34 (Sept. 12, 2011) at ¶ 38.



Sections (a)(1)-(3) specify the behaviors that trigger liability under this draft Article. Section (a)(1) addresses religious oration or criticism of the fundamental tenets of Islam. Thus, both a speech performed in a public square and a speech videotaped and posted online would trigger liability under this Section. Section (a)(2) addresses the production, sale, or distribution of materials that criticize the fundamental tenets of Islam.

Importantly, Sections (a)(1) and (a)(2) also require that the conduct described in each provision criticize the “fundamental tenets of Islam.” This requirement limits liability to only that speech or those materials that insult the most basic tenets of Islam, such as the oneness of God, acceptance of Muhammad as His prophet, prayer, fasting, pilgrimage, and charity.<sup>199</sup> In cases where the criticism of Islam is minimal, most likely the defendant will not have satisfied this element of the offense.

Section (a)(3) criminalizes conduct that impedes or disturbs the exercise of Islamic functions, ceremonies, or practices in a place intended for religious purpose, or in a public place. For instance, if a person enters a mosque and disrupts the sermon during *Jummah* prayer because they disagree with the preacher (*khatib*), or they try to forcibly stop the celebration of the Prophet’s birthday (*mawlid al-nabi*) in a public place, they may be liable under this provision.

Section (b) grades the offense as a Class [B] felony.

*Relation to Current Law.* This draft Article simplifies and consolidates four provisions from the Penal Code (1962): Arts. 313 (Bringing the Religion of the State into Contempt), 314 (Disturbance of Religious Functions), 315 (Crimes Against Forms of Worship Permitted in the State), and 559 Section 1 (Blasphemy and Offensive Acts Towards the Dead).

Art. 313 of the Penal Code (1962) is incorporated into Sections (a)(1)-(2). This draft Article also reflects Art. 559 (Blasphemy and Offensive Acts Towards the Dead) of the Penal Code (1962), because it incorporates the limitation of liability to conduct “with incentives [sic] or insulting words, the Deity or the symbols or the person venerated in the Religion of the State” by similarly limiting liability under this draft Article to conduct that is intended to “disparage Islam” and which criticizes the “fundamental tenets of Islam.” Doing so also helps to ensure that legitimate discourse is protected, and that only conduct that is both sufficiently blameworthy and likely to cause a public disturbance is sanctioned.

Section (a)(3) incorporates Art. 314 of the Penal Code (1962). Art. 315 is not fully incorporated in this draft Article of the Penal Code (1962), because it refers to an outdated Constitution. However, because that provision acted to criminalize the similar conduct for any religion permitted in the State, and because Articles 2 and 17 the current Constitution only permit Islam to be propagated in the State, this draft Article is not inconsistent with Art. 314 of the Penal Code (1962).

The grading of this offense is much harsher than the grading of the offense in the Penal Code (1962). All of the corresponding Penal Code (1962) articles allow a maximum of two years imprisonment for an offense, whereas this offense increases the maximum punishment more than tenfold, to a Class [B] felony.

Finally, this provision contradicts the guarantee of rights in the Provisional Constitution (2012) Article 18 (Freedom of Expression and Opinion). Particularly, that provision guarantees the right to freely express information gathered through research; however, this draft Article does not include a guarantee that scholarly work will be free from criminal liability. Moreover, to comply with the requirements of freedom of expression and opinion, this offense should not reach conduct that is reckless with respect to whether it criticizes Islam, but rather only conduct

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<sup>199</sup> SAHIH MUSLIM 16c, Bk. 1, Hadith 21, available at <http://sunnah.com/muslim/1/21>.

where the person knowingly criticizes. This draft Article should be interpreted to comply with the guarantees of Article 18—however, it is recommended that this Article include express limitations on its reach in order to fully comply.

*Relation to Sharia Law.* There is no Sharia justification for the expansion of this provision to cover private conduct done recklessly. The state’s jurisdiction with regard to private homes is very limited and often only gets triggered when the private conduct directly impacts the public. Additionally, there is no support for this Article’s coverage of all public speech, including scholarly work. Muslim jurists generally support free debate within Islamic society.<sup>200</sup>

*Relation to International Law.* Although criminalizing behavior that amounts to a public disturbance is consistent with international law generally, this draft Article violates Somalia’s treaty obligations under the International Covenant for Civil and Political Rights and the International Covenant for Economic and Social Rights, both of which protect the freedom of speech, including the criticism of religion. Restricting the provision’s operation to situations that actually constitute or result in a public disturbance would bring this draft Article into compliance with Somalia’s international obligations.

### **Comment on Article 6503. Propagating a Religion Other than Islam**

**Corresponding Current Provision(s):** Provisional Constitution (2012) Arts. 2 (State and Religion), and 17 (Freedom of Religion and Belief)

#### **Comment:**

*Generally.* This draft Article makes it an offense for a person in the Somali State to contact another individual who is a Muslim with the intent to persuade that person to convert to another religion. The basis for this provision is in the Provisional Constitution, but this Article could be limited in various ways to accommodate free expression, which the Constitution and international law require, and the privacy of the home, which Sharia requires.

*Relation to Current Law.* There are no corresponding provisions in the Penal Code (1962); rather, this principle derives from the Provisional Constitution, which provides that “No religion other than Islam can be propagated in the Federal Republic of Somalia.”

*Relation to Sharia Law.* The commentary for apostasy is relevant for this provision, as this describes conduct that is an instance of aiding apostasy. In order to fully comply with Sharia law, this provision should include an exemption for private conduct within the home.<sup>201</sup>

*Relation to International Law.* This draft Article conflicts with the guarantee of freedom of expression and religion in international law. See the commentary for draft Article 6501 (Apostasy) and 6502 (Disparaging Islam).

## **Crime Control Offenses**

### **Chapter 7100. Weapons**

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<sup>200</sup> MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM (Islamic Texts Society, 1997); AL-RISALA MONTLY (Al-Risala Forum International) (<http://www.alrisala.org/Chapters/islam/expression.htm>).

<sup>201</sup> See generally, Chapter 6300 and the commentary on Sharia rules regarding privacy. The Qur’an contains strong language prohibiting spying (QUR’AN 49:12) and regulating outside parties entering a home (QUR’AN 2:189, 24:27).

## **Introduction: Chapter 7100**

This Chapter criminalizes harmful conduct related to dangerous weapons, catastrophic agents, explosives, and firearms. This Chapter is intended to reflect society's need to limit the use, proliferation, and possession of dangerous weapons, catastrophic agents, explosives, and firearms because of the danger posed by their use. These types of objects can also become a destabilizing force in society, making it easy for people to turn to violence instead of committing to the rule of law. Article 7101 penalizes the use of a dangerous weapon during an offense. Articles 7102 and 7103 penalize the trafficking, manufacture, sale, and possession of firearms and catastrophic agents. Article 7104 penalizes unlawful discharge of a firearm or detonation of an explosive. Article 7105 penalizes the failure to declare explosives to law enforcement.

