THE GENERAL PART OF THE SOMALI PENAL CODE (EXISTING PROBLEMS AND PROPOSALS FOR SOLUTIONS)

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ABSTRACT

The Penal Code of the Somali Democratic Republic [PC] was approved by Legislative Decree in December 1962, but came into force on 3 April 1964 when it replaced the 1930 Italian Code, then applicable in Somalia, and the Indian Penal Code of 1860, which was applied in Somaliland. This PC has been in force for almost 60 years. Over this period of time, significant changes occurred. Penal law theory made remarkable progress. Also, new crimes and complex forms of criminal activities appeared. In response, the international community recommended and many foreign countries introduced a number of new penal provisions to oppose them. The current situation dictates modernization of the Somali PC as well. It is expected to remain the main legal instrument in fighting crime. The de-codification policy, which has been followed lately, should not be encouraged as it is likely to create difficulties to both lawmaking and application of the law. The innovation of the Somali penal law through special laws, though acceptable under Article 14 of the PC, shall be truly exceptional and individually justified. In general, the necessary new penal provisions should be inserted in the PC. This article is focused on the General Part of the PC as more difficult, challenging and applicable to special penal laws as well. Improvement of some key provisions is proposed. The conservative nature of penal law has been taken into consideration. This is why abrupt changes are not recommended as they might be counterproductive, especially in the current situation.

Key Words: Law, Penal code, Application, Criminal Offence, Guilt, Justification.

INTRODUCTION

Application of the penal code

A. According to Article 3 (1) of the Somali PC, “(Persons to Whom the Penal Law Is Applicable). Except as otherwise provided by national or international law [6 Const.], the Somali penal law shall be applicable to all, citizens or aliens, who are in the territory of the State [4 Const. 4’ P.C.]”. The initial words of this Paragraph “except as otherwise provided by national or international law” are hardly justifiable. They are misleading and it would be wise to delete them. Persons who seem to be excluded from the operation of the penal law in the territory of the State are those who enjoy procedural immunity until withdrawn1. They cannot be subject to any criminal repression: be prosecuted, tried, punished and/or detained, e.g. by the virtue of Article 31 of the Vienna Convention on Diplomatic Relations (Somalia acceded to it on 29th March 1968). However, this is not sufficient to conclude that the PC is applicable to their offences also, the accepting country, incl. Somalia, may expel such persons by declaring them persona non-grata. Otherwise, the accepting country would hardly have a solid legal basis to argue that their acts or omissions constitute unacceptable conduct deserving expulsion. Finally, such persons may be held criminally responsible when the sending party (country or international organization) decides to withdraw their immunity. If in such cases the sending party’s withdrawal causes also the applicability of own penal law to the crimes of these persons, it would mean that the action of the PC is dependent on individual foreign decisions, which is absurd. Actually, the immunity of the aforementioned persons makes sense only if the PC is applicable to them; otherwise, they do not need any immunity. Therefore, immunity presupposes the applicability of the PC. It is true that, after all, there would be no criminal repression against such persons. However, this is not an argument in support of the non-applicability of the PC to them. Children under fourteen years of age are also free of any criminal repression. This does not mean, though, that the PC is not applicable to them. If it were not, they cannot benefit from its Article 59 (Persons under Fourteen Years of Age): “Whoever, at the time he committed an act, had not attained fourteen years of age [177 P.C.], shall not be liable [47 P.C.].” The fact that only one provision exists, this favourable one, does not change anything. The PC, nevertheless, is applicable to such children as well. This is why the PC needs a much simpler provision that the existing Article 3 (1): a provision without any conditions in its text. Good examples are the corresponding German and French penal rules. Thus, pursuant to Section 3 of the German PC, “German criminal law shall apply to acts committed on German territory”2. Likewise, Article 113-2 (1) of the French PC reads: “French Criminal law is applicable to all offences committed within the territory of the French Republic”.

B. Article 3 (2) of the PC reads as follows: The Somali penal

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law shall also be applicable to citizens or aliens [4 P.C.] who are outside the territory of the State [4 Const.], within the limits established by the said law [6, 7, 8, 9 P.C.] or by international law [6 Const.]." The last words in the text "or by international law" might be deleted. They mean that international law may directly determine the extraterritorial application of the PC. However, this is not true. Actually, it is the other way around. Contemporary international law and, particularly, multilateral conventions (both global and regional) require from Parties to produce criminal law provisions through their legislative bodies (parliaments) for the purposes of criminalizing certain conducts in their PC-s (acts and/or omissions) and/or expanding the extraterritorial application of their PC-s to such conducts. This is the only way to make the own PC applicable “outside the territory of the State” as only the national law can yield such a result – on its own or through the implementation of the respective international convention. If such a convention exists, it solely puts in motion the national legislative mechanism for the production of the result.

For example, Article 15 (a) of the UN Convention against Corruption reads: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties…” Obviously, until the adoption of the said measures by the national legislation, the respective criminalization cannot occur. Also, pursuant to Article 42.1 (b) of the same Convention, “Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when... The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed”. Obviously, until the adoption of the said measures by the national legislation, the respective criminal jurisdiction cannot be established.

Article 21 (2) of the West African Convention on Mutual Assistance in Criminal Matters obliges in a similar way its Parties to establish their jurisdiction over certain criminal offences. The provision envisages the cases of transfer of criminal proceedings when only the Party transferring the proceedings has jurisdiction over the investigated offence. If the other Party which takes charge of the proceedings has no such (original) jurisdiction, the aforementioned Paragraph imposes the obligation on that Party to establish own exceptional jurisdiction (deriving from the one of the transferring Party), whenever it accepts the proceedings. The Paragraph obliges its Parties as well “to take the necessary legislative measures to ensure that a request of the requesting Member State to take proceedings shall allow the requested Member State to exercise the necessary jurisdiction”. Again, until the required legislative measures are taken at the national level, no jurisdiction would be established, let alone exercised. Moreover, when it comes to the extraterritorial application of national criminal laws, conventions, often, give only recommendations for establishing extraterritorial jurisdiction. Thus, Article 105 of the UN Convention on the Law of the Sea stipulates that

“Oh on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed…”

Therefore, the country which apprehends the pirates may (not shall) establish own extraterritorial jurisdiction over the piracy crimes in this situation. Hence, the duty of Somalia as a Party to this Convention is to solely consider the option of expanding its national criminal law to acts of piracy in the aforementioned situation. It is unthinkable that the Somali legislator would state in general that it unconditionally accepts in advance whatever such multilateral conventions may recommend by converting it in advance into mandatory law. Actually, it might be only the other way around; Somalia is not obliged to follow recommendations, such as the one in Article 105 of the UN Convention, let alone accept their direct application by making them mandatory legal provisions without any the legislative approval of each by the Parliament. The approval of each international recommendation in the area of criminal law matters, actually, depends on the national penal law as a sovereign discretion (choice). In this case, particularly, the acceptance of Article 105 depends on the national penal law provisions, which govern the territorial application of the penal law as the recommendations might be materialized only through their texts. In view of thereof, the parallel reference to international law in Article 3 (2) of the PC is redundant and misleading. This is why it should be abandoned.

