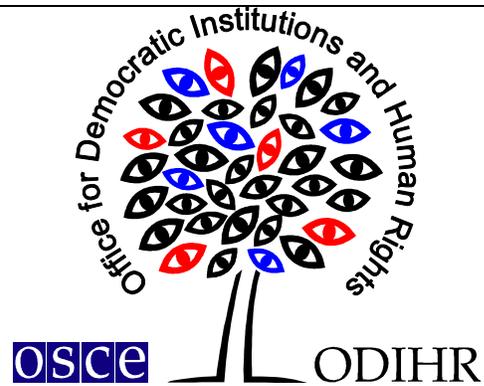


Warsaw, 12 November 2010

Opinion-Nr.: CRIM – ARM/172/2010 (LH)

www.legislationline.org



OPINION

ON DRAFT AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA

**Based on an unofficial English translation of relevant documentation provided
by the OSCE Office in Yerevan**

This Opinion has benefited from the contribution made by Professor Karoly Bard, Pro-Rector for Hungarian and EU Affairs and Chair of the Human Rights Program of the Central European University in Budapest, Hungary

TABLE OF CONTENTS

- 1. INTRODUCTION**
- 2. SCOPE OF REVIEW**
- 3. EXECUTIVE SUMMARY**
- 4. ANALYSIS AND RECOMMENDATIONS**

Annex 1: Law of the Republic of Armenia on “Introducing Changes and Amendments to the Criminal Procedure Code of the Republic of Armenia”

1. INTRODUCTION

1. *From April 2008 to June 2009, the OSCE/ODIHR conducted a Trial Monitoring Project in Armenia. The Final Report completing this Project (hereinafter, “the Final Report”) was issued in March 2010 and included numerous recommendations on various issues related to criminal proceedings and the implementation of related human rights standards.¹ On the basis of the findings contained in the Final Report, as well as the case-law of the European Court of Human Rights, the Ministry of Justice of the Republic of Armenia has drafted a Law on “Introducing Changes and Amendments to the Criminal Procedure Code of the Republic of Armenia” (hereinafter, the Draft Law).*
2. *On 25 June 2010, the Minister of Justice of the Republic of Armenia addressed the Head of the OSCE Office in Yerevan with a request for expertise on the Draft Law. As per established procedure, the OSCE Office in Yerevan forwarded English translations of both the request and the Draft Law to the OSCE/ODIHR. The current Opinion is provided in response to the above request.*

2. SCOPE OF REVIEW

3. The scope of this Opinion covers the draft Law of the Republic of Armenia on “Introducing Changes and Amendments to the Criminal Procedure Code of the Republic of Armenia”. Thus limited, the Opinion does not constitute a full and comprehensive review of the current and draft criminal procedure legislation in Armenia.
4. For purposes of concision, the Opinion focuses on areas that are a source of concern rather than on the positive features of the Draft Law. The ensuing recommendations and comments are based on international human rights standards, as found in international agreements and commitments ratified by the Republic of Armenia.²
5. The Opinion is based on an unofficial translation of the Draft Law into the English language which is attached to this document as Annex 1, as well as an unofficial translation of the Criminal Procedure Code of the Republic of Armenia. Errors from translation may result.
6. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments on the criminal procedure legislation of the Republic of Armenia that the OSCE/ODIHR may make in the future.

¹ The Final Report is available on the OSCE /ODIHR website under http://www.osce.org/documents/odihhr/2010/03/42944_en.pdf

² Of particular relevance for the purposes of this Opinion is the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (signed on 4 November 1950, entered into force on 3 September 1953, ratified by the Republic of Armenia on 26 April 2002) and the United Nations International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, acceded to by the Republic of Armenia on 23 June 1993).

3. EXECUTIVE SUMMARY

7. To ensure the compliance of the Draft Law and the Criminal Procedure Code of the Republic of Armenia with international law, it is recommended, in particular:
 - A. To consider prescribing expressly that a suspect can be detained only when there is reasonable suspicion that he or she has committed a crime [paragraph 10];
 - B. To reduce the time-period of the interval at which pre-trial detention needs to be reconfirmed [paragraph 12];
 - C. To formulate with greater precision the circumstances in which “a danger threatening the public order” can be used as a ground for detention [paragraph 13];
 - D. To consider prescribing a rule that the accused be present at the questioning of witnesses who were called by the defence, as well as those witnesses who may be unavailable at trial [paragraph 15];
 - E. To reconsider the blanket inadmissibility of motions that repeat previously-rejected grounds [paragraph 17].

4. ANALYSIS AND RECOMMENDATIONS

8. The OSCE/ODIHR notes from the very outset that the majority of the amendments proposed by the Draft Law are commendable, and if enacted into law should undoubtedly enhance the protection of human rights in the course of criminal proceedings in Armenia. At the same time, several amendments put forward in the Draft Law could benefit from re-consideration or reformulation, in order to fully meet international standards, as explained below.
9. Articles 2 and 18 of the Draft Law propose to amend, respectively, Articles 16 and 288 of the Criminal Procedure Code with a view to ensuring the public nature of hearings on detention on remand (open-door sessions). While international law does not require hearings on detention to be held in public session, some European states – such as France, Bulgaria and others – have recently amended their Criminal Procedure Codes and made hearings on detention public, as a rule.³ Such an amendment may represent a progressive development in so far as it may increase the transparency and public scrutiny of proceedings which may result in deprivation of liberty.

³ See, for instance, Art. 145 of the Criminal Procedure Code of France (in force from 2 March 1959, consolidated version as of 1 October 2010), which provides that the hearing on detention shall take place in open court, unless the public prosecutor, the person under judicial examination or his defense counsel request that the hearing be closed if publicity may hinder the specific inquiries needed by the investigation, or threaten personal dignity or a third party's interest.