## **Comment on Article 7101. Use of a Dangerous Weapon During an Offense**

**Corresponding Current Provision(s):** None

### **Comment:**

*Generally.* This Article criminalizes using or displaying a dangerous weapon during an offense. Section (a) defines the offense as the use or display of a dangerous weapon in the course of committing an offense. A person can only be charged with use or display, and cannot be charged with two counts of this offense because he or she displays a weapon while using the weapon during an offense.

The grading for Article 7101 distinguishes between discharge of a firearm, graded under Section (b)(1) as a Class [C] felony, and all other offenses under Article 7101 graded under Section (b)(2), which are Class [D] felonies. Discharge of a firearm receives a higher grade because it is more likely that another person will be harmed if a weapon is discharged. Displaying or using a firearm without discharging it is less likely to cause harm.

For example, it is an offense under this Article to use a firearm while committing murder (Article 3101). Use could be discharge of the weapon, whether or not discharge causes the injury or death, which would be an offense under Section (b)(1). Use could also be hitting another person with the weapon, which would be an offense under Section (b)(2). If a person only displays the dangerous weapon, he or she commits an offense under Section (b)(2).

Section (b)(3) contains an aggravating factor that, if present, causes the grade of the offense to be increased. If an automatic or semiautomatic weapon is used, the offense is one grade higher than it would otherwise be. Therefore, if a person displays an automatic weapon in the course of committing an offense, he or she commits a Class [C] felony. This is grade adjustment is used because of the increased danger posed by automatic and semiautomatic weapons.

Section (c) provides guidance when charging offenses, due to the fact that some offenses or grades of offenses already account for the use of a weapon. If an offense already accounts for the use of a weapon, a prosecutor should not charge an individual with violating both Article 7101 and the underlying offense.

*Relation to Current Law.* This draft Article has no corresponding provision in current law.

*Relation to Sharia Law.* Islamic law supports this Section by broadly prohibiting the threatening use of dangerous weapons. Muslim jurists have looked unfavorably at even “pointing” or “gesturing” at others with dangerous weapons.<sup>202</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7102. Trafficking, Manufacture, Sale, or Possession of Firearms**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 532 (Aggravating Circumstances), and 539 (Failure to Keep Arms in Custody)

#### **Comment:**

*Generally.* This Article criminalizes the trafficking, manufacture, sale, or possession of firearms. This offense aims to prevent the spread of firearms through society and the possession of firearms by members of society because of firearms’ dangerous and destabilizing potential. However, Section (a) allows that the government may regulate firearms in a way that licenses individuals or businesses to possess, manufacture, or sell firearms. If a person or business possesses the proper governmental authorization, no offense has been committed under this Article.

The offense criminalizes five specific acts. Section (a)(1) criminalizes the sale of a firearm for resale. For example, it is an offense under this Section if a person sells a weapon to a buyer with the knowledge that the buyer intends to resell the weapon. Section (a)(2) criminalizes the possession of a firearm with the purpose of selling it for resale. For example, it is an offense under this section if a person buys a firearm with the purpose of selling it to a trader who will resell the firearm. Section (a)(3) criminalizes manufacturing firearms. For example, it is an offense under this section to own or operate a factory that produces firearms. Section (a)(4) criminalizes the sale or transfer of a weapon to another. For example, it is an offense under this Section for a person to sell a weapon that he or she no longer needs or uses. It is also an offense to give that weapon away for free. Section (a)(5) criminalizes the possession of a firearm. For example, it is an offense under this Section for a person to keep a firearm in his or her home. It is also an offense to walk in public carrying a firearm.

The offense under Section (a)(1) is graded as a Class [C] felony under Section (b)(1). It receives a higher grade than the other offenses in Article 7102 because it is aimed at stopping the spread of firearms throughout society. The offenses under Sections (a)(2) and (a)(3) are graded as Class [D] felonies under Section (b)(2). Section (a)(2) is graded one grade lower than Section (a)(1) because possession with intent to perform a prohibited act is a specially codified form of attempt liability, and inchoate offenses like attempt are always graded at one grade lower than the substantive, target offense. Section (a)(3) relates to the creation of firearms, which could increase the number of firearms in circulation, and therefore receives a relatively high grade compared to other offenses in this Article. The offense under Section (a)(4) is graded as a Class [D] felony under Section (b)(3) if the firearm is transferred to a person under the age of 14 or to a person prohibited by law from obtaining a firearm. These circumstances receive special treatment because a firearm could be more dangerous in the hands of a young person or the hands of someone law enforcement has deemed unfit to possess a firearm. In all other instances,

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<sup>202</sup> AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELER* 692,984 (Nuh Ha Mim Keller trans., Amana Publications 1994).

the offense under Section (a)(4) is graded as a Class [E] felony under Section (b)(3)(B). The offense under Section (a)(5) is graded as a Class [A] misdemeanor under Section (b)(4)(A) if the firearm is loaded and carried in a public place. These circumstances receive a higher grade than possession of an unloaded gun in a private space because of the higher potential to harm another person. In all other circumstances, the offense under Section (a)(5) is graded a Class [B] misdemeanor under Section (b)(4)(B).

Section (b)(5) contains an aggravating factor. If the offense in Article 7102 is committed with an automatic or semiautomatic weapon, the offense is one higher grade than it would be otherwise. For example, if a person sold an automatic firearm for resale, criminalized under Section (a)(1), the offense would be a Class [B] felony instead of a Class [C] felony because it involved an automatic weapon.

*Relation to Current Law.* This draft Article incorporates Art. 532 (Aggravating Circumstances) and Art. 539 (Failure to Keep Arms in Custody).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7103. Trafficking, Manufacture, Sale, or Possession of Catastrophic Agents**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 530 (Unlawful Manufacture of and Trade in Explosive Materials), and 541 (Arms)

#### **Comment:**

*Generally.* This Article criminalizes the trafficking, manufacture, sale, or possession of catastrophic agents. This offense aims to prevent the spread of catastrophic agents through society and the possession of catastrophic agents by members of society because of the agents' dangerous and destabilizing potential. This Article operates in the same way as Article 7102: it criminalizes the same five specific acts, and creates the possibility of exceptions to the offense based on government-issued licenses and other forms of official permission. The difference between the two Articles is that this Article focuses on catastrophic agents, while Article 7102 focuses on firearms.

The grading for this draft Article identical to the grading for Article 7102, except that aggravating factors unique to firearms are not incorporated into the grades of the offenses here.