C. Article 9 of the PC reads: “Apart from the cases specified in article 7, criminal proceedings for a crime committed abroad cannot be instituted against a person who was finally acquitted abroad of the same crime or against a person who, abroad, has been convicted of a crime and has served the sentence prescribed, therefore”.

It would be wise to narrow the scope of the general rule in this Article. There are over two hundred (200) countries in the world and under the quoted Article Somalia shall trust their jurisdictions in full and unconditionally and shall accept each of their penal judgments like its own. Somali authorities are not allowed to question as to whether the person was not shielded by the judiciary in the foreign country, especially if s/he was acquitted or a too lenient punishment was imposed on him/her. To avoid such unacceptable restrictions, e.g. Article 9 of the Turkish PC postulates, contrary to Article 9 of the Somali PC, that „A person who is convicted in a foreign country for an offence committed in Turkey is subject to retrial in Turkey“. Unless the foreign penal judgment has been recognized on some grounds (see Articles 282-286 CPC of Somalia and 10 of the PC), the general rule is that such a judgment constitutes no impediment to criminal proceedings against the same person for the same crime(s). This rule is clear and easy to apply. Certainly, this rule is restricted in some countries, e.g. Articles 5 and 7 of the Libyan PC but at this point, such further complications should not be necessarily supported.


6See also Ganzglass, op. cit., p. 15.
In view of thereof, it might be recommended that the non-recognized foreign judgment does not preclude the institution of criminal proceedings. However, any foreign deprivation of liberty (detention or punishment) in relation to it, shall be deducted from the punishment imposed in Somalia, if any. Article 5 of the Japanese PC is an interesting example in this regard:

“Even when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act; provided, however, that when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted. Article 5 Even when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act; provided, however, that when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted.”

D. No Article of the PC on the territorial applicability contain clear rules on connected criminal activities of multiple offenders, although some complications occur when the activities are performed in different countries. It would be wise to have appropriate rules for such situations. The multiple offenders might be participants in a single crime. If the perpetration (the principle co participant’s activity) is performed in the country, usually, its PC is applicable to the activities of the accessory/secondary participants in the crime as well even if conducted abroad. Such are the activities of the inciters and the assistants whose criminality derives from the criminal nature of the perpetration. This legislative solution of covering the entire crime, with all activities involved, is not always used for the opposite situation when the activities of the secondary participants are performed in the country while the perpetration is committed abroad. Foreign legislations may resort to different approach. In such cases, usually, the PC is applicable to the activities of the secondary participants on the grounds that they are performed in the territory of the country. As regards the perpetration of the crime, the solutions are different. Some countries prefer not to apply their PC to it as well (e.g. Section 9.2.ii of the German PC). At the same time, other countries apply their PC to this perpetration as well despite the fact that it takes place abroad (e.g. Article 6.3 of the Ukrainian PC). Such countries prefer not to tear the crime apart. However, there are also interdependent criminal activities which do not belong to a single crime. The activities are included in more crimes. Here the connection is weaker. Such connected activities are those which constitute a predicate crime and the corresponding secondary one: non-reporting of a crime, e.g. Article 283, harbouring a criminal (assistance after the crime), e.g. Article 297, hiding stolen goods, e.g. Article 298 of the Somali PC. Their criminality is also derivative: it depends on the criminality of the predicate activity. Hence, the question is: in case that the predicate crime is committed in the territory of the country and the corresponding secondary one is not, should the PC of the country be applicable to the secondary crime as well? And vice versa, if the predicate crime is committed outside the country and the corresponding secondary one takes place in its territory, should the PC of the country be applicable to any of them at all or only to the one committed in the territory of the country?

Such general rules are necessary. It goes without saying that they would not prevent special rules from being produced for specific crimes in the Special Part of the PC if appropriate. The special rules would derogate/exclude the applicability of the general ones which, in any case, would be helpful.

The CRIMINAL OFFENCE

A. The Actus Reus (the punishable conduct)

When does any punishable conduct (act or omission) exist? As preparation has not been criminalized [see Articles 18.1 and 76 of the PC], the attempted crime (the attempt) is the first act/omission to indicate the existence of punishable conduct.

According to Article 17 of the PC, “(Crimes Attempted) A crime shall be considered attempted where the act or omission on the part of the offender, unequivocally directed towards causing the event [19 P.C.], has not been entirely completed, or where the event has not resulted [125 P.C.”

To define attempt the text resorts to the so-called ‘material criterion’. Essentially, this criterion means that the interest (value), protected by the criminalization of the respective act or omission, is in some immediate danger. This danger to the object of the crime has not yet amounted to any direct negative consequences on it. This criterion successfully distinguishes attempt from accomplished crime. However, the bigger problem, usually, is to distinguish between preparation (unpunishable under this PC) and attempt rather than attempt and accomplished crime. If this is valid also for Somalia, the attempt should be delineated more clearly in the text of this Article. It is to be particularly highlighted that, unlike, preparation, attempt is a part of the respective accomplished crime (this is why the latter consumes the former), “a commencement of the performance “Article 53 (1) of the Indonesian PC, “perpetrating all or part of” its constitutive acts– Article 16 (1) of the Spanish PC. It, more or less, contains the ingredients of the accomplished crime provided by the legal description of the crime, consumes them being “a beginning of its execution” – Article 121-5 of the French PC. An attempt is the undertaking of the initial perpetration of the crime; the start of its consummation. It is an activity which, more or less, fulfils the legal description of the respective crime and in particular, the specific conduct (the 'executive conduct') of the crime outlined in the legal description – Article 13 (1) of the Polish PC. Unlike attempts, preparation, though also an overt act [not only manifesting the actor's decision to commit a crime but creating favourable conditions for its commission], does not go that far to begin satisfying the legal indications of the executive conduct of the crime.

