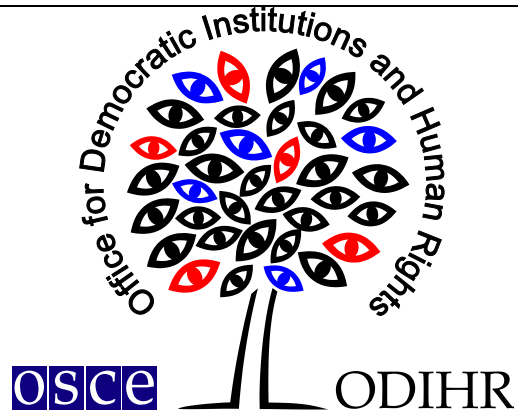


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OPINION ON THE DRAFT AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA

based on an unofficial English translation of the draft amendments

provided by the OSCE Office in Yerevan

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The OSCE/ODIHR supports OSCE participating States by reviewing, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provide recommendations.

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Annex: Draft on Introducing Changes and Amendments in the Criminal Procedure Code of the Republic of Armenia

I. INTRODUCTION

1. *On 7 June 2016, the OSCE Office in Yerevan sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request by the Investigative Committee of the Republic of Armenia for legal review of the Changes and Amendments in the Criminal Procedure Code of the Republic of Armenia (hereinafter “the Draft Amendments”). The Draft Amendments relate to the use of attesting witnesses in investigative procedures.*
2. *On 10 June 2016, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these draft amendments with OSCE commitments and international human rights standards.*
3. *This Opinion was prepared in response to the above request.*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the Draft Amendments, submitted for review. At the same time, the Opinion also takes note of certain provisions of the Criminal Procedure Code of Armenia which, while not affected by the Draft Amendments, are topically linked to those parts of the Criminal Procedure Code that the Draft Amendments seek to address and improve.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on international standards and practices related to fair trial rights in criminal procedure and during investigations. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
6. This Opinion is based on an unofficial English translation of the Draft Amendments provided by the OSCE Office in Yerevan, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to this and other related legislation of the Republic of Armenia that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, it should be noted that many of the provisions in the Draft Amendments improve the transparency of criminal investigations, by safeguarding the rights of persons involved in and affected by those investigations. As such, many provisions help strengthen the right to a fair trial and the right to privacy.
9. At the same time, it needs to be borne in mind that the reason for requiring attesting witnesses to be present during certain investigative measures is to prevent the police or investigators, or even prosecutors from altering or fabricating evidence during inspections, searches, and other investigative actions. This is particularly important in

systems where the defense does not, or may not cross-examine the officers who conducted and reported on such investigative acts before court.

10. For this reason, it is essential to guarantee the impartiality and independence of attesting witnesses throughout the Criminal Procedure Code. In some instances where the presence of attesting witnesses is no longer foreseen under the Draft Amendments, it is thus recommended to retain the presence of attesting witnesses and/or an affected person's legal counsel or another member of the defense team, to safeguard the transparency of criminal proceedings, the rights of a suspect or accused and the individual's right to privacy.
11. More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance the Draft Amendments:
 - A. to explicitly state, in Article 81 Criminal Procedure Code, Article 2 par 1 sentence 3 and Article 9 of the Draft Amendments that employees of the executive branch cannot act as attesting witnesses; [pars 21-23 and 29]
 - B. to make an examination or inspection of a person's home subject to judicial authorization; [par 28]
 - C. to require the presence of a person's legal counsel when searching a private home, in cases where the respective individual so wishes and where it does not jeopardize the success of the search operation; [pars 32-34]
 - D. to require a person's defense counsel to be present during identification procedures; [par 39]
 - E. to retain the presence of attesting witnesses as a requirement during the identification of objects and the examination of surveillance recordings; [pars 41 and 46-47] and
 - F. to review the provisions on length and renewal of court orders in order to adequately take into account the individual's right to privacy. [par 48]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Attesting Witnesses

12. Within the sphere of criminal investigations, attesting witnesses are civilians who are called upon to witness the conduct of certain investigative acts. These types of witnesses are impartial third persons who can attest to the correct execution of relevant investigative measures and thereby help guarantee that the rights of a suspect, an accused person or any other person affected by such measures are upheld. As such, the use of attesting witnesses touches upon the rule of law and constitutes part of the right to a fair trial, which covers not only the trial itself, but also the investigative phase of

criminal proceedings.¹ The way in which investigations are conducted can also affect the right to privacy, family, home or correspondence.