10. Art. 3 of the Draft Law proposes new provisions concerning the “suspect”. While the respective provisions are well-drafted, they could be further strengthened with a rule stating that the suspect can be arrested or detained only when there is *reasonable* suspicion that he or she has committed an offence (and not just a genuine suspicion, or a suspicion held in good faith). This would mean that a mere *bona fide* suspicion of the law enforcement bodies would not suffice for detention, and that there should exist some factual evidence that the said person had in fact committed a crime. Such a rule would enhance the protection of the right to liberty and would reflect the case-law of the ECtHR.⁴
11. Art. 10-12 of the Draft Law propose a revision of Art. 137-139 of the Criminal Procedure Code, which regulate the use of detention in the course of criminal proceedings. It is highly commendable that the amendments remove the rule under which the calculation of the period of detention is stopped, or suspended, once the case-file was remitted to court.⁵ Such a rule, which in effect removes the obligation for periodic judicial review of the necessity for prolonged detention after the remittal of the case-file to the court, is a Soviet relic which violates the right to liberty and security of person as guaranteed by Art. 5 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter, “the ECHR”). Similar “suspensions” of the calculation/review of detention once the defendant was “placed at the disposal of the court” existed in many countries from Central and Eastern Europe (e.g., Poland, Lithuania, Moldova and others) and were all eventually abolished upon accession to the ECHR.⁶ The elimination of such practice in Armenia is imperative in order to ensure full compliance with the requirements of international law, more exactly, Art. 5 of the ECHR.
12. At the same time, however, it is noted that the proposed revision of the rules on the application of pre-trial detention leave unchanged the maximum duration of detention. Initial pre-trial detention will still be applicable for a period of up to 2 months, extendable every 2 months up to a total of 6 months by reason of complexity of the case, and in exceptional cases involving grave or extremely grave crimes, extendable up to 12 months.⁷ These provisions do provide for a periodic judicial review of detention, as mandated by the presumption in favour of liberty under Art. 5 ECHR; however, the periodicity of the review of pre-trial detention under this rule is less frequent than in most European states. Usually, *pre-trial detention* can be ordered for an initial period of up to one month, extendable (usually by either another month at a time, or by periods of one or two months, in alternative succession), with longer extensions (of 2-3 months) allowed for *detention on remand* (i.e., once

⁴ The ECtHR has held that in order for detention to be lawful, the fact that a suspicion is held in good faith is insufficient and that there must be facts or information which would satisfy an objective observer that the suspect may have committed a criminal offence. See *Fox, Campbell and Hartley v. United Kingdom*, ECtHR Judgment of 30 August 1990 (Application no. 12244/86; 12245/86; 12383/86), paragraph 32.

⁵ As prescribed by the current version of the Criminal Procedure Code in the 3rd sentence of Art. 138(3) of the Code.

⁶ For some examples of ECtHR rulings on such practices, see *Baranowski v. Poland*, ECtHR judgment of 28 March 2000 (Application no. 28358/95); *Jėčius v. Lithuania*, ECtHR judgment of 31 July 2000 (Application no. 34578/97); and *Boicenco v. Moldova*, ECtHR judgment of 11 July 2006 (Application no. 41088/05).

⁷ See Art. 138 and 139 of the Criminal Procedure Code of the Republic of Armenia.

the case is sent to court). A comparative analysis of other OSCE participating States's legislation shows that it is uncommon to have an interval of much more than a month between the occasions on which the justification for pre-trial detention is submitted to judicial review.⁸ It is therefore recommended to consider amending the relevant provisions of the Criminal Procedure Code of Armenia with a view to reducing the time interval at which pre-trial detention would have to be reviewed. Such reduction would also be in keeping with the Council of Europe recommendation that “the application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice”.⁹

13. Art. 10 of the Draft Law proposes a new version of Art. 137 of the Criminal Procedure Code which would allow for pre-trial detention to be applied also in cases where there is a danger of threat to public order and the application of other measures of securing appearance is impossible or insufficient. As a matter of principle, such a ground for applying detention has been accepted in international law in exceptional cases involving crimes which by reason of their particular gravity and possible public reaction to them may give rise to a social disturbance that may justify pre-trial detention for a certain period of time.¹⁰ The proposed phrasing in the new Art. 137 par. 2, however, may raise some concerns because of its vagueness. To prevent abuse, it is recommended to formulate it with greater precision and to circumscribe it by guarantees such as the existence of exceptional circumstances which demonstrate that the release of the person would actually disturb public order at that particular time (because of high public outrage, for instance).
14. Art. 13 of the Draft Law introduces an amendment which will make bail applicable in all cases, irrespective of the gravity of the offence incriminated. As already mentioned in its earlier Concept Paper Note,¹¹ the OSCE/ODIHR welcomes such an amendment, which in fact is imperative for bringing the Armenian criminal procedure legislation in line with the requirements of international law.¹² At same time, preservation of the minimal amount of bail at the level of 200 minimal salaries may unduly restrict its application in practice. It may be advisable to consider granting judges more discretion in determining the amount of bail in order to broaden its use as an alternative to pre-trial detention.
15. Art. 14 of the Draft Law proposes an amendment which would give the suspect the right to request confrontation, and the accused – the right to interrogate witnesses who had testified against him or her. This amendment

⁸ See *Pre-Trial Detention in the OSCE Area* (OSCE/ODIHR Background Paper 1999/2; prepared by Jeremy McBride), section 4.3.1 Periodic judicial confirmation of detention. The document is available online at http://www.osce.org/documents/odihr/1999/09/1504_en.html#p431

⁹ See Recommendation No. R (99) 22 of the Council of Europe Committee of Ministers *Concerning Prison Overcrowding And Prison Population Inflation*, paragraph 11.

¹⁰ See *Letellier v. France*, ECtHR judgment of 26 June 1991 (Application no. 12369/86), paragraph 51.

¹¹ See paragraph 26 of the *OSCE/ODIHR Note on the Concept Paper on the Reform of Criminal Procedure Legislation in Armenia* of 4 November 2010 [Opinion-Nr.: CRIM – ARM/171/2010 (LH)].

¹² A general rule prohibiting bail in cases involving serious charges and which excludes *a priori* the possibility of any consideration by the court of releasing the defendant on bail, violates that person's right to liberty as it effectively removes the judicial control over detention in that particular category of cases, in violation of Article 5(3) of the ECHR. See *S.B.C. v. UK*, ECtHR judgment of 19 June 2001 (application no. 39360/98), paragraphs 22-23.

reflects the requirements laid down in Art. 6(3)d ECHR. In this context, one additional recommendation can be made in order to adequately protect the rights of the defence. As concerns the presence of the accused at the questioning of witnesses during the investigation, and the right of the accused to examine the witnesses – that should be permitted in all cases where the questioning of the witness was requested by the defence, and also in all cases where there is a probability that the witness may not be examined during the trial (e.g. because of illness, age, travel abroad or when the witness is a minor who should not be examined in open trial etc.).