Thus, attempt exists if the offender’s activity has begun satisfying the legal indications of the specific conduct of the respective crime. This is the so-called formal or technical criterion for the existence of attempt. If, however, the executive conduct is outlined too broadly or/and unclearly, e.g. as in the case of murder (Article 434 of the PC), then the material criterion under the present text of the Article 17 comes into service as an auxiliary one. This material criterion, actually, indicates the satisfaction of the 'formal' one. It assists the interpreter of law in finding whether or not a given activity

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has begun fulfilling the legal description of the specific criminal conduct. The fulfilling of this legal description occurs and therefore, the attempt takes place, whenever the activity produces an immediate danger to the interest (value), protected by the criminalization of the respective act or omission. Otherwise, if such danger has not yet been produced, no attempt takes place. Finally, it is well known that the typical form of the guilt of attempted crimes is the direct intent. However, if the detrimental consequences of the crime are outlined in the legal description of the crime, they might be caused by indirect intent as well. Whenever such consequences do not occur and the perpetrator has displayed only indirect intent (indifference) towards them, it is to be decided whether his/her activity would also constitute an attempted crime or this is ruled out because the attempt is possible with a direct intent only. It would be very well if the text of Article 17 explicitly settles this matter by clarifying whether or not attempt is possible only with direct intent. Please, see hereunder also the remarks and proposals for the improvement of Article 24 (1). Article 19 (1) of the PC stipulates that “Attempt to Commit an Impossible Offence’. Attempt shall not be punishable where, owing to the unsuitability of the act or the non-existence of the object thereof, the event is impossible…”

Actually, this Article envisages only one of the many cases where the act is insignificant as its social danger (specific endangering or/and harming capacity) is too low to deserve penal sanction although the act itself fully satisfies the legal description of a given criminal offence. In foreign PC-s the rules on such acts are codified. Should this codification approach be followed in regard to such acts in Somalia, two legislative solutions must be taken into consideration as feasible:

- A provision contemplating a general definition/a concept of crime which expressly indicates and therefore, requires a non-ignorable degree of social danger (the so-called ‘material definition’ of crime), or/and

- A provision envisaging the insignificant act, in general, to proclaim/ determine its non-criminality.

Most of the interested countries resort to both options, simultaneously. For example, Article 14 [Concept of a crime] of the PC of Azerbaijan reads:

14.1. A crime shall be admitted as a socially dangerous deed (act or omission), forbidden by the present Code, under threat of punishment on guilty.

14.2. A deed (an action or inactivity), though it is formally containing attributes of an action (act or omission), provided by the criminal law, but by virtue of insignificance not representing public danger, and shall not cause harm to a person, to a society or the state, shall not be admitted as a crime.

As a result, all such insignificant deeds are precluded from being treated as crimes in the implementation of the law. They may constitute violations of other branches of law, such as administrative laws and labour/disciplinary statutes but contrary to the situation with Article 19 (2) of the Somali PC, they can never be any other (different) crime at all. It is also worth highlighting that thanks to provisions, such as the quoted Article 14, the non-prosecution of the perpetrators of the insignificant deeds is a matter of legality rather than a matter of any opportunity. This is always the preferable approach whenever it comes to the application of penal law. Legal certainty necessitates that every step taken to determine the criminality of an actor’s conduct and his/her criminal responsibility shall be regulated by law. Actually, the social danger of any criminal offence is not something new and surprising to the criminal legislation of Somalia. On the contrary, Article 20 (1) of the PC confirms and expresses this inherent peculiarity of crime. The provision regards all actual criminal offences as dependent on the existence of some “harmful or dangerous event”. Hence, the problem is how to efficiently use it in regulating penal matters.

B. The Mens Rea (the forms of guilty mind)

Article 24 (1) of the PC reads that “A crime:

a) Is with criminal intent, where the harmful or dangerous event which is the result of the act or omission is foreseen and desired by the offender as a consequence of his act or omission, and where the law makes the crime dependent upon such event [f. ex.: art. 434 P.C.];

b) Is preterintentional or beyond the intent, where the harmful or dangerous event arising from the act or omission is more serious than the one desired by the offender [f. ex.: art. 441 P.C.];

c) Is with culpa, or against the intent, where the event, even if foreseen, is not desired by the offender and occurs as a consequence of negligence, imprudence, lack of skill, or non-observance of laws, regulations, orders or instructions”.

Only dolus directus (the direct intent, commission with purpose) has been defined: in letter “а” of the text. Dolus eventualis (the indirect intent, committed knowingly) is missing. It is neither in letter “b”, as the description there of “preterintentional (beyond any intent)” does not fit in any way what is meant by indirect intent, nor in letter “с”, as its text envisages imprudence (recklessness), which is quite different, and negligence. Obviously, this gap should be filled in with a definition of the indirect intent. This intent, on the one hand, occurs where the offender does not desire the detrimental consequences of his act or omission as it is the case with the direct intent. On the other hand, the indirect intent differs from imprudence (recklessness) as well. It is true that the two sorts of guilt (or the two mens rea forms/the two guilty minds) look alike. The common peculiarity of both, the indirect intent and the imprudence, is that the offender does not want the probable detrimental consequences of his act or omission although he knows that they are likely to occur. However, when it comes to the indirect intent, the offender, in contrast to the case with the imprudence, is not against the occurrence of the detrimental consequences of his act or omission. Actually, he is indifferent to them, agrees with their occurrence as a probable additional (side) result to what he wants to achieve through his conduct. In the case of indirect intent, the offender realizes that the probable additional result (side) is not excluded in his individual situation. The offender wants a specific outcome but

*Social danger is a specific notion denoted by somewhat misleading terminology. This notion includes also all cases where harm has been inflicted. E.g. according to Article 10 of the Bulgarian PC; “Dangerous to society shall be an act which threatens or harms the person, the rights of the citizens, the property, the legal order established by the Constitution... or other interests, protected by the legal system”.*
knows that this action could also result in another outcome: some detrimental consequence(s). Nevertheless, he chooses to proceed with this conduct leading to the desired outcome. For example, somebody wants to shoot a particular person in a crowded restaurant. The perpetrator would be aware that in shooting a particular person, he also runs a very real risk that other people in the restaurant are likely to be harmed, but, nevertheless, proceeds to shoot. If someone else dies as a result of the shots being fired, the court will find that the perpetrator had the indirect intent and will convict that person for murder (i.e. although the accused did not have the intention to kill that particular individual). The offender, therefore, is aware of the concrete probability of the occurrence of specific detrimental consequence(s) as an additional (side) result of his planned conduct but being indifferent to it, proceeds with his activity.