*Relation to Current Law.* This draft Article incorporates Art. 541 (Arms) of the current Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7104. Unlawful Discharge or Detonation**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 540 (Dangerous Ignitions and Explosions)

#### **Comment:**

*Generally.* This Article criminalizes the reckless discharge of a firearm or detonation of an explosive without a license. This Article aims to prevent the potentially fatal consequences of discharging a firearm or detonating an explosive, which can put people and property in substantial danger. For example, it would be an offense under Section (a) for a person to engage in target practice with a firearm if the person did not have a license for the firearm. It would also be an offense under Section (a) for a person to use an explosive to demolish his or her home if the person did not have a license to detonate the explosive.

Section (b)(1) grades this offense a Class [E] felony if committed in a public place. Otherwise, Section (b)(2) grades this offense a Class [A] misdemeanor. The offense receives a higher grade when committed in a public place because of the increased likelihood that a person will be wounded by the discharge or detonation.

*Relation to Current Law.* This draft Article incorporates Art. 540 (Dangerous Ignitions and Explosions) of the current Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7105. Failure to Declare Explosives**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 531 (Failure to Declare Explosive Materials)

#### **Comment:**

*Generally.* This offense criminalizes a person's failure to inform a law enforcement officer when the person is asked that he or she is in possession of explosives or that explosives are being stored in his or her place of inhabitation. This offense aims to allow law enforcement to stay informed about where potentially dangerous explosives are held in order to make sure they are secure. Ensuring that explosives are secure is intended to prevent explosives from being obtained by dangerous people or groups through sale, theft, or other means.

For example, it is an offense under this Article for a person to obtain explosives for a demolition project and to not inform law enforcement when asked whether he or she is in possession of the explosives. This would be an offense if they were stored at the person's place of business, home, or in any other location as long as the explosives are possessed by the offender.

It would also be an offense for a person to store explosives in his or her place of inhabitation and fail to disclose their existence if asked by a law enforcement officer, even if the explosives did not belong to the person. A person is reasonably expected to be aware of articles that are stored in his or her place of inhabitation. It would not be an offense if the person did not know the explosives were stored at his or her place of inhabitation because the person would fail to meet the reckless culpability requirement.

This Article also criminalizes failure to abide by any existing regulations related to storage of explosives.

*Relation to Current Law.* This draft Article incorporates Art. 531 (Failure to Declare Explosive Materials) of the current Penal Code (1962). It consolidates the punishment to imprisonment terms and not fines because of the potential harm to human life.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7106. Definitions**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 7200. Drugs**

### **Introduction: Chapter 7200**

This Chapter criminalizes certain drug-related offenses. This Chapter is intended to deter the drug trade and drug use. Drug trade is harmful to the Somali nation and to the rest of the world. Drug use is harmful to the individual user and may have secondary effects on those around him. The overall offense grade scheme of this Chapter reflects the relative severity of the harms associated with drug trade and use in order to achieve the most appropriate punishment. Draft Article 7201 penalizes drug trafficking. Draft Article 7202 penalizes the sale of drugs. Draft Article 7203 penalizes drug use or possession.<sup>203</sup>

### **Comment on Article 7201. Drug Trafficking**

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<sup>203</sup> Because Somalia does not currently have a system under which certain substances are available only with a doctor's prescription, the draft code does not include any prescription drug offenses. If Somali should choose to adopt such a system, the following provision should be added to Chapter 7200:

*Article 72XX. Prescription Drug Offenses*

(a) *Unlawful Possession or Use of Prescription Drugs: Offense Defined.* A person commits an offense if he or she:

- (1) knowingly possesses, uses, or consumes
- (2) a substance that is not a controlled drug, but for which a prescription is required by law
- (3) without a valid prescription.

(b) *Unlawful Prescribing: Offense Defined.* A person commits an offense if he or she knowingly prescribes a drug without legal authority to do so.

(c) *Unauthorized Prescription by a Doctor: Offense Defined.* A person commits an offense if he or she:

- (1) is a doctor; and
- (2) knowingly prescribes or overprescribes a drug for the purpose of recreation or other non-medical reasons.

(d) *Grading.*

- (1) The offense under Subsection (a) is a Class [D] misdemeanor.
- (2) The offense under Subsection (b) is a Class [A] misdemeanor.
- (3) The offense under Subsection (c) is a Class [F] felony.

(e) *Definitions.* "Controlled drug" means a substance listed on the [Somali drug list].

**Corresponding Current Provision(s):** Penal Code (1962) Art. 342 (Trading in Narcotics)

**Comment:**

*Generally.* Article 7201 criminalizes drug trafficking. Drug trafficking is a broad term used to describe the range of offenses involved in drug trade. Section (a) defines the offense as knowingly selling a controlled drug for resale, possessing a controlled drug with the purpose of selling it for resale, or manufacturing a controlled drug. In order to be liable for the offense, the person must be aware or practically certain that what he is selling, possessing, or manufacturing is a controlled drug. The phrase “unless authorized by law” means that an individual who has been properly authorized to sell for resale, possess for the purpose of resale, or manufacture a controlled substance is not liable for the offense. For example, an undercover police officer who possesses a controlled substance with the intent to sell it to a suspected drug distributor as part of a valid ongoing investigation would not be liable for the offense. Nor would a manufacturer who has been authorized by the government to produce a substance on the [Somali controlled drug list].

Section (b) provides a rebuttable presumption applicable to prosecutions for the offense described in Section (a). If the defendant possessed more than [50] doses of a controlled substance, it may be presumed that he intended to sell the controlled substance for resale as required for liability under Section (a). However, this presumption is rebuttable and can be overcome by sufficient proof that the defendant did not in fact intend to sell the controlled substance for resale. The reasoning behind the rebuttable presumption is that if a person sells or intends to sell a very large quantity of a controlled substance to another person, it is reasonable to conclude that the recipient will distribute or resell the controlled substance to various third parties rather than keep it for personal use.

Section (c)(1) grades the offense under Section (a)(2) as a Class [D] felony. It is set at one grade lower than actual sale of a controlled drug because possession with intent to sell is a specially codified form of attempt liability, and inchoate offenses are always graded at one grade lower than the substantive, target offense under draft Article 907. In all other cases, Section (c)(2) grades this offense as a Class [C] felony.

*Relation to Current Law.* This draft Article incorporates Art. 342 (Trading in Narcotics) of the current Penal Code (1962). Art. 342 criminalizes illegal trade in narcotics, possession of narcotics for the purpose of sale, and supply or procurement of narcotics for others. The draft Article specifies and further defines the offense of drug trafficking. It also expands the offense to include the manufacture of drugs in order to capture the full range of offenses involved in drug trade.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

**Comment on Article 7202. Drug Sale**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 342 (Trading in Narcotics), and 565 (Supply of Poisonous or Harmful Substance to Minors)

**Comment:**



*Generally.* This Article criminalizes the sale of controlled drugs.