16. Art. 16 of the Draft Law proposes changes to Art. 285 of the Criminal Procedure Code, including also a new rule according to which “[t]he pre-trial detention term may not be extended only upon the same grounds as the grounds of choosing the pre-trial detention as the measure of securing appearance”. Such a rule is welcome in so far as it aims to prevent detention orders that are phrased in a repetitive and stereotypical manner, and should ensure compliance with ECtHR’s statement that “[t]he persistence of a reasonable suspicion that the person arrested has committed an offence is a *conditio sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices”, and that therefore a continued detention should be justified with other “relevant and sufficient” grounds.¹³
17. Art. 23 of the draft Law proposes to introduce a new paragraph to Art. 331 of the Criminal Procedure Code, stating, *inter alia*, that “[t]he motion which repeats the grounds of the rejected motion shall not be subject to examination”. The OSCE/ODIHR has already expressed reservations with respect to such rule in its Concept Paper Note.¹⁴ While such a provision could aim to prevent repetitive, superficially-argued and stereotypically-phrased motions for detention, it may, on the other hand, fail to take due account of the fact that certain elements which were originally of little relevance, may acquire new significance as criminal investigations progress. It is therefore recommended to reconsider such a blanket inadmissibility of motions that repeat previously-rejected grounds, as it may result in unintended deleterious consequences.

[END OF TEXT]

¹³ See *Labita v. Italy*, ECtHR judgment of 6 April 2000 (Application no. 26772/95), paragraph 153.

¹⁴ See paragraph 24 the *OSCE/ODIHR Note on the Concept Paper on the Reform of Criminal Procedure Legislation in Armenia* of 4 November 2010 [Opinion-Nr.: CRIM – ARM/171/2010 (LH)].

Annex 1:

DRAFT

**THE LAW OF THE REPUBLIC OF ARMENIA
ON “INTRODUCING CHANGES AND AMENDMENTS IN CRIMINAL
PROCEDURE**

CODE OF THE REPUBLIC OF ARMENIA”

Article 1. To edit Paragraph 19 of Article 6 of the RA Criminal Procedure Code from July 1, 1998 (hereinafter “the Code”) with the following wording: “Termination of criminal prosecution - a decision made by the body conducting the criminal proceedings to terminate the criminal prosecution”.

Article 2. In paragraph 1 of Article 16 of the Code after the word “examination” to add the words “as well as the examination of decisions on choosing of arrest as a measure of securing appearance or filing motions on extension of pre-trial detention term”.

Article 3. To edit Article 62 of the Code with the following wording:

“Article 62. The Suspect

- 1) The suspect is the person:
 1. who is arrested upon the suspicion in committing a crime;
 2. with regard to whom a decision on choosing of measure of securing appearance is taken;
 3. with regard to whom a decision on recognizing as a suspect is taken.

The body conducting the criminal proceedings must immediately make a decision on arresting or choosing of a measure of securing appearance or recognizing as a suspect, clearly specify the grounds for arresting or choosing of a measure of securing appearance or recognizing as a suspect therein, respectively, and immediately deliver a copy of the decision to the suspect.

- 2) The body conducting the criminal proceedings shall not be entitled to keep the person in detention as a suspect over 72 hours, and as for implementation of measures of securing appearance or taking a decision on recognizing the person as a suspect over 10 days from the moment of declaration to him or her the respective decisions.
- 3) Upon the expiration of 72 hours from the moment of arrest, the person shall be released from custody if detention as a measure of securing appearance is not chosen for him or her in the prescribed manner.
- 4) Upon the expiration of the 10 days’ deadline from the moment of acquiring a status of a suspect, the person shall cease to be a suspect or the body conducting the criminal proceedings takes a decision on

impleading him/as accused.

- 5) Finding the suspicion on committal of the crime unjustified, the body conducting the criminal proceedings and the court shall vacate the decision on the recognition as a suspect, release the suspect from custody or eliminate the chosen measure of securing appearance prior to the expiration of the established deadlines”.

Article 4. In paragraph 2 of Article 63 of the Code:

1. In Paragraph 3 after the word “arrested” to add the words “after acquiring a status of a suspect to receive immediately the free copy of the decision on recognizing him or her as a suspect”.

2) In Paragraph 4 add the words “recognizing as a suspect” before the words “on arrest”.

Article 5. In item 6 of paragraph 2 of Article 65 of the Code to replace the words “to confront persons who testified against him or her” with the words “in the course of confrontation ask questions to persons who testified against him or her”.

Article 6. Article 69 of the Code:

- 1) To repeal paragraph 3;
- 2) To amend a new sentence in paragraph 4 with the following content: “Mandatory participation of a defense attorney for an insolvent suspect or accused shall be ensured by the Office of Public Defense pursuant to the procedure provided for by the Law.”

Article 7. Article 70 of the Code:

- 1) To edit paragraph 4 with the following wording:
“4. In the case envisaged in item 2 of paragraph 3 of this Article, prior to assigning of a defense attorney, the body conducting the criminal proceedings shall suggest to the suspect or accused inviting a defense attorney”.

2) To edit item 1 of paragraph 5 with the following wording:

“The investigation body, investigator, prosecutor must suggest to the suspect or accused inviting a defense attorney or assigning a defense attorney through Chamber of Advocates of the Republic of Armenia, if...”.

Article 8. Article 106 of the Code:

- 1) To add the words “and Non-Pertinence” after the word “Inadmissibility” in the heading;
- 2) To add the word “and non-pertinence” after the word “inadmissibility” in paragraph 1;
- 3) To add the words “and pertinence” after the word “admissibility” in paragraph 2, and to add the words “and non-pertinence” after the word “inadmissibility”.

Article 9. To repeal paragraph 2 of Article 135 of the Code.

Article 10. To edit Article 137 of the Code with the following wording:

“Article 137. Pre-Trial Detention

- 1) The pre-trial detention is deprivation of freedom of a person for a deadline established upon the court decision in case of presence of the grounds stipulated by the Law.
- 2) Pre-trial detention as a measure of securing appearance may be applied only in the case when there is a justified suspect about commitment of the crime by the person, for which the Criminal Code stipulates minimum one year of deprivation of liberty, the person may commit the actions stipulated in paragraph 1 of Article 135 of this Code or there is a danger threatening the public order and application of other measures of securing appearance is impossible or insufficient.
3. Simultaneously with taking a decision on choosing of pre-trial detention as a measure of securing appearance, the court solves the issue of the opportunity of releasing on bail the person from pre-trial detention. When the person who posted the bail, within one month period after adoption of the decision on choosing pre-trial detention as a measure of securing appearance, submits to the body conducting the criminal proceedings the document verifying the full payment of the bail to the court deposit, from that moment the pre-trial detention chosen as a measure of securing appearance is replaced with the bail, and the person shall be immediately released from pre-trial detention. The court, upon a motion of the defense attorney based on new reasons, may review the inadmissibility of the bail or decision on the bail”.