The imprudence (recklessness) has quite a different meaning. Hence, it cannot cover indirect intent. The imprudent/reckless offender (the road traffic offences are the typical examples) is not any indifferent to the detrimental consequences of his act or omission. Actually, he is against their occurrence. The sole reason to perform his act/omission, which eventually led to them, was his conviction that they, though possible, would not occur in his individual situation. The offender was in his mind unfoundedly sure that (thanks to his own abilities or another excluding factor, the reliability of which was grossly overestimated) the likely detrimental consequence(s) would successfully be prevented from occurring. This is why, contrary to the case with indirect intention, the offender is not aware of the concrete probability of their occurrence. Lastly, according to Article 29 of the PC (titled ‘Mistake Caused by Deceit of Another’), the provisions on mistakes of facts, precluding guilt, “shall also apply in the mistake of fact as to the act constituting the offence is caused by deceit committed by another person; in this case, however, the person who has induced the deceived person to commit the act shall be liable for the same”.

However, the crime of the deceiver might be a different one as well. This person can commit a consuming offence, as an ‘indirect perpetrator’, while the deceived one commits a consumed offence. For example, the deceived person, induced by the deceiver to destroy some military works, mentioned in Article 196 (1) of the PC, by making him think that they are not such items. As a result, the deceived person has no idea of the military character; he has only the knowledge and the will to destroy a foreign piece of property, mentioned in Article 491 (1) of the PC. In this situation, the deceived person commits only the crime of ordinary ‘damage to property’ under Article 491 (1) of the PC, while the deceiver would commit, as an indirect perpetrator through the deceived person, the crime of ‘destruction of military works’ under Article 196 (1) of the PC. Because the legal description of this crime consumes that of the other one the deceiver is not in the position to fulfil also the legal description of that other crime. In turn, the deceived person would appear as a relatively innocent agent - towards the former crime with the consuming legal description, but towards the latter crime with the consumed legal description he would be subject to penal liability. In this regard, the deceived person differs from the absolutely innocent agents (small children, under 14, and insane persons), who are never subject to any penal liability at all. Obviously, the deceiver in this situation would not ‘be liable for the same’ as the induced person since he commits a crime with the consuming legal description, while the induced person commits only a crime with the consumed legal description. Likewise, a deceiver may commit a crime with another excluding legal description (primary or special) while the deceived person would, in turn, commit a crime with the correspondingly excluded legal description (subsidiary or general) - see also my remarks and proposals to Article 13 of the Somali PC. It follows that the liability to a punishment of the deceiver should be denoted as liable for the respective crime or for the heavier crime that he has committed rather than for the same as the person deceived by him. Lastly, Article 72 of the PC (Causing a Person not Liable or not Punishable to Commit an Offence) contains a similar oversight. It reads: “Whoever has caused a person who is not liable, or not punishable on account of a personal condition or capacity, to commit an offence, shall be liable for the offence committed by that person...” Obviously, the actor may commit some complex crime (Article 46.1 of the PC) while the person influenced by him could have the partial capacity under Article 51 of the PC to solely commit some simpler underlying offence. After all, since the PC recognizes the partial incapacity, it may as well recognize the relative innocent agency as well.

III. JUSTIFICATIONS (The Precluded Wrongfulness)

A. Personal Defence

As per Article 35 of the PC, “Whoever has committed an act, having been compelled by the necessity of defending his own or another person’s right against the actual danger of an unlawful injury, shall not be punishable provided that the defence is proportionate to the injury [37 P.C.]”.

A.1. According to the text of this provision, the conduct of the actor may be qualified as a ‘private defence’ only if s/he “has committed an act having been compelled by the necessity of defending his own or another person’s right”. Per argumentum a contrario, if the defence was not necessary, e.g. the actor or the other assaulted person had the chance to run away from the assailant, no private may defence exist and no one is authorized to harm the assailant even to stop him/her. Hence, if the assailant is guilty harmed, the act would constitute a crime. Nowadays, though, such necessity is not required; it is sufficient that the assault is contrary to the law to have the right to harm the assailant. Therefore, the defence is also allowed when the actor or the third person can run away and if they harm the assailant within the boundaries of private defence, the act would be justified and would not constitute any crime. As per Section 22 (4) of the Hungarian PC, “the person assaulted shall not be liable to take evasive action so as to avoid the unlawful attack”; s/he is always allowed to defend himself/herself against any such attack. This is why the words, indicating the subsidiarity of defence (when there are no other means to protect the endangered interest), should be deleted.

A.2. There is no doubt at all that, as everywhere, the defence shall be proportionate to the assault, which it repels. The text of Article 35, however, requires that the defence is proportionate to the injury. Obviously, the word “injury” should not be used as it wrongly implies that the defending actor or the third defended person, if any, should be harmed to some extent before starting the defence; the harmful consequences of the assault should have begun occurring. This is not necessary, though; the start of the activity constituting the assault is sufficient. Either way, it is not possible to
To avoid such conclusions nowadays the opposing values, targeted by defence and assault, are also compared. The contemporary concept is that private defence should be ‘successful’ but to the extent, it is ‘just’. The comparison of both the opposing forces and the opposing values as well has been made in the text of the law in Azerbaijan (Article 36.3 of the PC), Bulgaria (Article 12.2 of the PC), Uzbekistan (Article 37.2 of the PC). The private defence laws of these countries do not require any strict proportionality at all. As a result, the rule of the boundaries of private defence has the following general meaning:

- The force of the defence shall not be strikingly out of proportion compared to the assault force and
- The value of the interest harmed by the defence shall not be strikingly out of proportion compared to the value of the interest endangered by the assault as well.

The alternative option is to generally state in the text of the applicable law that the defence shall be carried out in accordance with the circumstances, e.g. “to ward off the attack by means that are reasonable in the circumstances” (Article 15 of the PC of Switzerland). Such text, containing no comparison criteria, is less specific but provides more freedom for its interpretation, both adequate and inadequate, regretfully. Finally, there are solutions to two additional problems related to the boundaries of private defence. These solutions might also be considered and eventually accepted by the Somali legislation. In some countries, no boundaries of private defence exist when the assault takes place at the home of the actor or of the third defended person if the assailant has entered there “by violence, deception or breaking in”, e.g. the new 2019 section in Article 52 of the Italian PC and Article 19 (3) of the Romanian PC. In such situations, there is no room for any excessive private defence at all. Sometimes, it is stated (correctly or not) that there is an irreputable/conclusive presumption (Latin: praesumptio iuris et de iure) of proportionality of the defence when it comes to the aforementioned situations. Thus, the private defence boundary, based on the proportionality requirement, is not more restrictive than the horizon as one can never reach it. After all, this impossibility to reach such boundaries means that no boundary exists at all. There are also countries where the punishability for the excessive private defence if the existing boundaries were exceeded due to “fright or emotional distress caused by the circumstances of the attack”, e.g. Article 25 (3) of the Polish PC. Such a defence is, on the one hand, unlawful. Therefore, it constitutes unlawful assault, in turn, repealable by a private defence. On the other hand, although, it does not carry any punishment. As a result of a legislative compromise, the actor is exempted from punishment on the aforementioned mental grounds. If such a rule is introduced in the PC, it would be a special provision to Article 52 of the Code.