13. Key international standards in these areas can be found in Articles 14 (on fair trial rights) and 17 (on the right to privacy, family, home and correspondence) of the International Covenant on Civil and Political Rights.² At the regional level, Articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms enshrine the right to a fair trial and the right to privacy respectively.³ Within the OSCE framework, the Copenhagen Document reflects participating States' commitments to "support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression".⁴

2. Attesting Witnesses in Criminal Investigations

14. Article 81 par 1 Criminal Procedure Code of the Republic of Armenia (hereinafter "CPC") defines "attesting witnesses" as "any adult citizen of the Republic of Armenia, disinterested personally in the criminal case, invited by the body of criminal prosecution for the participation in the implementation of investigatory action for the verification of the fact of its implementation, the substance, the course and the results." This definition is not changed in the Draft Amendments. The attesting witness (*poniatoy* in Russian) already existed in the Soviet era and can still be found in most criminal procedure codes of countries formerly belonging to the Soviet Union. Attesting witnesses may be used to attest to the correct execution by the executive of a variety of different investigative measures, such as searches of a person's home, line-ups for the identification of suspects or the examination of surveillance recordings.
15. Article 106 of the CPC deals with the admissibility of evidence, but does not seem to include strong and clearly defined rules with regard to the inadmissibility and exclusion of evidence. It is thus assumed that a violation of the rules on including attesting witnesses in criminal investigations would not lead to the exclusion of evidence gathered during an inspection, search, collection of bodily substances, exhumation, etc. According to jurisprudence of the European Court of Human Rights (hereinafter "ECtHR"), evidence which is obtained in violation of Article 8 ECHR also does not

¹ Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Right for Judges, Prosecutors and Lawyers* (New York and Geneva 2003), pages 223-248.

² UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966. The Republic of Armenia acceded to the ICCPR on 23 June 1993.

³ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Armenia ratified the ECHR on 26 April 2002.

⁴ See par 2 of the OSCE Copenhagen Document (1990), available at <http://www.osce.org/odihr/elections/14304?download=true>.

necessarily lead to a violation of the right to a fair trial under Article 6 ECHR.⁵ **Instead, national courts need to look at proceedings as a whole including the effect the illegally obtained evidence has on the proceedings.**⁶

3. The Changed Role of Attesting Witnesses in Armenia

16. Generally, the Draft Amendments reform the role of attesting witnesses in investigative procedure. While the Draft Amendments strengthen the role of attesting witnesses in some areas where their presence was so far not requested under Armenian law (such as certain identification procedures for suspects), in other areas, such as exhumations or the examination of surveillance recordings, the Draft Amendments propose to eliminate the requirement of having an attesting witness present.

3.1. Record-Keeping

17. In criminal procedure, investigative acts and their conclusions are set out in records and these records can later be used in court proceedings to prove the guilt or innocence of an accused person. It is therefore extremely important that these records reflect correctly the facts and investigative actions which took place, and that they are not distorted in any way, e.g., to support the prosecution's theory of the case. In the most extreme cases, this can lead to wrongful convictions of innocent persons.
18. To avoid such situations, states have adopted different measures to check the veracity of information and prevent the acceptance of wrongful evidence, meaning evidence "created" by the police, by investigators or prosecutors. Such evidence may be created via suggestive identification procedures, in-custody confessions, or the testimony of undercover informants. Therefore, in the common law system, documents and records produced by police, investigators, or even prosecutors are not accepted as *prima facie* reliable evidence. All persons who discovered, recorded or examined evidence which is admitted for the purpose of proving guilt can be called to testify in court and be subject

⁵ See e.g., *Schenk v Switzerland*, ECtHR judgment of 12 July 1988 (Application No. 10862/84), available at <http://hudoc.echr.coe.int/eng?i=001-57572>; *Khan v. The United Kingdom*, ECtHR judgment of 12 May 2000 (Application No. 35394/97), available at <http://hudoc.echr.coe.int/fre?i=001-58841>.

⁶ See also Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union*, 30 November 2003, page 6, available at http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion3_2003_en.pdf; for a comparative perspective, some post-Soviet codes have what appear to be rather strict exclusionary rules. Article 75 par 1 Criminal Procedure Code Russia says that any evidence gathered in violation of the "requirements" of the Criminal Procedure Code may not be used to prove guilt. Similar provisions are found in Belarus, Georgia, Kazakhstan, Azerbaijan, Kyrgyzstan and Turkmenistan. In Germany, a violation of Article 105 Criminal Procedure Code Germany in relation to inviting attesting witnesses will not lead to a prohibition in the use of evidence gathered in an otherwise valid search. The same is true in relation to a similar provision in Spain, the requirement of Article 569 par 4 Criminal Procedure Code Spain, that the secretary of the investigating magistrate accompany and prepare a report of the search if the investigating magistrate herself is not present. The Spanish Supreme Court, in a decision of 9 July 1993, held that, if the main constitutional underpinnings of a search—probable cause and judicial authorization—have been satisfied, a mere error in the execution of an otherwise valid search will not lead to a prohibition on admissibility of the fruits of this search, but only on a prohibition on the use of the police's written reports of the search. This only means that the police who conducted the otherwise lawful search must testify in court as to how the search transpired.

to cross-examination by the defense so that judges, courts or juries can better assess the credibility of such evidence.