Article 11. Article 138 of the Code:

- 1) To edit paragraph 1 with the following wording:
“1. The term of pre-trial detention shall be counted from the moment of the actual detainment of the person. The term of pre-trial detention of the suspect may not exceed 10 days. If the suspect was arrested pursuant to the procedure provided for by this Code prior to application of pre-trial detention as measure of securing appearance, the term of his or her arrest shall be calculated in the term of his or her pre-trial detention.”
2. To delete the third sentence from paragraph 3.

Article 12. Article 139 of the Code:

- 1) In the third sentence of paragraph 1 after the word “familiarize” to add the words “as well as after forwarding the case to the court by the prosecutor to take a decision established in Article 292 of this Code”;
- 2) In the third sentence of item 2 of paragraph 1 after the word “prior/before” to delete the words “familiarization with the case materials by the accused and his or her defense attorney”, and to replace the word “forward” with the words “taking a decision as set in Article 292 of this Code after forwarding”.

Article 13. Article 143 of the Code:

- 1) In paragraph 1 to delete the words “classified as minor or medium gravity”;
- 2) To edit paragraph 4 with the following wording:
“The size of the bail may not be less than two hundred folds of the minimum salary. The size of bail shall be determined by the body conducting the criminal proceedings taking into account the nature and level of danger of the alleged offense, the size of the harm caused, marital and property status of the accused.”

Article 14. To add Article 216 of the Code with a new 1.1 paragraph with the following content:

- “1.1 The investigator must conduct confrontation upon the request of the suspect, irrespective of the circumstance that he/she was interrogated previously. The accused shall have the right to interrogate persons who testified against him or her.”

Article 15. Article 283 of the Code:

- 1) In paragraph 1 to replace the word “closed-doors” with the word “open-door” and after the word “session” to add the words “,except for cases prescribed by this Code.”
- 2) In paragraph 4 add a new sentence with the following content:
“The decision on choosing pre-trial detention as a measure of securing appearance or filing motions on extension of pre-trial detention term must be immediately examined by the judge.”

Article 16. Article 285 of the Code:

1. In second sentence of paragraph 1 to replace the words “the motives and” with the words “the presence of the justified suspicion on the committed crime and the ...as established in paragraph 1 of Article 135 of this Code”;
- 2) paragraph 2
 - a) in the first sentence of Paragraph 1 to replace the words “**The decision on filing a motion for choosing pre-trial detention as a measure of securing appearance shall be subject to immediate consideration by a single judge in the jurisdiction of preliminary investigation**” with the words “The decision on filing a motion for choosing pre-trial detention as a measure of securing appearance is subject to immediate discussion by a single judge of the court of the preliminary investigation location.”
 - b) In Paragraph 2 to add a new sentence with the following content:
“The searched-for accused, for whom the pre-trial detention has been chosen as a measure of securing appearance, after being discovered and moved to the

site of the criminal proceeding must appear before the court with 72 hours for checking the grounds of pre-trial detention chosen as the measure of securing appearance.”

3) In paragraph 5 to add the word “justified” after the word “the judge” and to add a new sentence after the words “on refusal” with the following content:

“Upon examination of the motion, the judges shall decide on the term of pre-trial detention, irrespective of the term presented in the motion.”

4) In paragraph 6 to add a new sentence with the following content:

“The pre-trial detention term may not be extended only upon the same the grounds as the grounds of choosing the pre-trial detention as the measure of securing appearance”.

Article 17. To edit paragraph 3 of Article 287 of the Code with the following wording:

“3. The appellate court, upon receiving the complaint, shall demand to present the materials justifying the necessity of arrest, the court decision, and immediately consider the matter and take a decision.”

Article 18. In paragraph 3 of Article 288 of the Code to replace the word “closed-doors” with the word “open-door” and after the word “session” to add the words “except for cases prescribed by this Code”.

Article 19. To edit paragraph 1 of Article 291 of the Code with the following wording:

“1. The criminal case entering the court is taken over by the court within 3 days’ period as established by procedure, which is indicated in a ruling.”

Article 20. To edit article 292 of the Code with the following wording:

“1. The judge who has undertaken a case examines the materials of the case and takes one of the decisions stipulated in paragraph 2 or paragraph 3 of this Article.

2. The judge, within 15 days period from the moment of undertaking the case, shall take one of the following decisions on:

- 1) Appointment of a hearing;
- 2) Abatement of the criminal proceeding or termination of the criminal prosecution;
- 3) Suspension of the criminal proceeding;
- 4) Return of the case to the prosecutor.

3. The judge, within 3 days’ period from the moment of undertaking the case, may take one of the following decisions on:

- 1) To forward the case by jurisdiction;
- 2) Self-recusal.

4. A new judge who has undertaken the case as a consequence of taking one of the decisions stipulated in paragraph 3 of this Article shall examine the case materials and within 10 days’ period from the moment of undertaking the case shall take one of the decisions stipulated in paragraph 2 of this Article or within 3 days’ period - one of the decisions stipulated in paragraph 3 of this Article.”

Article 21. In Article 300 of the Code after the word “to forward” to add the words “and self-recusal” and to replace the word “the decision” with the word “decisions”.

Article 22. In paragraph 1 of Article 315 of the Code after the word “also” to add the words “examining the motions stipulated by paragraph 1 of Article 278 of the Code”.

Article 23. To add paragraph 4 of Article 331 of the Code with the following wording:

“The motion on reconsidering the decision on applying the pre-trial detention as a measure of securing appearance may be submitted at any stage of the trial, and shall be subject to immediate examination. The motion which repeats the grounds of the rejected motion shall not be subject to examination”.

Article 24. To add paragraph 5 of Article 334 of the Code with the following new wording:

“The statements of the defendant referring tortures and improper treatment against him or her, in case of sufficient grounds, shall be immediately forwarded to the prosecutor’s office by the chairman. The testimony given by the suspect or accused at the pre-trial proceeding may be accepted as evidence only in case when the statements concerning torture and improper treatment are recognized as groundless in the prescribed manner.”