A.3. In relation to the mental ingredient of the private defence, another, more general and difficult issue might be raised also. It poses the question of whether or not private defence has anymental ingredient at all. Some countries, e.g. Spain, require animus defendendi (intention to defend), others, e.g. Bulgaria, Germany and Russia, do not. It is sufficient for such countries that the actor objectively possessed an unlawful assault; his/her motives, good or bad, are irrelevant. Because private defence is regarded as a right and rights are enjoyable/exercisable even in the absence of any intention (contrary to obligations as they are fulfillable with anumus solvendi) the right to this defence, in particular, should also be free from a mental requirement. Hence, if the Somali authorities find this issue worth being regulated in the PC, they might be advised to prefer the second option by having such a text of Article 35 which excludes the conclusion that any animus defendendi (intention to defend) is necessary.

B. Necessity

Article 36.1 of the PC reads as follows: “Whoever has committed an act, having been compelled by the necessity of saving himself or others from actual danger of serious bodily injury, and where such danger has not been voluntarily caused by him or could not otherwise be avoided, shall not be punishable provided that the act is proportionate to the danger, and the person is not legally bound to expose himself to such danger”.

B.1. According to the text of this provision, the conduct of the actor may be qualified as a necessitous act only if the danger “has not been voluntarily caused by him”. Per argumentum a contrario, if the danger has been caused by him, the unlawfulness of his saving action shall not be precluded. It is unjustified and therefore, a prohibited action. The Penal Codes of a limited number of foreign countries also contain such a ‘no provocation’ requirement. For example, Article 54 of the Italian PC and Article 25 of the PC of Bosnia and Herzegovina also prescribe that the state of necessity shall not

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8 In such cases, the house owner generally defends three kinds of values, simultaneously: (i) the inviolability of his/her home, (ii) his/her life and health as well as the life and health of the members of his/her household who are present there, (iii), and the ownership of these physical items in the house which the intruding assailant would otherwise take away with him. Indeed, there is some risk of actual disproportionality, especially in the case of the intruder’s death. However, this legislative risk is regarded as justified: if any actual disproportionality occurs at all, is justifiable by its very low probability and also by the inevitable and serious positive result as the three aforementioned values are defended.
10 Pursuant to Paragraph 2, “an act is committed out of necessity, if committed for the purpose of averting from himself or from another an immediate or
have been deliberately created by the actor to produce permission for himself to cause the harm, which occurred, under the disguise of a rescue operation. However, any such deliberate creation of the danger together with the causation of the necessary final harm by the same person is regarded as an intentional crime everywhere. It is a crime even in countries where the ‘no provocation’ requirement does not exist at all. Therefore, the non-compliance with this requirement is not needed to make a crime out of such person’s conduct. It follows that the ‘no provocation’ requirement (if it exists at all), does not contribute in any way to the criminalization of the person’s conduct. Actually, the ‘no provocation’ requirement criminalizes solely the provoked necessitous act of the person by excluding it from the justification under Article 36.1. It follows that the unlawfulness of such an act is not precluded. Hence, any infliction of harm for averting the danger, which has been previously provoked by the same actor, is prohibited. If nevertheless, such a necessitous act is performed, it may be repelled as unlawful through the private defence under Article 34 of the PC.

In this sense is also the provision of 3.2.2 [Safe Harbor] in CHAPTER 3, Protection of Persons and Property at Sea and Maritime Law Enforcement of the US Commander’s Handbook on the Law of Naval Operations. The provision allows foreign ships in distress to enter safe harbours but only if the conditioning distress is “real andnot contrived”. Otherwise, if it has been contrived (deliberately created), the foreign ship is prohibited from entering the harbour. If the ship tries to enter, it might be stopped by force…

The problem, however, is that such dangers rarely affect only the persons who have deliberately created them to misuse the state of necessity. Usually, the danger affects third persons (solely or together with the creating person). Such persons have never participated in the creation of the danger, let alone for the purpose of opening the way to producing the final detrimental result. In view of thereof, it makes no sense to disallow the protection of the third persons. If the captain of the ship causes distress, the passengers shall not suffer: he shall be authorized to save them by entering the harbour and punished afterwards for the illegal border crossing into the country. Exceptionally, the actor may have created such a danger, which affects him only. Again, however, it is difficult to argue that he shall be prohibited from protecting himself by excluding his necessitous act from the justification under Article 36.1. On the one hand, such exclusion may be counterproductive as it would further complicate the law on necessity. On the other hand, the civil law obligation, deriving from the situation, might be a sufficient deterrent. Because the actor was the intentional creator of the danger as well as the beneficiary of his own necessitous act for averting this danger, he shall pay the compensation to the victim of the final detrimental result as this victim is the one at the expense of which the endangered values of the actor were rescued. This

‘zero’ benefit alone is likely to dissuade him from undertaking the whole operation. Secondly, the necessitous act of the person, who provocatively created the conditioning situation, constitutes his positive post-criminal behaviour, actually. Contemporary penal law encourages such behaviour of offenders in the implementation of its growing preventive function. The necessitous act in question is such behaviour also; it is very similar to the voluntary withdrawal from attempt under Article 18.2 of the PC. Moreover, the two post-criminal acts may even coincide as the voluntary withdrawal from attempt might be performed through a necessitous act as well. For example, late in the evening, the actor has given poison to a whole family; they are likely to die in an hour or so. The only way to save them is to break into the nearest pharmacy shop and take medicine which would neutralize the given poison. Obviously, no one shall be allowed to stop the actor from saving the poisoned family in this only possible way.