19. In contrast, this is not required or practiced in many Western European countries which have a civil law tradition or in states formerly belonging to the Soviet Union. Under Article 104 par 2 (8) and (9) of the CPC, the records of procedural acts, such as searches or autopsies are admissible in court as such and there is therefore no need to call the respective authors of the reports as witnesses. This appears to be a common practice in most countries formerly belonging to the Soviet Union.⁷
20. The presence and role of attesting witnesses is thus of paramount importance, as a means to ensure that the contents of the records of investigative acts actually reflect the facts of a case. Article 1 of the Draft Amendments, by amending Article 29 of the CPC, provides the Government with the power to determine the technical means by which procedural acts undertaken during any stage of the criminal procedure may be recorded. **This provision raises no objections. Ideally, however, court records should be digitalized so that they may be distributed to the parties and easily referred to at any stage of the proceedings.**
21. In particular, if record-makers are not called to testify in court, the neutrality and independence of attesting witnesses is particularly crucial. Article 81 requires an attesting witness to be “disinterested personally in the criminal case”. Even though this implies a certain level of impartiality, the provision lacks specificity. **To ensure the neutrality and independence of the attesting witnesses and overall respect for fair trial rights and the rule of law, it is recommended to reword Article 81 so that it explicitly states that such witnesses should not be employees of the executive branch assigned to special operative-detective or normal criminal preliminary investigation tasks.**⁸
22. In this context, it is noted that Article 2 par 1 sentence 3 of the Draft Amendments seeks to add the following language to Article 81 par 1 of the CPC: “The investigator, the body of inquest may invite attesting witnesses also from the condominium or community service and in the city of Yerevan from community servants of the staff of administrative district who are obliged to arrive upon the call of the body conducting proceedings.”
23. Allowing law enforcement officials to invite public servants (from the condominium administration or from the Yerevan administrative district public servants) may be problematic insofar as they are employees of the same executive branch that the police, organs of the inquest and prosecutors also belong to. This could likewise raise doubts as to the actual independence and impartiality of such witnesses, in particular where investigative officials use the same “public servants” in many cases. **It is therefore recommended to either delete Article 2 par 1 sentence 3, or to amend it**

⁷ Stephen C. Thaman, “The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversary Procedure, Jury Trial, Plea Bargaining and the Inquisitorial Legacy” in John Jackson, Máximo Langer & Peter Tillers, eds, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*: Oxford, Portland: Hart (2008), pages 105-06, available at <http://ssrn.com/abstract=2591543>.

⁸ Similar provisions, stressing the independence of attesting witnesses and prohibiting employees of the executive branch from acting as attesting witnesses can be found, e.g., in Article 60 par 2 Criminal Procedure Code Russia and Article 68 Criminal Procedure Code Kyrgyzstan.

substantially so that it clarifies that employees of the executive branch cannot act as attesting witnesses.

3.2. Video-Taping of Investigative Measures

24. Article 2 pars 2 (2-1) and (2-2) of the Draft Amendments add provisions to Article 81 outlining the circumstances under which investigators can forego the mandatory participation of attesting witnesses (if it may be dangerous for life or health, impossible to invite attesting witnesses to the given place or in the given time, as well as in remote areas or in case of absence of appropriate means of communications) and instead opt for video-audio reporting. In these cases, the reason for not inviting attesting witnesses has to be included in the investigative protocol.
25. These are important additions to Article 81 of the CPC, which are in line with international good practice and constitute a significant step in preventing that investigative officials alter evidence or otherwise compile their records of investigative measures in bad faith.⁹
26. However, video evidence may also be tampered with or cut, and may thus not always include video monitoring of the entire course of an investigative act. Moreover, certain situations could be staged, i.e., evidence could be planted by the authorities before the video cameras begin filming or the video can be cut in a way which portrays facts in a specific light favored by the investigators. **This could be avoided by requiring uninterrupted and uncut filming by law for the purpose of the investigation. Another option would be, in cases where this is not impossible due to time constraints or because the investigative act takes place in a remote area, to transmit the filming live to an attesting witness who is not on site. Additionally, officials performing the search and the technical crews doing the filming should be available for cross-examination if the court or the defense has doubts as to the authenticity of the film documentation.**