Article 25. In paragraph 2 of Article 375.1 of the Code:

- 1) In item 3 to delete the words “if the defendant has such”;
- 2) To supplement with a new Paragraph 4 with the following content:
“4) The victim has no objection.”

Article 26. Transitional Provisions

1. This Law shall come into force on the 10th day following its official publication.
2. The provisions of this Law concerning pre-trial detention shall come into force after 3 months from the moment of its official publication.

Justifications

Draft Law of the Republic of Armenia on “Introducing Changes and Amendments in the Criminal Procedure Code of the Republic of Armenia”

The Draft Law of the Republic of Armenia on “Introducing Changes and Amendments in the Criminal Procedure Code of the Republic of Armenia” is based on the recommendations enclosed in Annex “Coordinated Recommendations” of “Observation of Procedures” of the ODIHR/OSCE report (hereinafter “the Report”). This Draft presents exclusively the provisions that are not related directly to conceptual issues and may be enacted without systemic reforms. In connection with the other part of recommendations, in conformity with the order of the RA President on “Establishing of a Working Group” from April 26, 2010, a relevant concept will be developed, the legal framework requiring changes and supplements will be clarified, and the final draft package of the drafts will be developed.

This Draft contains also such provisions that are not explicitly envisaged in the Report, but they derive from the provisions of the document and guarantee their proper implementation.

Below follow the reasons related to this Draft:

- 1) Revision of Paragraph 19 of Article 6 of the Criminal Procedure Code of the Republic of Armenia (hereinafter the “the Code”) is conditioned with the position that for the initiation of criminal prosecution it is not necessary to bring charges against a person. Therefore, its termination should not be interconnected exclusively with elimination of the charge or rejection of the charge. Moreover, such approach is in line with the provisions of the draft in conformity with which pre-trial detention as a measure of securing appearance may be applied also to the suspect.
- 2) The amendment introduced in Article 16 of the Code proposes to expand the frames of the principle of publicity of trial, in particular, it is proposed to apply it also in examining the decisions on submitting of motions on choosing pre-trial detention as a measure of securing appearance in the court sessions.
- 3) A completely new definition of the term “Suspect” also derives from the key provisions of the draft, according to which the pre-trial detention as a measure of securing appearance may be applied also to the suspect. This provision of key importance will exclude the tendencies of bringing charges without sufficient grounds at short term, it will be sufficient to submit only reasons which testify about the justified suspicion and a number of other justifications which be reflected later.

At the same time, to predetermine the status of a person as a suspect and eliminate any related uncertainty, it is recommended that the status of a suspect be terminated or charges brought within a maximum term of 10 days.

The other novelty is that in case of not choosing pre-trial detention as a measure of securing appearance within 72 hours the person is released from pre-trial detention, the ground of which shall be not only the decision of the body in charge for criminal prosecution but also the procedure prescribed by the Law, which is broader.

- 4) The changes and amendments recommended in Article 63 of the Code pursue the objective of clarifying a legal status of a suspect. In particular, a provision about a decision on recognizing as a suspect is introduced, and free-of-charge and immediate delivery of the decision is deemed as mandatory.
Participation of the defense attorney shall be deemed as mandatory not only at the time of arrest but also from the moment of being recognized as a suspect.
- 5) The change introduced for the rights and obligations of the accused in Article 65 of the Code proposes to review the provisions that refer to confronting the person who testified against the accused. Pursuant to the Draft, the suspect shall have the right of not being cross-examined but asking questions to persons who testified against him or her. It should be noted that no permission of the investigator shall be required for exercising this right, in connection with which the relevant amendment is introduced also in Article 216 of the Code.
- 6) Changes introduced in Article 69 of the Code referring the mandatory participation of the defense attorney propose in the first place, to repeal paragraph 3 of the Article, which will enable the suspect or accused to have a defense attorney even in case they earlier rejected the defense attorney.
This recommendation is not envisaged in the Report; however, the authors of the Draft believe that the said groundless limitation fixed in the acting legislation is not in line with the approaches of mandatory participation of the defense attorney. Besides, it is an attempt to clarify the procedure of mandatory participation of the defense attorney for an insolvent suspect or accused.
- 7) The change proposed in Article 70 of the Code is connected with wording.
- 8) The amendment introduced in Article 106 of the Code proposes to make comprehensive the evidence-related requirements, which is necessary in order to take justified decisions in the case of their big volume. Thus, this Draft adopts the idea of equal conditions for submitting of evidence by the defense attorney. At the same time, it shall be mandatory for the parties, in submitting of evidence, to justify not only the admissibility, but also pertinence. Thus, this provision proposes to justify whether the submitted evidence is related to the circumstances of the criminal case subject to proof.
Moreover, the burden of evaluation of two criteria shall be borne by the body conducting the proceedings.

- 9) The recommendation on repealing paragraph 2 of Article 136 of the Code excludes the practice of establishing common grounds for applying as measure of securing appearance. This and other changes and amendments introduced in a number of provisions related to this issue exclude application of the same grounds as for pre-trial detention as well other measures of securing appearance. In particular, more rigorous conditions are set for application of the pre-trial detention as a measure of securing appearance.
- 10) Article 137 of the Code is edited in a completely new wording as the essence and conditions of
- 11)
- 12) The recommendation of introducing changes and amendments in Article 138 of the Code intends to clarify the provision according to which a detained person in the status of a suspect may be detained maximum 10 days.

The recommendation on deleting the third sentence from paragraph 3 of this Article has more critical importance. In particular, it is recommended to recognize unlawful the provision according to which the term envisaged in the decision on application of the pre-trial detention as a measure of securing appearance shall be suspended from the moment the criminal case is forwarded to the court with the indictment. This Draft takes as a benchmark that the pre-trial detention term may not be suspended upon any ground, including forwarding to the court with the indictment.

In this connection it is recommended to define a procedure in the case of which the pre-trial detention term shall not be suspended, and in case of absence of a relevant decision for its extension, a person shall be released immediately.

The aforementioned approach is based on the jurisprudence of the European Court of Human Rights, including the caselaw involving the Republic of Armenia. ECHR also shares the opinion that keeping a person in pre-trial detention without a warrant is unlawful and is deemed as a violation of Article 5 of ECHR.