Further on, since such a necessitous act, which constitutes a voluntary withdrawal, shall be allowed, there is no point in prohibiting other necessitous acts for the sole reason that they do not constitute any voluntary withdrawal. On the contrary, as the only peculiarity of their conditioning danger is the lack of the actor’s desire to produce the respective derivatory harm, this actor shall per argumentum a fortiori be allowed to prevent its occurrence. Thirdly, the comparison of the provoked state of necessity with the actio in libera in causa (Latin: produced incapacity) under Article 49 of the PC also supports the conclusion that the necessitous act shall not be prohibited and repelled through private defence. The two situations look very much alike. Both situations consist of two consecutive acts. The same actor performs them: the first act initiates a process leading to some harm while the second one materializes the existing danger by converting it into some actual harm.

However, when it comes to the actio in libera causa, the actor is held penally responsible only for his former act bringing himself to the situation of insanity/incapacity. He is not responsible for his latter act, although it is harmful as it does not save anything at all. This following act is unlawful and therefore, is an act, which may be stopped through the private defence. In contrast, the actor who provoked the state of necessity should not be stopped from performing his second act of saving the endangered value as this act is even socially useful. Because the criticized ‘no provocation’ requirement in Article 36.1 prompts the opposite conclusion, an unfounded one, its removal from the text is strongly recommended. This legal requirement might be a source of confusion; it signifies a bad understanding of the legal institution of necessity. It is counterproductive to require that the danger shall not have been created by the actor who averts it to protect the endangered interest. Even in such a case, he is authorized to protect the interest by causing necessary harm. As the actor saves this interest, his activity is socially useful and shall not be prevented through any private defence as ‘unlawful conduct’. His rescue act is no less useful than similar acts by persons who have not caused the danger. This does not mean, though, that in this situation, the actor does not commit any crime at all. The only problem is not to confuse his act of values destroys it or something else not belonging to him. Thus, pursuant to Section 228 of the German Civil Code, no act of necessity, done to avert danger by destroying the object of the danger, constitutes a ground for compensation unless “the person acting in this manner caused the danger”.

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averting the danger with his previous criminal act of creating this danger and eventually resulting in the occurrence of some necessary harm. Obviously, he would be responsible for this previous act. The complication in the causal connection cannot preclude its criminality.

B.2. According to the text of Article 36.1, the danger ... could not otherwise be avoided. The common interpretation, though, is that the danger could not be avoided in a harmless way. Therefore, it is not necessary that the way, to which the actor has the resorted, was the only possible way. If the requirement is understood in this way, it would mean that if two possibilities exist to avoid the likely harm by causing some smaller, they both eliminate each other. In view of thereof, if the aforementioned interpretation is acceptable, it would be better to modify the existing text into the following one: the danger ... could not be harmlessly avoided. The text of Article 36.1 also requires “that the act is proportionate to the danger”. Proportionality, however, is required for private defence as well. Because, traditionally, some difference between the two defensive acts exists, the peculiarity of the necessitous act must be clearly described in the text. Unlike the situation with the private defence where the proportionality concerns the opposing acts, herethrough proportionality concerns the results: caused and avoided. In contrast to private defence, it is not sufficient for the necessitous act to be prevented from being strikingly disproportional to the assault. It is, most often, necessary that the harm caused is smaller than the harm avoided. It might be a positive step if this peculiarity of the boundary of the act is described in the text of Article 36.1 of the PC.

C. Justified (Reasonable) Risk

C. 1. Nowadays, risky activities become both necessary and popular in all spheres of life. The risk issue has always been a challenge, but, like Somalia, most countries have not yet produced a general legal framework for it. The countries, which already have, outline the risky act as a justification to offence in their Penal Codes after the state of necessity, usually. Penal law rules on justified risk, wherever they exist, are subsidiary to the legal framework for the state of necessity. Rules on necessity require success, whereas the problems of risk and its probable justification come in when the activity fails. An informed decision on the legal framework for justified risk requires some explanations deriving from foreign legislative experience, mostly. It is well known that different risks exist. The risk might be medical, economic, military, naval, cosmic, etc.

There is a risk, for example, when safe harbour is granted to ships in distress. The International Maritime Organization adopted the “Guidelines on places of refuge for ships in need of assistance” [Resolution A 949 (23) of 5 December 2003] to encourage countries to offer assistance to vessels in distress. According to Item 3.12 and 13 of the Guidelines, all countries are expected to perform a risk assessment before rejecting refuge applications by distressed vessels. The harbour authorities need to determine the risk of contamination, explosion or similar disaster, if such a vessel enters the harbour. The Somali PC contains no rule of justified or reasonable risk. In part, such a justification exists, for example, in the Iraqi PC. Its Article 41 (3) (ii) outlines the so-called medical risk. Other countries have rules in their PC-s on the economic risk, e.g. Article 13a of the Bulgarian PC. The PC-s of third countries have provisions codifying all permissible or reasonable risks into a single justification, e.g. Article 41 of the Russian PC. Either way, regardless of their peculiarities, different justified risks have some common features which form the concept of justified (reasonable or permissible) risk. This justification might be considered for introduction in the Somali PC as well. This is why a short explanation of it follows.

This risk is expressly recognized as a separate justification in the eastern half of Europe, mostly. One can find this justification in: Article 13a of the Bulgarian PC and Article 34 of the Lithuanian PC, Article 27 of the Polish PC, Article 41 of the Russian CC and Section 27 of the Slovak CC, etc. These articles provide a positive legal framework for permissible risk. Until its legislative recognition, the risk was regulated by borrowing the rules on the state of necessity. As these rules represented favourable criminal law provisions, they were applicable by statutory analogy. This ANALOGIA LEGIS is not forbidden as in this case, the provision applied is favourable to the actor. Therefore, criminal law is applicable in bonam partem [Lat.: “in a good sense, with a positive connotation”] and can never violate the “Nullum crimen, nulla poena sine lege” principle, in particular.

C. 2. The Essence of Risk

To take a risk means to stand the possibility of causing some undesired harm while in pursuit of some desired benefit. The undertaking of “risky” activities is generally encouraged in cases when the desired result could be socially useful. For example, society accepts the risk of speeding ambulances and fire engines in order to save life and property, but it does not accept a similar risk posed by a reckless motorist fleeing the police. Hence, when some risky act is under consideration, in deciding whether it is justifiable, its social purpose is of utmost importance. “Danger” and “risk” are not synonyms. Risk always involves some danger, but not any danger constitutes a risk. When it comes to risk, the accompanying danger is never wanted. It is solely a necessary condition that the actor must tolerate while attempting to achieve some desired result. Therefore, the risk is a combination of danger and opportunity to achieve the result. This result shall be socially useful in

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12 Risk undertaking is not foreign even to criminal justice. For example, an accused person may, based on an agreement with the public prosecutor/ investigative judge, be used as the so-called co-operative witness. Thus, under Article 129 of the Iraqi Criminal Procedure Code [CPC] or Articles 298-303 of the CPC of Kosovo, the suspect may be granted immunity for giving testimony against the high level of the criminal organization in which s/he participates. However, s/he may not execute his/her part of the agreement and eventually, create difficulties to the investigators and prosecutors in charge, and even bring the criminal proceedings against the big criminal bosses to failure.