Section (a) defines the offense. An individual commits the offense if he either agrees to transfer a controlled drug in exchange for something of value or possesses a controlled drug with the purpose of transferring it to another in exchange for something of value. In order to be liable for the offense, the person must be aware or practically certain that what he is selling or intends to sell is a controlled drug. The phrase “unless authorized by law” means that an individual who has been properly authorized to sell a controlled substance is not liable for the offense. For example, an undercover police officer who possesses a controlled substance with the intent to sell it to a suspect as part of a valid ongoing investigation would not be liable for the offense.

Section (b) provides a rebuttable presumption applicable to prosecutions for the offense described in Section (a). If the defendant possessed more than [20] doses of a controlled substance, it may be presumed that he intended to sell the controlled substance as required for liability under Section (a). However, this presumption is rebuttable and can be overcome by sufficient proof that the defendant did not in fact intend to sell the controlled drug. The reasoning behind the rebuttable presumption is that if a person possesses a large quantity of a controlled drug, it is reasonable to conclude that he intends to sell it rather than keep it for personal use.

Section (c)(1) grades drug sale under Section (a)(1) as a Class [D] felony if the recipient or intended recipient of the controlled substance is a minor or is mentally impaired, or a Class [E] felony in all other cases. Section (c)(2) grades possession with intent to sell a controlled drug under Section (a)(2) as a Class [E] if the recipient or intended recipient of the controlled substance is a minor or is mentally impaired, or a Class [F] felony in all other cases. These offenses are graded at one grade lower than the completed offense of drug sale because possession with intent to sell is a specially codified form of attempt liability, and inchoate offenses are always graded at one grade lower than the substantive, target offense under draft Article 907.

*Relation to Current Law.* This draft Article incorporates Art. 342 (Trading in Narcotics) of the current Penal Code (1962). Unlike Art. 342 of the current Penal Code, the draft code distinguishes between drug “trafficking” and “sale.” The distinction is one of degree of involvement with the drug trade. Drug “sale” describes the direct transaction with the end user, or the sale of quantities of drugs normally associated with that final transaction. “Trafficking” describes a higher-level involvement with distributing larger quantities of drugs for resale. The higher grade for drug trafficking offenses in draft Article 7201 reflects the higher degree of culpability associated with such high-level involvement in the drug trade, while the drug sale offenses in draft Article 7202 are graded lower because one is less culpable for a low-level sale of a smaller quantity of a controlled substance to a single end user.

The grading distinction within draft Article 7202 also incorporates Arts. 342 (Trading in Narcotics) and 565 (Supply of Poisonous or Harmful Substance to Minors) of the current Penal Code (1962). Art. 342 provides a higher penalty for the sale of drugs to anyone under 18, of unsound mind, mentally deficient, or addicted to narcotics. Draft Article 7202 provides an increased penalty for the sale of drugs to anyone under 18 or anyone who is “mentally impaired,” the definition of which encompasses the mental conditions described in Art. 342. Draft Article 7202’s grading distinction also reflects Art. 565 of the current Penal Code (1962), which criminalizes the delivery of poisonous or harmful substances to a minor.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7203. Drug Use or Possession**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 343 (Abetting in the Use of Narcotics), and 564 (Abuse of Stupefying Substances)

#### **Comment:**

*Generally.* Draft Article 7203 criminalizes the use or possession of a controlled drug.

Section (a) defines the offense as knowingly possessing or using a controlled drug unless authorized by law. The person must be aware or practically certain that the substance he possesses or uses is a controlled drug. The phrase “unless authorized by law” means that an individual who has been properly authorized to possess or use a controlled drug has not committed an offense.

Section (b) grades this offense as a Class [B] misdemeanor. This reflects the fact that the user has minimal culpability as compared to the seller and trafficker, as his drug use tends to have the worst effects on the user himself, though it may have secondary effects on others.

*Relation to Current Law.* Draft Article 7203 incorporates Art. 564 (Abuse of Stupefying Substances) of the current Penal Code (1962). Art. 564 criminalizes being in a state of serious mental imbalance due to a stupefying substance in a public place. The offense defined in draft Article 7203 encompasses such behavior, if the mental imbalance is due to the use of a controlled substance. Draft Article 7203 expands on Art. 564 by not limiting the offense to public use of a controlled substance. Draft Article 7203, in conjunction with the principles of accomplice liability contained in draft Article 401, also encompasses the offense defined in Art. 343 (Aiding and Abetting the Use of Narcotics) of the current Penal Code (1962), which criminalizes aiding and abetting the use of narcotics.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law

### **Comment on Article 7204. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 7300. Terrorism**

## **Introduction: Chapter 7300**

This Chapter punishes crimes related to terrorism. Crimes related to terrorism threaten both sweeping destruction of human life and property and the stability and security of the State. The offenses in this Chapter seek to stabilize the State by punishing acts that help terrorist groups gain, hold, and spread their influence. This Chapter punishes people who commit, support, fund, train or recruit for, or possess or provide materials for acts of terrorism. This Chapter also criminalizes some of the most severe methods for perpetrating acts of violence, which are often used by terrorists. The methods include the use of unlawful explosives and the use of weapons of mass destruction. The punishments in this Chapter reflect the potential for wide-spread destruction of human life and property that result from the actions of terrorists.

## **Comment on Article 7301. Participating in Terrorist Acts**

**Corresponding Current Provision(s):** Counterterrorism Law of 2014 Arts. 1 (The Objective of This Act), 2 (Definition of a “Terrorist Act”), 3 (Terrorist Group and Its Property), 5 (Terrorist Act), 6 (Possession of an Article for Purposes Connected with Terrorism), 7 (Collection of Information), 8 (Preparation), 9 (Directing the Commission of a Terrorist Act), 11 (Recruitment of Persons to be Members of Terrorist Groups or to Participate in Terrorist Acts), 13 (Incitement or Promotion of the Commission of Terrorist Acts), 14 (Conspiracy to Commit Offenses Under this Law), 17 (Soliciting and Giving of Support to Terrorist Groups or for the Commission of Terrorist Acts), and 18 (Use of Property or Funds for Commission of Terrorist Acts)

### **Comment:**

*Generally.* Article 7301 defines offenses related to participating in terrorist acts. Sections (a)(1)-(2) criminalize committing a terrorist act. Section (b) criminalizes supporting a terrorist act. Section (c) criminalizes possession of material for commission of a terrorist act.

Sections (a)(1)-(2) define committing a terrorist act. Section (a)(1) defines the required act. To commit an offense under Section (a)(1), a person must do at least one of the following: (A) cause death or serious bodily injury; (B) endanger a person’s life; (C) seize or detain and threaten to kill, injure, or continue to detain another person or persons; (D) create a serious public health or public safety risk; (E) cause or threaten serious damage to public or private spaces or facilities; (F) seize or threaten to hold or damage an aircraft, ship, vessel, or vehicle of any type; (G) use firearms or explosives; (H) release or threaten to release into the environment any toxic chemical, biological agent, or other harmful substance; (I) interrupt the provision of government, communication, financial, transportation, or other essential services; (J) disrupt the police, civil defense, medical, or other emergency services; or (K) disrupt military operations.