- 13) Since Article 139 of the Code is devoted to the regulation of relations referring the revision of pre-trial detention term, the Draft also presents such solutions which are in line with the principle of exclusion of suspension of the pre-trial detention term.
- 14) The innovation recommended in Article 143 of the Code also has very important significance. The thing is the acting legislation interlinks the application of a bail exclusively with the gravity of a crime. In particular, the acting legislation allows a bail only for minor and medium gravity crimes, in the result of which the application of pre-trial detention may be lawful only when the gravity of a crime is considered, i.e. the application of a bail shall be simply prohibited in case of grave and exceptionally grave crimes in any situation.

The Draft recommends that the gravity degree not be considered as an obstacle for the bail, but the point of reference rather be the personal circumstances, which is in line with the ECtHR jurisprudence.

15) The intention of the changes and amendments recommended in Article 216 of the Code is to provide opportunity for an accused, without permission of an investigator, to ask questions to persons testified against him or her through confrontation; this has been specified above in connection with introducing of changes and amendments in Article 65 of the Code.

16) This justification has already reflected the necessity of having public discussion of a decision on submitting of a motion on choosing pre-trial detention as a measure of securing appearance. In this relation, it has been recommended to amend Article 16 of the Code which is devoted to fixing of the principle of publicity of the trial.

With the purpose of ensuring the comprehensiveness of legislative norms, relevant amendments are made also in Article 283 of the Code; in this case they directly apply to the procedures of discussing the aforementioned motions in trials.

17) It is recommended that significant changes and amendments be made in Article 285 of the Code. First, it is recommended that the scope of reasons to be specified in the decision on submitting of a motion on application of pre-trial detention as measure of securing appearance be clarified.

The aim of the change and amendment recommended in paragraph 2 of this Article is to prevent unduly extensions of discussions of motions on choosing pre-trial detention as a measure of securing appearance. In particular, it is recommended that a provision obliging the court not only to discuss such motions immediately, but to make immediate decisions be reinforced. This is also deriving from the recommendations contained in the Report. Besides, this will exclude in practice occurrence of such cases when the court unlawfully postpones the court sessions, in the result of which obviously complicated and uncertain situation occurs.

The next novelty refers to the regulation of questions about application of pre-trial detention for seared-for persons. According to the Draft, pre-trial detention as measure of securing appearance may be applied also for absconding persons, however, immediately upon finding the person in question it is deemed as mandatory to bring the detainee to court within 72 hours after transporting him or her to the place of the criminal proceeding for the purpose of checking the lawfulness of the pre-trial detention.

This Article recommends another important novelty: in relation to grounds for extension of pre-trial detention term, the preference should be given to a solution in the case of which the grounds already presented may not be repeated identically when a motion on application of pre-trial detention as measure of securing appearance is submitted.

- 18) The Draft attempts to exclude undue extensions not only in applying pre-trial detention as measure of securing appearance or motions on extension of pre-trial detention term, but also in discussing complaints filed against adopted court decisions. Therefore, the relevant changes are recommended in Article 287 of the Code.
- 19) We have already reflected the changes made in Article 288 of the Code when speaking about the issue of publicity of trial.
- 20) The change recommended in Article 291 of the Code aims at establishing a concrete term which shall be deemed as sufficient by the court for taking a decision on accepting of a criminal case in its proceeding. The acting legislation has no set term for this, which gives rise to unduly court extensions.
- 21) The changes recommended in Article 292 of the Code attempt to establish definite deadlines for taking decisions after the criminal case is brought to the court. At the same time, the frames of decisions which may be taken for these cases are clarified.

In particular, the tendency is that in the circumstance of bringing a criminal case to the court, a court decision on predetermining the future process of the case shall be taken within 15 days' period at maximum.
- 22) The recommendation in Article 300 of the Code imakes the motion for self-recusal the subject matter of immediate discussion.
- 23) As a result of introducing amendments in Article 315 of the Code it becomes mandatory to maintain protocols related to motions of pre-trial detention, which is a feature of a full session.
- 24) The amendment made in Article 331 of the Code requires that the decision on choosing pre-trial detention as a measure of securing appearance shall immediately become the discussion subject at any stage of the trial. It should be noted that for the purpose of prevention of abuse of this right, a procedure has been established that exempts the grounds of the previously rejected motions from additional consideration.
- 25) The amendment made in Article 334 of the Code obliges the judge to deliver immediately the statements concerning torture or violence for examination of the competent bodies. At the same time, taking into account the risk of frivolous statements intended to make the trial steer away from its natural course, a

procedure has been established according to which the judge provides preliminary assessment in relation to their justification.

- 26) The amendment to Article 375.1 of the Code creates a framework where the position of the victim in implementing of expedited trial is of decisive importance.

- 27) Establishment of a 3-month deadline for the enactment of the pre-trial detention-related provisions is due to practical issues that will undoubtedly occur in the legal practice. The requirements set for the pre-trial detention deadlines will be impossible to observe should the Law enter into force immediately after its publication.

Ministry of Justice of the Republic of Armenia

Annex 2:

**Criminal Procedure Code of the Republic of Armenia
(Excerpt)**

[...]

Article 6. Definitions of the Basic Notions Used in the Criminal Procedure Code
The notions used in the Criminal Procedure Code have the following meaning:

[...]

19. "termination of criminal prosecution" means a decision made by the body conducting the criminal proceedings to remove or reject the charge; [...]

Article 16. Public Trial

Trial in all courts shall be public, with the exception of cases provided for by paragraph 2 of this Article.[...]

CHAPTER 8. DEFENSE PARTY

Article 62. The Suspect

1. The suspect is the person:

- 1) detained upon a suspicion in committing a crime;
- 2) with regard to whom a resolution on the selection of a measure of securing appearance is adopted.

2. The body of criminal prosecution shall not be permitted to detain a person as a suspect for longer than 72 hours, and as for implementation of measures of securing appearance for longer than 7 days from the moment of declaration to the suspect the resolution on the selection of the measure of securing appearance.

3. Prior to the expiration of the time limits set by Part 2 of this Article, the body of criminal prosecution shall release the suspect and lift the measure of securing appearance selected in respect of the person in question, or to issue a bill of indictment.

4. In the event the suspicion is not sufficiently substantiated, the body of criminal prosecution and the court shall release the detained suspect and to lift the measure of securing appearance, selected with respect to him or her prior to the expiration of the deadlines, set by Part 2 of this Article.

5. The person shall cease to be a suspect from the moment of his or her release or from the moment of issuing by the body of criminal prosecution of bill of indictment.
[...]