13 Some laws mention justified risk but they do not positively outline it. Instead, they directly deal with non-justified risks by solely mentioning them as a basis to define recklessness, usually. Thus, recklessness is defined as the taking of unjustified risk, e.g. Article 15.05 (3) of the State of New York Criminal Code and Article 2.02 (2) (c) of the US Model Penal Code. However, the normal starting point is the risk, which is justified. The unjustified one, need to determine recklessness and knowledge, which comes per argumentum a contrario from the notion of justified risk. No one can safely figure out what unjustified risk is if the law does not tell what justified risk is. Therefore, legal provisions should clarify justified risk: its prerequisites and the boundaries of risky acts. If the actor does not meet the legal conditions of justified risky acts or, at least, if s/he oversteps its legal boundaries, his/her act becomes socially unacceptable and legally unlawful. Then his/her guilt would be possible and it would be necessary for competent judicial bodies to look for its specific manifestation, incl. in the form of recklessness or indirect intent, in particular.

order to make the justification of the act possible at all. The risky act may end up with success. This happens when its overall balance is positive: the desired result has been achieved without any accompanying harm at all, or it has been accompanied by significantly smaller harm. In such situations, the act committed is socially useful, and the actor is likely to be granted some award only. Such risky acts are not relevant to criminal law, in general. Certainly, a risky act may be unsuccessful: the desired result has not been achieved at all, or though achieved, has been accompanied by greater harm. Such situations of an overall negative balance require checks as to whether the risk was worth taking since it might have ended up in a failure. The production of the harm caused is generally prohibited by some provision of the PC and it must be determined as to whether there are sufficient grounds to exceptionally justify the performed risky act. Thus, risk alone is not sufficient to make the act a criminal law issue. For the relevance of the act to criminal law, it is also necessary that the created danger materializes by causing some loss. For example, a driver of a fire engine rushing to a fire is justified in exceeding the speed limit. Even with sirens wailing, the speeding engine may raise the danger of a traffic accident, but the risks of harm are greater if time is lost getting to the fire. In this situation, the driver’s behaviour executes special permission for fire engines to take the risk of a traffic accident. The permission excludes the applicability of the general administrative restrictions regarding the speed. At this point, though, the driver’s behaviour has not yet become any criminal law problem. It may become such a problem only if some serious harm actually occurs, e.g. the driver crashes into another car and cannot reach the burning building at all. These undesired consequences make the unsuccessful risky act fall under the legal description of some crime (e.g. damage or destruction of another person’s property or economic mismanagement); thus, given the harm it causes, the act corresponds to the criminal law prohibition, expressed by the legal description. Only then the act actually becomes a subject of interest to criminal justice. Hence, the act must otherwise constitute a crime, if it were not a risky one. As any other justification in criminal law, justified risk “simply reflects a permission - extended for whatever reason - to do what the criminal law otherwise forbids”[15].

However, not every unsuccessful risky act, irrespective of the amount of the harm caused, is an independent problem of criminal law. To become such a problem, the act shall not be expressly allowed by some general legal permission, such as “implementation of law”, fulfillment of duty, exercise of a right. Otherwise, if the act is allowed by any such provision, it would be justifiable under it. Hence, the actual need for the legal institution of justified risk comes in for those risky acts, which do not fall within the general justification of ‘implementation of law’ or any other general justification.

3. Conditions

It would never be possible to fully avoid the risk of failure and undesired harm in any sphere of life because it would mean to stop all expeditions, experiments, tests of new vehicles/technologies, investments, rescue operations. As almost all such activities pose some danger, it may follow that all of them shall be prohibited. However, this is not possible. On the contrary, in the name of the progress society has to tolerate certain dangers which accompany medical interventions, military operations, production of many goods, banking activities, etc. Nowadays, with the development of complex technologies, risk became a part of the human progress that plays an important role in financing, banking, commerce, construction works, transport, science that requires investment, undercover operations by police and other law enforcement agencies, etc. In some situations, heavy losses occur, namely: deaths, serious injuries, destruction of property, financial losses. Inevitably, they will occur in the future. Nothing can fully prevent them from occurring. In situations when serious harm occurs, competent judicial bodies shall make sure that the risky act was justifiable. For this purpose, they must find the right answer to the question as to whether it was worth taking the risk in the given conditions. If the answer is a positive one as the risky act meets the requirements for its undertaking, this risk is qualified as justified (also: permissive/permited, or allowed, or reasonable, or tolerated or substantiated one). Such risk is unsuccessful but acceptable. However, where it was not worth taking the risk in the given conditions, then the fact that the risky act has been committed in the name of a socially useful result constitutes, most often, a mitigating circumstance only. Even the worst result alone, although predictable in general when it comes to risk, cannot entail criminal responsibility for the actor, regardless of the peculiarities of his/her act that produced the result. To be criminally liable, s/he should also have acted in a way contrary to existing legal provisions. The risky act is “legitimate” and does not entail criminal liability of the person who acts within its legal boundaries to satisfy the needs of the society and purposes of science and technology. As in the case with the previous justifications, the relevant conditions pertain to the state of justified risk and to the risky act itself.