The person must commit the act or acts recklessly, meaning the person either knew or disregarded a substantial risk that he or she was committing the act. It is not enough for a person to commit the act negligently. For example, if a person accidentally sets off an explosive because the explosive looks like a firework for entertainment, he or she does not commit an act under Section (a)(1)(G) because he or she did not set off the explosive recklessly. In contrast, if a

person knows or disregards a substantial risk that the object he or she is setting light to is an unlawful explosive, he or she commits an act under Section (a)(1)(G).

In addition to committing one or more acts under Section (a)(1), a person must fulfill the requirements of Section (a)(2), which defines the culpability and result elements of the offense. A person must intend to: (A) intimidate the public; (B) compel the government or an international organization to act or refrain from an act; or (C) undermine the stability of Somalia. The law requires one of these intentions because the difference between committing a terrorist act and committing another crime is the intent to cause societal disruption, intimidation, coercion that accompanies a terrorist act.

For example, a person commits an offense if he or she commits murder with the intention to force the government to abstain from prosecuting a member of the person's family for a crime. The act of committing murder falls under Section (a)(1)(A) (causing death or serious bodily injury) and the intention of causing the government to abstain from prosecution falls under Section (a)(2)(B) (compelling the government or an international organization to act or refrain from an act). Similarly, a person would commit a terrorist act if he or she jams the radio communication system of the police force with the intention of undermining the stability of Somalia by disrupting the police force. The act of jamming the radio communication system of the police force falls under Section (a)(1)(J) (disrupting police, civil defense, medical, or other emergency services) and the intention of undermining the stability of Somalia falls under Section (a)(2)(C). In contrast, if a person were to commit murder or jam the radio communication system of the police without an intention listed under Section (a)(2), the person would commit an offense under Chapter 3100 (Homicide Offenses) or Chapter 5300 (Obstruction of Government Operations; Escape), but would not commit an offense under this Article.

Section (b) makes it an offense to support a terrorist act. The goal of this Section is to make it more difficult for terrorists to find support for the perpetration of terrorist acts. A person commits an offense if he or she solicits, promotes, funds, or gives material support for a terrorist group. A terrorist group is defined in Article 7304 as an entity whose activities and purposes include the commission of, or facilitation of the commission of, a terrorist act as defined by Section (a) of Article 7301. Note also that the General Part's liability for solicitation and conspiracy, under Chapter 900 (Inchoate Offenses), and complicity under Article 401 (Accountability for the Conduct of Another) can all be used to hold those working with terrorists accountable.

For example, a person would commit a crime under Section (b) if he or she solicited support for a terrorist group by doing recruitment activities. This conduct fulfills Section (b) because the support is directed at a terrorist group. In contrast, a person would not commit an offense under Section (b) if he or she bought gasoline from a person belonging to the terrorist group, but the purchaser was merely negligent as to the fact the terrorist group would ultimately receive and benefit from the funds.

Section (c) criminalizes the possession of materials for the purpose of committing an act criminalized by Section (a) (Committing a Terrorist Act). This offense has two goals. The first goal is to punish people who are preparing to commit a terrorist act. The second goal is to punish people who are assisting in the commission of a terrorist act by possessing or harboring materials to be used in a terrorist act. For example, it would be an offense under Section (c) for a

person who is planning to commit a terrorist act to keep bomb-making materials in his or her house, even if he or she had not constructed a bomb yet. It would also be an offense for a friend of a person who is planning to commit a terrorist act to keep bomb-making materials in his or her house if the friend knows or disregards a substantial likelihood that the materials will be used to make a bomb in the future. This offense is meant to target the materials that will be used for the commission of a terrorist attack, including but not limited to bomb-making materials, instructions, and weapons. This offense does not include auxiliary materials like the car that will be used for transportation to and from the terrorist act, or the food and water consumed while preparing for the terrorist act.

Section (d) criminalizes knowingly collecting, recording, or possessing information for the commission of or preparation for an act under Section (a) of this Article. For example, it would be an offense if a person collected pictures of the layout of an airport in order to commit an act of terrorism, criminalized by Section (a), against the airport. In contrast, it would not be an offense for a person to commit an offense if he or she collected pictures of an airport in order to complete a study about how to increase airport security or for his or her own personal interest.

Section (e)(1) grades the offense under Section (a) a Class [A] felony if the person directs or leads the act, or as a Class [B] felony in all other cases. Section (e)(2) grades the offense under Section (b) and (c) a Class [C] felony. These grades reflect a middle position between the Bill's punishment of ten years to life imprisonment where applicable. The grading scheme has been consolidated to enhance the usability of the Article and ensure the consistent grading of offenses that cause similar levels of societal harm. Section (e)(3) grades the offense under Section (d) a Class [D] felony.

*Relation to Current Law.* This draft Article incorporates the objective of the Counterterrorism Law of 2014, which is to counter and deter terrorism throughout the chapter. This draft Article incorporates Counterterrorism Law Art. 2 (Definition of a "Terrorist Act"), Art. 3 (Terrorist Group and Its Property), Art. 5 (Terrorist Act), Art. 6 (Possession of an Article for Purposes Connected with Terrorism), Art. 8 (Preparation), Art. 9 (Directing the Commission of a Terrorist Act), Art. 11 (Recruitment of Persons to be Members of Terrorist Groups or to Participate in Terrorist Acts), Art. 13 (Incitement or Promotion of the Commission of Terrorist Acts), Art. 14 (Conspiracy to Commit Offenses Under this Law), Art. 17 (Soliciting and Giving of Support to Terrorist Groups or for the Commission of Terrorist Acts), and Art. 18 (Use of Property or Funds for Commission of Terrorist Acts).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law. Indeed, the definition of terrorist acts is consistent with Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism, to which Somalia is a party.<sup>204</sup>

### **Comment on Article 7302. Providing or Receiving Terrorist Training**

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<sup>204</sup> See [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en).

**Corresponding Current Provision(s):** Counterterrorism Law of 2014 Art. 12 (Providing or Receiving Terrorist Training)

**Comment:**

*Generally.* Article 7302 criminalizes providing or receiving terrorist training. Sections (a)(1)(A)-(C) define terrorist training as instruction in creating or using an explosive or noxious device, military or combat training, or any other training related to committing a terrorist act as criminalized by Article 7301. Section (a)(2) limits the offense to training related to the commission of an offense criminalized by Article 7301. Therefore, it is not a crime to receive weapons training for the purpose of hunting because hunting is not an offense criminalized by Article 7301. Article 7302 aims to prevent preparations for the commission of terrorist acts, the spread of knowledge and skills related to the commission of terrorist acts, and the education of people able to commit terrorist acts.