Article 63. The Rights and Obligations of the Suspect

1. The suspect has a right to defense. The body conducting the criminal proceedings shall the suspect with an opportunity to exercise the right to defense he or she is entitled to, by all means not prohibited by law.

2. The suspect, pursuant to the procedure, as provided for by this Code, shall be entitled to:

[...]

3) to receive immediately upon detention or upon declaration of the resolution on the selection of a measure of securing appearance from the body of criminal prosecution, the free copy of the resolution of the body of criminal prosecution or the copy of the resolution on the selection of measure of securing appearance; to receive a copy of the protocol of detention immediately upon its completion;

4) to have a defense attorney from the moment of presentation to him or her the resolution of the body of criminal prosecution, on detention, the protocol of detention or the resolution on selection of the measure of securing appearance; to refuse from defense attorney and to defend oneself; [...]

Article 65. The Rights and Obligations of the Accused

1. The accused has the right to defense. The body conducting the criminal proceedings shall provide the accused with an opportunity to exercise his or her right to defense by all means not forbidden by law.

2. The accused shall be entitled, pursuant to the procedure provided for by this Code:

[...]

6) to testify and to refuse from testifying, to be interrogated with persons who testified against him or her; [...]

Article 69. Mandatory Participation of Defense Attorney

[...]

3. The wish stated by the suspect or the accused to have a defense attorney shall not predetermine the mandatory nature of defense attorney's participation, if the suspect or accused earlier had a defense attorney and stated a wish to refuse from the defense attorney, which was accepted by the body conducting the criminal proceedings.

4. The mandatory participation of a defense attorney in the proceedings of a criminal case shall be ensured by the body conducting the criminal proceedings. [...]

Article 70. Invitation, Appointment, Substitution of Defense Attorney and Other Grounds of his or her Participation in the Criminal Trial

[...]

3. The body conducting the criminal proceedings shall request the Association of Lawyers of the Republic of Armenia to appoint a lawyer as a defense attorney in the following cases:

1) upon the motion of the suspect or the accused; Ī

2) in the event if the participation of a defense attorney in the criminal proceedings is mandatory, but the suspect or the accused have no defense attorney.

4. In cases provided for by item 2 of paragraph 3 of this Article, the body conducting the criminal proceedings shall have the right to offer the suspect or accused to invite another defense attorney of their own choice.

5. The inquest body, the investigator, the prosecutor, the court have the right to offer the suspect or accused to invite another defense attorney of their own choice, or to appoint a defense attorney through the Association of Lawyers of the Republic of Armenia in the following cases:

1) in the event of impossibility of the defense attorney to arrive for the participation in the first interrogation of the detained suspect or accused within 24 hours from the moment of acquiring the status of the defense attorney or in the case of non-arrival within the same timeframe;

2) in the event of impossibility of the participation of the defense attorney in the criminal proceedings for more than 3 days. [...]

Article 106. Establishment of the Evidence Inadmissibility

1. The inadmissibility of facts as evidence as well as their restricted use in the proceeding shall be established by either the body which conducts the proceeding or one of the sides.

2. The admissibility of the evidence shall be substantiated by the side which obtained the evidence. If the evidence was obtained in accordance with the requirements of this Code, the grounds for the inadmissibility of the evidence shall be presented by the side that argues its acceptability. [...]

Article 135. Grounds for the Application of Measures of Securing Appearance

[...]

2. Pre-trial detention and the corresponding alternative measure of securing appearance shall be applied in respect of an accused only for crimes that entail deprivation of liberty of over a year as the maximum sentence; or else if sufficient grounds exist to assume that the accused may commit an act provided for by paragraph 1 of this Article.[...]

Article 137. Pre-trial Detention

1. To detain a person means to remand a person in a place and under conditions prescribed by law.

2. A detainee shall not be detained in an arrest facility for more than 3 days except for cases when his or her delivery to a pre-trial detention facility or another facility provided for by law for pre-trial detention is impossible due to unavailability of transportation.

3. The inquest body, investigator, prosecutor and the court shall have the right to instruct the administration of the pre-trial detention facility to detain persons accused in the same criminal case or in several related criminal cases in separate facilities, in order to prevent the communication between the accused, as well as the right to issue other instructions that do not contradict the procedure provided for by law in respect of pre-trial detention. The instructions issued shall be binding on the administration of the pre-trial detention facility. [...]

Article 138. Pre-Trial Detention Deadlines

1. The terms of the detention shall be counted from the moment of the actual detention of the person; if the person has not been detained, the term of the detention shall start from the moment of the execution of the court decision about applying this measure of securing appearance. [...]

3. Detention carried out at the time of pre-trial criminal proceedings shall not last longer than 2 months except for the cases prescribed by this Code. The time spent by the accused in a detention and in the medical institution shall be included in the calculation of the term of his detention. The term of detention in the course of pre-trial criminal proceedings shall terminate on the day when the prosecutor forwards the case to the court or when the accused and his or her defense attorney obtain access to the materials of the case, or when the decision on application of the pre-trial detention is annulled. [...]

Article 139. Extension of the Detention Term

1. If the investigator or the prosecutor find it necessary to extend the pre-trial detention term of the accused, they shall motion the court at least 10 days in advance of the detention term expiration, providing a reasoned justification for such extension. If the court grants the extension, the decision to this effect shall be made at least than 5 days in advance of the detention term expiration. In the event if the extension of pre-trial detention is due to the time required by him or her or his or her defense attorney to familiarize with the case materials, the prosecutor or the investigator with the prosecutor's approval shall file a motion to this effect with the court at least 5 days in advance of the expiration of the detention term.

Case materials shall be handed to the accused in pre-trial detention and his or her defense attorney at least 30 days in advance of the maximum detention term provided for by paragraph 4 of Article 138 of this Code, and if the accused and his or her defense attorney cannot familiarize themselves with the case materials within the given time, then the detention term shall be extended pursuant to the procedure established by this Code and in accordance with paragraph 4 of Article 138 of this Code, prior to familiarization with the case materials by the accused and his or her defense attorney and forwarding the case by the prosecutor to the court. In the event if there is more than one accused, the detention term may be extended for other accused as well, if the grounds for their detention still exist. [...]

Article 143. Bail

1. Bail shall be money, securities or other valuables posted by one or several persons to the deposit account of the court for the release from detention of someone accused of committing a crime classified as minor and medium gravity. Upon permission of the court, real estate may be posted as an alternative measure to bail. [...]