3.1. Conditions Relating to the State of Justified Risk

a. First of all, the state of risk can exist if there is some serious social need, which can be satisfied by achieving a specific result. There are two types of desired results that may justify any risk, incl. those that conclude with a failure. The first of them is to attain some significant positive change – knowledge, financial benefit, etc. through an expedition, experiment or investment, involving in any case possibility of loss. In such situations, the problem arises when and because society does not gain anything at all as the action results in inflicted losses only or it gains something but at the expense of significantly greater harm. The other desired result that may justify a risk is to avoid some negative change – prevent damage from occurring through a rescue operation involving the possibility of losses. In such situations, the problem arises when and because the damage has not been prevented at all, as the action resulted in inflicted losses only and the necessity rules are not applicable, or the damage has been prevented but at the expense of greater harm.

b. One is allowed to risk if there is no “non-risky” (not posing any danger) way to attain a socially useful objective that he wants. In view of this, justified risk resembles necessity as both are subsidiary in the aforementioned sense. In contrast to them, the private defence is not subsidiary since anyone is allowed to resort to it, even if he or the third person assaulted may run away.

c. The risk must be reasonable. It may be undertaken if it does not represent any pure adventure where the actor relies solely

on luck to avoid failure demonstrating in this way insufficient concern for others. The actor should be aware that legal interests might be infringed, but his action is in pursuit of a socially useful goal. The risk should make sense. The planned action must be aimed at a result which is sufficiently serious and/or very likely compared to the possible harm. The risk taken must be reasonable in accordance with two general criteria: a qualitative – how much the value of the desired result exceeds the value of the possible harm; and a quantitative criterion – the probability of achieving the desired result compared to the probability of causing greater harm. Thus, according to Article 13a (2) of the Bulgarian PC, “In deciding the issue whether the risk was justified, taken into consideration must also be the correlation between the expected positive result and the eventual negative consequences, as well as the probability of their occurrence”. Where the risk constitutes some experiment with a physical person involved as a potential victim, his/her informed consent (for risk assumption) is required in advance under most criminal laws regulating risk. It follows that, in contrast to the legal framework for necessity, risk law requires a comparison not only of the values of the two opposing results (the harms): the desired positive result and the negative result which actually occurred. Risk law also requires a comparison of the probabilities of their occurrence. Thus, the idea of the lesser evil, inherent in extreme necessity, is no longer sufficient when it comes to justified (allowed) risk. The quantitative comparison between saved and sacrificed values is insufficient to judge whether the risky act is justified or not. If solely the value criterion of extreme necessity were valid, the risky act would always be justified when e.g. one buys a lottery ticket for 10 dollars to win 10 000 dollars. However, once probabilities are also taken into account, the risky act may get the opposite evaluation, as the loss of the invested 10 dollars is inevitable (100% probability) while the probability of the gain is insignificant (1%, even less). Hence, this qualitative comparison between the probabilities of occurrence of the desired positive result and the undesired harm shall also be made to judge whether the risky act is socially beneficial justified or not. Regardless of the insufficiency of the quantitative comparison between saved and sacrificed values, the general idea of proportionality stays as an objective characteristic of the risky act. The combination of the absolute value of the desired social result and the likelihood of its achievement must always exceed the combination of the absolute value of the harm suffered and the likelihood of its occurrence. The act would be “unjustifiable if the gravity of the foreseeable harm, multiplied by the probability of its occurrence, outweighs the foreseeable benefit from the conduct.”

### 3.2. Conditions Relating to the Act in Justified Risk (the Risky Act)

The leading peculiarity of the risky action is that it is not successful. This makes the risk different from and even contrary to the necessity. First of all, the risky act may be undertaken for attaining a positive change - a situation that has nothing to do with necessity and cannot, therefore, be governed by its rules. More importantly, the necessity rules always require success while the risk becomes a criminal law matter when the risky action is unsuccessful. However, the harm to the interests affected shall not occur through arrogant miscalculation and activities. The actor should have exercised necessary care to avoid the negative result. To guarantee proportionality, Article 13a (1) of the Bulgarian PC requires that the actor should have taken all necessary measures to prevent the harm from occurring or to reduce its volume, at least. Unlike the legal framework for necessitous acts and similarly to that for undercover activities (Article 12b of the PC), the legal provisions on risky acts do not regulate them directly and in full. Existing criminal law institutions of justified risk, including Article 13a of the PC, contain one or more blanket provisions filled up by specific rules applicable to risky activities undertaken in the different areas of life. These rules are in administrative laws and/or technological achievements to specify the requirements for the risky act within the two general criteria for comparison. The legal designation of allowed risk contains them in one blanket indication, at least, such as: “it is not counter to explicit ban established by a normative act, complies with the modern scientific and technical achievements and experience” - Article 13a of the Bulgarian PC. The use of blanket indications makes the legal framework for risky acts, both stable and flexible. Thanks to their blanket nature, the indications take automatically into consideration any modification in bylaws regulating risky activities in different spheres of social life. Such blanket indications are indispensable. They give to bylaws, applicable to specific risky acts, the necessary legal power to preclude the applicability of the respective prohibitive provisions of the PC. Otherwise, the bylaws, though special, shall not be applied given their lower legal power. Hence, their applicability on the principle that lex specialis derogat lex generalis not achievable without blanket indications in the legal description of justified risk in the PC. The same approach to regulating risky acts might be applicable to risks undertaken in cases of a granted safe harbour, in particular. According to Item 3.2 of the Guidelines on places of refuge for ships in need of assistance, each country should establish own rules on risk assessment of situations when ships in need request access to a place of refuge. If the country’s domestic law contemplates a legal description of justified risk which, expectedly, contains one or more blanket indications, they are likely to be filled out by the respective rules on risk assessment.

## Conclusion

Somali penal law should be improved but this must be done gradually and carefully. Legislative authorities are not advised to make drastic changes in the current situation, let alone introduce a new PC immediately. The PC in force should be modernized and this might be the necessary and appropriate step towards a new PC.

De-codification of penal law should not be encouraged. Such legislative policy results in some typical weaknesses, which are difficult to overcome:

- First of all, the production of special penal laws slows down the improvement of the PC as the drafters are more...
occupied with new criminalizations through such laws rather than the modernization of the existing provisions in the PC. Also, provisions of common nature, relevant to all crimes (e.g. about participation in crime), are often placed in special laws rather than in the PC to eventually create unnecessary conflicts of application.

b. As a result, those officials who have to apply Somali penal law or have to take it into consideration (e.g. to decide whether or not to render international judicial cooperation to Somalia) would need to construe multiple legal institutions, such as extraterritorial applicability, complicity, confiscation, etc. They have to learn and understand two or more parallel set of rules rather than address a single codified set of rules in the PC. The interested officials are obliged to compare these parallelly existing rules; otherwise, they will not assimilate the meaning of any well. Thus, the interested persons must work with two laws, drafted in different times and based, more or less, on different ideas.

c. Besides, those who have to apply Somali penal law or have to take it into consideration are likely to face or/and get involved in more disputes which would not occur if there had been no special laws at all. The interested officials shall have to decide which law is the applicable one in cases of conflict. It cannot be always clear what is covered by the special penal law and what has been left for the general PC, respectively.

Therefore, as a general rule the innovations should be made in the existing PC. Their introduction through special penal laws should be avoided as it complicates unnecessarily the criminal justice system.

References