A person must provide or receive terrorist training knowingly to commit an offense. Recklessness and negligence as to providing or receiving terrorist training do not satisfy the offense's culpability requirement. A person commits an offense if he or she is aware that he or she is receiving weapons training in order to commit an offense under Article 7301 – for example a murder a person with the intention to intimidate the public. In contrast, a person does not commit an offense if he or she receives weapons training from a friend who is affiliated with a terrorist group, but the person receiving the training does not believe the training is related to the commission of an offense criminalized by Article 7301. The latter example would not be an offense under Article 7302 because the person does not fulfill the culpability requirement of knowing that the training is related to the commission of an offense criminalized by Article 7301. In contrast, in the former example the person does fulfill the knowing requirement.

Section (b) grades the offense as a Class [B] felony. This reflects a middle position between the punishment given in the Counterterrorism Law of 2014 of ten years to life imprisonment.

*Relation to Current Law.* This draft Article incorporates Counterterrorism Law of 2014 Art. 12 (Providing or Receiving Terrorist Training).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law, and is consonant with the State's obligations under the International Convention of the Suppression of the Financing of Terrorism.

**Comment on Article 7303. Use of Explosive Devices or Weapons of Mass Destruction**

**Corresponding Current Provision(s):** None

**Comment:**

*Generally.* Article 7303 criminalizes the use of explosives, lethal devices, and other weapons of mass destruction. Section (a) defines the offense as the use of unlawful explosive devices or weapons of mass destruction against any person or property. This offense criminalizes the use of weapons with the potential to cause a high number of human casualties or

severe damage to property. For a person to commit an offense, the detonated weapon does not need to cause fatalities or property damage. A high number of fatalities and widespread property damage merely need to be a possible result of using the weapon.

Article 7303 targets weapons that have a high potential for widespread destruction or damage. Article 7303 does not cover small-scale explosive devices, including firecrackers and fireworks used for entertainment purposes.

Section (b)(1) grades the offense a Class [A] felony if the person uses a weapon of mass destruction. Section (b)(2) grades the base offense, the use of unlawful explosive or lethal devices that are not weapons of mass destruction, as a Class [B] felony. Weapons of mass destruction are punished more severely because of their potential to cause greater death and damage than other unlawful explosive devices. If an unlawful explosive device meets the definition of “weapon of mass destruction,” its use should be treated as an offense under Section (b)(1) of this draft Article.

*Relation to Current Law.* There are no directly corresponding provisions in current law; however, this Article is consistent with the general aims of the Penal Code (1962) and the Counterterrorism Law of 2014.

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

### **Comment on Article 7304. Definitions**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 325 (Intimidation of the Public by Means of Explosive Materials); Counterterrorism Law of 2014 Art. 4 (Other Definitions)

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This draft Article incorporates Penal Code (1962) Art. 325 (Intimidation of the Public by Means of Explosive Materials) and Counterterrorism Law of 2014 Art. 4 (Other Definitions) for the definition of “explosive or lethal device.”

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Chapter 7400. Organized Crime**

### **Introduction: Chapter 7400**

This Chapter seeks to punish groups that operate with a continuing criminal purpose or plan, including groups that operate gambling enterprises or carry out piracy. It also seeks to punish those who help disguise or conceal the proceeds of criminal activity after the criminal acts have occurred. The rationale behind this Chapter is to punish and deter these types of

organizations and those who aid them because they pose a serious threat to security, civil order and the national economy. Those who work in concert to achieve criminal ends pose a greater danger than those who engage in criminality alone, and thus the offenses of this Chapter are graded in accordance with that danger.

### **Comment on Article 7401. Participation in a Criminal Organization**

**Corresponding Current Provision(s):** Counterterrorism Law of 2014 Art. 10 (Membership of Terrorist Groups)

#### **Comment:**

*Generally.* This draft Article criminalizes participation in any way in the operations of a criminal organization. Even if a person's participation involves activities on behalf of the organization that would be otherwise lawful, those activities are crimes under this draft Article. This reflects the societal harms of engaging, supporting and participating in criminal organizations. However, the offenses under this draft Article are graded more harshly if the actor knowingly participates in a criminal enterprise. This Article covers terrorist groups as well as other criminal enterprises.

Section 7401(a) defines the offense of participating in a criminal organization. Participation in such an operation can include involvement in the criminal activity itself, or merely providing support services or running legitimate businesses on behalf of the organization. Section (a)(1) is directed at the people with primary authority for organizing and running criminal organizations. The primary purpose of this Section, and the commensurate grading in Section (b), is to allow the leaders of criminal organizations to be charged with a more serious felony than the other participants.

Section (a)(2) punishes participation in the operation of a criminal organization or the recruitment of others to do so. "Operation" of a criminal organization refers to any activity that is necessary for the planning or commission of the organization's criminal acts. A person who tries to persuade or encourage others to become involved in the operations of a criminal organization, and succeeds in persuading the others to join, also commits an offense under Section (a)(2). This Section criminalizes membership in a terrorist group.

Section (a)(3) criminalizes material support for criminal organizations. This Section criminalizes contributions to criminal organizations even if the donor is not involved in the actual planning or commission of criminal acts. The "material" requirement under this Section is an important limitation, as not everyone who has contact with a criminal organization is blameworthy enough for criminal liable. For example, the person who sells napkins to a gangster is not liable, but a criminal syndicate's transportation coordinator probably would be.

Section (a)(4) makes it an offense to use or invest the proceeds of a criminal organization. Thus, if a member recklessly took money that was derived from illegal drug operations and invested it in the stock market or used it to open a legitimate business, he could be charged under this Section. This provision aims to prevent certain members of criminal organizations from escaping liability for the group's criminal activities by participating only in lawful activities. It also creates an obstacle to the operation of criminal organizations by denying such groups access to legitimate commerce and financial services.

Section (b) provides the grading scheme for draft Article 7401. In general, each offense under Section (a) is graded more harshly if the actor knows the organization is a criminal



organization. This comports with the draft Code's theme that knowing conduct is punished more harshly, but it also serves to recognize that those actors who are only reckless with respect to whether or not the organization is a criminal one are less blameworthy. There are many situations in which an actor may provide material support to an organization without actual knowledge that the organization is a criminal one, but nonetheless the actor is reckless with respect to that fact. Therefore, the base culpability required for liability, in line with other Chapters, is "recklessness." If the person unjustifiably disregards a known risk that the organization he is involved with may be a criminal organization he is still liable under draft Article 7401, but the offense is one grade lower.

Section (b)(1) punishes the offense under Section (a)(1) the most harshly because one who controls a criminal organization is more culpable than one who merely supports it. If an actor directs or controls an organization he knows to be criminal, he is guilty of a Class [B] felony. This draft Article recognizes that there may be some limited situations in which conduct can be construed as "direct[ion]" or "control[]" of a criminal organization, but nonetheless the actor does not know the organization is criminal. Therefore Section (b)(1)(B) punishes reckless direction or control of a criminal organization one grade lower, as a Class [C] felony. An example of this conduct could be a transportation director who organizes and directs drivers for a group, via a car service, without actual knowledge that the group is a criminal enterprise.