4. The amount of the bail designated by the court shall not be less than:
1) the equivalent of 200 minimum salaries when the alleged crime is classified as minor.
2) the equivalent of 500 minimum salaries when the alleged crime is classified as medium gravity. [...]

Article 216. Confrontation

1. The investigator is entitled to conduct the confrontation of those previously interrogated two persons whose testimonies contain essential contradictions. The investigator must conduct confrontation if there are essential discrepancies in the testimonies of the accused and other person.[...]

Article 283. Reviewing procedure for motions for investigative, special investigative measures and procedural restraint measures

1. Motions shall be reviewed by a single judge in a closed-doors court session in the presence of the motioning official or his representative.[...]

4. Appeals shall be considered by the judge immediately, but not later than on the next day upon their receipt. Motions for residence search shall be considered immediately.[...]

Article 285. Consideration of the motion for pre-trial detention as a measure of securing appearance

1. When necessary to use pre-trial detention as a measure of securing appearance or extend the pre-trial detention, the prosecutor or the investigator shall motion the court to apply this measure or to extend the pre-trial detention. The decision concerning the appeal shall indicate the motives and grounds of detaining the accused. The decision is attached to materials supporting the justification of the motion.

2. The decision on filing a motion for choosing pre-trial detention as a measure of securing appearance shall be subject to immediate consideration by a single judge in the jurisdiction of preliminary investigation, with participation of the motioning person, the defense attorney, if the latter participates in the case. Failure by the non-detained accused or the defense attorney to appear, provided informed on time, shall not serve as an obstacle to the consideration of the motion in court. The court shall duly inform on the venue and time of the court session the motioning person, the accused, the legal representative, defense attorney thereof, if the latter participates in the case. A motion to apply pre-trial detention as a measure of securing appearance issued in respect of an absconding accused shall be considered by court in the presence of the motioning person and the defense attorney of the absconding accused, if the latter participates in the case. [...]

5. In the course of the consideration of a motion, the judge shall adopt a decision on using pre-trial detention as a measure of securing appearance of the accused or on refusal of the motion. The judge's decision shall be handed to the person who appealed for using this means, is sent to the accused, the defense attorney the victim and is subject to immediate implementation.

6. After the refusal of the motion for choosing the given appearance securing measure, repeated motioning the court for the pre-trial detention of the same person for the same case is possible only in case of new circumstances justifying pre-trial detention.[...]

Article 287. Appeal against a court decision to use or not to use pre-trial detention as a measure of securing appearance

[...]

3. The appellate court, upon receiving the complaint, shall immediately demand that the materials justifying the necessity of pre-trial detention and the court decision be presented.

Article 288. Court hearing on the lawfulness or justification of decision to use or not to use pre-trial detention as a measure of securing appearance

[...]

3. The court hearing shall be conducted in a closed-door session with participation of the prosecutor and the defense attorney. The failure of the party previously notified about the hearing date to attend shall not impede the holding of the hearing. At the discretion of the court, the inquest body officer or the investigator, as well as the victim may be summoned to the court session to provide explanations. [...]

SECTION 9. PROCEEDINGS IN FIRST INSTANCE COURT

CHAPTER 40. PREPARATION OF THE HEARING

Article 291. Admitting the case by court for proceedings

1. The criminal case entering the court shall be admitted by judges, as established by procedure, which is indicated in a decision. [...]

Article 292. Decisions adopted while preparing cases for hearing

The judge who has undertaken a case shall examine the materials of the case and within 15 days after having undertaken the case takes one of the following decisions on:

- 1) appointment of court hearing;
- 2) abatement of criminal proceedings or termination of criminal prosecution;
- 3) suspension of the criminal proceedings;
- 4) return of the case to the prosecutor;
- 5) return of the case for additional preliminary investigation;
- 6) to forward the case by jurisdiction.
- 7) self-recusal. [...]

Article 300. Decision on the measure of securing appearance

Simultaneously with adopting decisions, except the decision to forward the case by jurisdiction, the court shall consider the issue of using or not using a measure of securing appearance in respect of the accused, and whether this measure is justified or unjustified, if such a measure has been selected. [...]

Article 315. Court session protocol

1. At the sessions of first instance, appellate and cassation courts, as well as outside a court session when conducting a procedural action, a protocol shall be conducted. [...]

Article 331. Motions and their resolution

1. The presiding judge shall ask the prosecution party and the defense party whether they have motions to demand new evidence and enclose it with the case. The

motioning person shall demonstrate for the clarification of what circumstances the additional evidence is required.

2. Each motion filed shall be considered by the court, the opinion of the other part must be heard. If the circumstances in respect of which the motion was made can be significant for the case or the material whose probative value is disputed was obtained with essential breach of law, the court shall satisfy the motion. The court decision to reject the motion shall be substantiated. Rejection of the motion by court does not restrict the rights of the motioning person to file the same motion later, depending on the process of hearing.

3. The court shall have the right, by its own initiative, to adopt decisions on the summoning of witnesses, appointment of examination, demanding other evidence.[...]

Article 334. Clarification of the defendant's position

1. The presiding judge shall explain to the defendant the essence of the charges, the legal qualification of the criminal act, the grounds and the amount of the civil suit brought. In case of several defendants, a similar clarification shall be made to each of them.

2. The presiding judge shall ask each defendant whether they admit their guilt and specifically for what. The defendant shall be advised that he or she is not restricted with statements accepting or not accepting his or her guilt made during preliminary investigation, is not obliged to answer to the question and the refusal to answer can not be interpreted against him or her.

3. The presiding judge shall ask the defendant whether he, partially or in full, accepts the civil suit brought against him. If the defendant answers this question, he or she shall be entitled to provide justifications.

4. The parties shall be entitled to pose such questions to the defendant that are aimed at the clarification of the defendant's position.

SECTION 9.1. ACCELERATED PROCEDURE

CHAPTER 45.1. APPLICATION OF ACCELERATED PROCEDURE IN THE CASE OF THE ADMISSION OF THE CHARGES BY THE DEFENDANT OR ACCUSED

Article 375.1. Grounds for the application of accelerated procedure

[...]

2. In the case provided for by paragraph 1 of this Article, the court shall apply the accelerated procedure if:

- 1) the defendant understands the nature and consequences of the motion filed; and
- 2) the motion was filed voluntarily; and
- 3) after consultations with the defense attorney, if the defendant has such. [...]