Section (b)(2) punishes the remaining offenses in Section (a) as Class [C] felonies if the material support, recruitment or investment is undertaken with knowledge that the organization is criminal. Otherwise, if the actor is merely reckless with respect to the criminal status of the group, the offense is a Class [D] felony.

*Relation to Current Law.* There are no provisions of the current Penal Code (1962) that are inconsistent with this chapter.

*Relation to Sharia Law.* This draft Article is in line with Muslim jurists' condemnation of organized criminal activities that are seen as "waging war against society" (hiraba).<sup>205</sup> Some Muslim jurists have considered this to be any activity by an "individual or group" who take the "law into their own hands" or wishes to disrupt the "communal order."<sup>206</sup>

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

## **Comment on Article 7402. Money Laundering**

**Corresponding Current Provision(s):** Penal Code (1962) Art. 298 (Assistance Relating to the Object of a Crime)

### **Comment:**

*Generally.* This draft Article criminalizes the process by which an actor disguises the original ownership of the proceeds of criminal conduct by making such proceeds appear to have

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<sup>205</sup> Islamic legal opinion (Fatwa) issued on September 27, 2001 by various Islamic scholars including Shaykh Yusuf al-Qaradawi, Haytham al-Khayyat, Fahmi Houaydi, Mohammad S. al-Awa, and Shaykh Taha Jabir al-Alwani, available at <http://kurzman.unc.edu/islamic-statements-against-terrorism/qaradawi/>; Hyderabad Declaration, 29th General Body Meeting of Jamiat Ulama-e-Hind (2008) available at [http://timesofindia.indiatimes.com/Hyderabad/Ulama\\_endorse\\_fatwa\\_against\\_terror/articleshow/3689923.cms](http://timesofindia.indiatimes.com/Hyderabad/Ulama_endorse_fatwa_against_terror/articleshow/3689923.cms)

<sup>206</sup> Javed Ahmad Ghamidi, "The Penal Law of Islam," Renaissance (September 2002) available at [www.monthly-renaissance.com/issue/content.aspx?id=444](http://www.monthly-renaissance.com/issue/content.aspx?id=444).

been derived from a legitimate source. This draft Article complements draft Article 7401 (Participation in a Criminal Organization) by criminalizing conduct that is not direct support or participation in a criminal organization, but constitutes the alteration of the proceeds after the original criminal conduct has occurred. However, the proceeds the actor seeks to disguise need not be derived from a criminal organization per se in order to constitute an offense under this draft Article. Disguising proceeds from any criminal act, even not via a criminal organization, constitutes money laundering under this draft Article.

Section (a) comprehensively outlines the ways in which the proceeds of criminal acts can be disguised. This includes concealing, transferring, transporting, investing or expending funds. Section (a)(2) criminalizes the supervision or facilitation of such activities. Section (a)(4) criminalizes the use of funds for further criminal activity. It differs from draft Article 7401 (Participation in a Criminal Organization) because, as explained above, the proceeds need only be from “criminal activity” to constitute an offense under this section and not from an organized criminal enterprise. Draft Article 7401 is aimed at hampering the ability of criminal organizations to access legitimate financial services; this draft Article is aimed at punish those who conceal the source of illegally obtained funds. Finally, Section (a)(5) recognizes that money laundering can occur when an actor seeks to evade or avoid any currency transaction reporting requirement

Section (b) grades all offenses under this section as Class [D] felonies. There is no grading differentiation with respect to any knowledge requirement. The conduct under Section (a) must be undertaken knowingly to establish criminal liability, but under Section (c) of this draft Article, only recklessness is required with respect to the specific criminal activity giving rise to the proceeds. To be liable under this draft Article, the actor does not need to conceal or evade the proceeds with actual and specific knowledge of the nature of the criminal activity that gave rise to them. This draft Article seeks to punish the principal conduct of concealment or evasion and thus is graded uniformly.

*Relation to Current Law.* Article 298 of Penal Code (1964) criminalizes “assist[ing] anyone to secure the proceeds, profit, or price of an offence,” where that person did not himself participate in the offense. This draft Article incorporates that prohibition, but it does not restrict liability to persons who did not commit the underlying offense, since it is often the case that the same individuals who commit an offense could also engage in such conduct.

*Relation to Sharia Law.* Money laundering is prohibited in the laws of many Muslim countries. It has also been addressed in many provisions within the Qur’an and Sunna, including a Prophetic hadith that says “any activity built from unlawful trade or ill-gotten property will be cast into the Fire.”<sup>207</sup>

*Relation to International Law.* As stated above, this draft Article should be construed to remain consistent with Somalia’s international legal obligations, in particular Arts. 9 and 14 of the International Covenant on Civil and Political Rights, which outline the fundamental guarantees of due process. Art. 14(3) of the Covenant requires access to counsel in criminal proceedings, and thus, to the extent that this draft Article would preclude a criminal defendant from retaining counsel due to the fact that such counsel refuses to represent him for fear of prosecution, the State is expected to provide criminal defense counsel in such situations. Accordingly, State-provided counsel cannot and would not be found liable under this draft Article as they are not receiving proceeds from a criminal enterprise.

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<sup>207</sup> Samah al-Agha, *Money Laundering from Islamic Perspective*, Journal of Money Laundering Control Vol. 10, No. 4 (2007), 406.

## **Comment on Article 7403. Gambling**

**Corresponding Current Provision(s):** Penal Code (1962) Arts. 553 (Conduct of Games of Change), 554 (Aggravating Circumstances), 555 (Participation in Games of Change), 556 (Essential Elements of a Game of Change; Gaming House), and 558 (Unlawful Holding of Games Not of Chance)

### **Comment:**

*Generally.* This draft Article criminalizes all aspects of gambling. It expands gambling to include not only games of chance, but also lotteries and bookmaking. Section (a) punishes establishing or running a gambling place, as well as offering land or a building under the person's control to allow another to facilitate games of chance. A game of chance is defined as a game, contest, or scheme where a person stake or risks something of value for the opportunity to win something of value, and where success or failure is predominantly dependent on chance. Specifically, chance or luck should have a much larger impact on the success or failure of the game than skill or talent. An example of something predominantly dependent on chance is a dice roll. Whether the dice will land on "1" or "6" is mostly determined by chance—there is very little skill that can be used to manipulate this outcome. If a person were to place money on the outcome of a dice roll, then that person has participated in a game of chance. Section (a) does not address games of skill.

The conduct must be done knowingly to establish criminal liability. This means that under Section (a)(3), a landlord whose property is being used to facilitate games of chance would not be criminally liable if he or she was only negligent or reckless as to the property's ultimate use when renting out the property. This draft provision is designed to prevent property owners from knowingly profiting off the proceeds of a gambling house

Section (b) punishes knowingly operating a lottery, which is a scheme or procedure where one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value. As with games of chance, the defining factor of a lottery is that the prizes are distributed by chance. A person who buys a ticket with the hopes of winning a prize when the prize is determined randomly has participated in a lottery.

Section (c) punishes receiving and recording wagers or offers to wager on any contest of skill or any result of chance. This includes wagers on the outcome of a soccer game, which is a contest of skill, or on the roll of a dice, which is a result of chance. A person committing this offense is facilitating the wagering of others. Section (c)(2) establishes a threshold amount for the offense to ensure that the conduct rises to the level of facilitation.

A wager is distinguishable from a reward. While wagering on the outcome of a soccer match is punishable under Section (d), playing the game of soccer for a reward is not. When considering whether a reward constitutes a wager, courts should look at who is offering the reward and whether it consists solely of pooled "entry fees." If the reward consists solely of pooled entry fees, the entry fees might be disguised wagers. It is important for courts to look at the nature and purpose of the transaction.

Section (e) provides the grading scheme for the draft provision. Section (e)(1)(A) lists three aggravating factors for the offenses under Sections (a)-(c). If these factors are not present, the offense is graded one level lower. If the person only participates in gambling without facilitating, the offense is a Class [B] misdemeanor.

*Relation to Current Law.* This draft Article incorporates Arts. 553 (Conduct of Games of Change), 554 (Aggravating Circumstances), 555 (Participation in Games of Change), and 556 (Essential Elements of a Game of Change; Gaming House) of the current Penal Code (1962). This draft Article condenses the four provisions into one comprehensive provision. The aggravating factors in Art. 554 are directly incorporated in Section (e)(1)(A) and are applied not only to running a gambling house, but also to running a lottery and bookmaking. Art. 557 (Confiscation) is not incorporated into the draft Article as confiscation is addressed at sentencing.

Finally, Art. 558 (Unlawful Holding of Games Not of Chance) is not covered here because it is too broad to give sufficient notice to potential offenders. Moreover, it prescribes only a fine and therefore can be dealt with through civil regulation.

*Relation to Sharia Law.* This draft Article finds support in Sharia law. Sharia law emphasizes the many negative side effects of gambling on the individual and on society and prohibits betting on outcomes determined by chance, which encompasses games of chance and wagers under this draft Article. Because “an individual’s property is inviolable,” Sharia law says “taking it by gambling is unlawful”.<sup>208</sup> The inclusion of lotteries is also consistent with Sharia law’s consideration of lotteries as gambling.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

#### **Comment on Article 7404. Piracy**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This provision criminalizes piracy. Under Section (a)(1)(A), a person commits piracy even if he or she only threatens an act of violence, detention, or theft. This provision recognizes that a threat is enough to allow a person to gain unauthorized access or control over a ship or aircraft. Section (a)(1)(C) defines the jurisdiction of the offense of piracy as on the high seas or in a place outside the jurisdiction of any state. This special jurisdictional provision is what sets the offense of piracy apart from other offenses such as robbery. When a person threatens another with seriously bodily harm in order to take his or her boat, the offense is defined as robbery under Chapter 3200 if it happens within the jurisdiction of the state, and piracy if it happens on the high seas or in a place outside of any state’s jurisdiction.

Section (a)(2) criminalizes voluntarily operating a piracy ship or pirate aircraft. This provision ensures that persons who do not personally commit or threaten to commit an act of violence do not escape criminal liability if they participated in the operation of the pirate ship or pirate aircraft. The provision only focuses on voluntary actions; if a person who is coerced or threatened into operating a pirate ship or pirate aircraft does not commit an offense. As in Sections (a)(1), the act must be done knowingly.

*Relation to Current Law.* No provision of the current Penal Code (1962) is inconsistent with this Chapter.

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<sup>208</sup> YUSUF QARADAWI, THE LAWFUL AND PROHIBITED IN ISLAM (1960), 301.

*Relation to Sharia Law.* Sharia Law makes “no categorical distinction between robbery or criminal acts on land and at sea” and considers “forcible theft at sea” to be a case of *hiraba*.<sup>209</sup> This draft Article, as with those above, is also in line with Muslim jurists’ condemnation of organized criminal activities that are seen as “waging war against society” (*hiraba*).<sup>210</sup> Some Muslim jurists have considered this to be any activity by an “individual or group” who take the “law into their own hands” or wishes to disrupt the “communal order.”<sup>211</sup>

*Relation to International Law.* Piracy is a pressing international law issue. This draft Article’s definition of piracy is similar to the definition of piracy in Art. 101 of the United Nations Convention of the Law of the Sea (UNCLOS), which Somalia has ratified. This draft Article is slightly broader than that of the UNCLOS as it eliminates the requirement of private ends and does not distinguish between private and public ships. Including piracy in the draft penal code is consistent with Somalia’s obligation to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”<sup>212</sup>

### **Comment on Article 7405. Definitions**

**Corresponding Current Provision(s):** None

#### **Comment:**

*Generally.* This Article defines the terms used for the first time in this Chapter. This Code also uses many of these terms elsewhere in the Code.

*Relation to Current Law.* This Article is consistent with the use of similar terms in the Penal Code (1962).

*Relation to Sharia Law.* Nothing in this Article is inconsistent with Sharia law.

*Relation to International Law.* Nothing in this Article is inconsistent with international law.

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<sup>209</sup> Hassan S. Khalilieh, *Perception of Piracy in Islamic Sharī‘a, in Jews, Christians and Muslims in Medieval and Early Modern Times* (2014), 230-231

<sup>210</sup> Islamic legal opinion (Fatwa) issued on September 27, 2001 by various Islamic scholars including Shaykh Yusuf al-Qaradawi, Haytham al-Khayyat, Fahmi Houaydi, Mohammad S. al-Awa, and Shaykh Taha Jabir al-Alwani, available at <http://kurzman.unc.edu/islamic-statements-against-terrorism/qaradawi/>; Hyderabad Declaration, 29th General Body Meeting of Jamiat Ulama-e-Hind (2008) available at [http://timesofindia.indiatimes.com/Hyderabad/Ulama\\_endorse\\_fatwa\\_against\\_terror/articleshow/3689923.cms](http://timesofindia.indiatimes.com/Hyderabad/Ulama_endorse_fatwa_against_terror/articleshow/3689923.cms)

<sup>211</sup> Javed Ahmad Ghamidi, “The Penal Law of Islam,” *Renaissance* (September 2002) available at [www.monthly-renaissance.com/issue/content.aspx?id=444](http://www.monthly-renaissance.com/issue/content.aspx?id=444).

<sup>212</sup> Article 100, United Nations Convention on the Law of the Sea.