3.3. Examinations within the Context of Criminal Investigations

27. Article 218 of the CPC describes the procedure for conducting examinations or inspections of objects, the scene of the crime, etc. Whereas many European criminal procedure codes, e.g. in Germany, Italy or Croatia, do not differentiate between “searches” and “examinations” or “inspections”, many criminal procedure codes of countries formerly belonging to the Soviet Union include separate procedural rules and requirements for an examination or inspection of an object or place, including a private home, as a less invasive measure compared to a search. According to Article 218 of the CPC, the “investigator conducts examination of the locale, premises, material objects, animals, human or animal corpses in order to discover the traces of a crime, other

⁹ In comparison, Article 170 par 3 of the Russian Criminal Procedure Code also provides for the use of “technical means” to record procedural acts if it is impossible for attesting witnesses to participate, but does not make it mandatory. However, if the official has not recorded the proceeding, reasons must be given for not having done so. Article 223 par 7 of the Ukrainian Criminal Procedure Code also provides for an exception to the use of attesting witnesses in those cases where they are otherwise required, “when the conduct of an investigative (detective) action is subject to uninterrupted video recording.” In the case of searches and inspections of private houses, however, video recording does not relieve the investigator of the necessity of summoning two attesting witnesses.

material objects which can be a source of proof, the circumstances of the crime significant for the case and other considerations.” In comparison, a search, which can only be conducted on the basis of a court order, takes place when an investigator suspects that “in some premises or in some other place or in possession of some person, there are instruments of crime, articles and valuables acquired by criminal way, as well as other items or documents, which can be significant for the case” (Article 225 of the CPC). A search can also be conducted for persons or corpses.

28. Article 218 of the CPC does not foresee particular precautions to be taken when an examination or inspection takes place inside a person’s home. Articles 12 and 225 of the CPC requires judicial authorization to “search” a home but notes that “examinations” of this location and entering it for such purposes requires only the authorization of the inquest organs, the investigator or the prosecutor.¹⁰ This is problematic in light of the right to privacy, which is a fundamental right. In particular, the scope of what constitutes an examination as opposed to a search seems to be difficult to establish in practice. Regardless of this distinction, an examination or inspection pursuant to the CPC also constitutes an interference with the inviolability of one’s home, which can only be justified in cases where the measure is necessary and proportionate.¹¹ Such measure should ideally be based on a court decision, to avoid any arbitrariness as to the categorization of the measure as a search or an examination. **To not require judicial authorization for an examination or inspection may not meet the requirements of Article 8 of the ECHR, Article 17 ICCPR or the international good practices in legal systems around the world. It is therefore recommended for the lawmakers to consider amending the CPC to require judicial authorization for both examination and searches.**
29. Despite this shortcoming, the presence of attesting witnesses, which is set out in Article 4 of the Draft Amendments in relation to examinations, does constitute a means to double-check the veracity of inspection reports, and is thus a possible safeguard against arbitrary state behaviour, or the abuse of power.¹² As examinations can potentially interfere with the individual’s right to privacy in the same way that searches do, the same additional safeguards which apply to searches under the jurisprudence of the ECtHR should also be in place for examinations. This means that in addition to attesting witnesses, an adult occupant of the home or, if impossible, a member of the condominium association or local administration, who is not an employee of the executive branch, should be present during the examination, as it is already the case

¹⁰ This reflects similar provisions found in criminal procedural legislation in Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan. In comparison, Article 125 par 2 of the Georgian Criminal Procedure Code, Article 177 par 5 of the Russian Criminal Procedure Code and Articles 235 par 1 and 237 par 2 of the Ukrainian Criminal Procedure Code (2012) require judicial authorization for an examination of a dwelling which is the correct approach in light of the inhabitants’ right to privacy.

¹¹ *Chappell v The United Kingdom*, ECtHR judgment of 30 March 1989 (Application No. 10461/83), available at <http://hudoc.echr.coe.int/eng?i=001-57459>.

¹² Most of the post-Soviet republics of Central Asia also require attesting witnesses during an examination of a home or dwelling, see Article 177 par 1 Criminal Procedure Code Kyrgyzstan; Article 183 par 1 Criminal Procedure Code Tajikistan; Article 260 par 5 Criminal Procedure Code Turkmenistan; Article 136 par 1 Criminal Procedure Code Uzbekistan; while attesting witnesses must be present during a “search” of a home pursuant to Article 170 par 1 Criminal Procedure Code Russia, during an examination inside a house, the investigator has discretion whether or not to invite attesting witnesses pursuant to Article 170 par 2 Criminal Procedure Code Russia. Two attesting witnesses are required during all inspections of private homes in Ukraine pursuant to Article 223 par 7 Criminal Procedure Code Ukraine.

with searches under Armenian law.¹³ **It is recommended to supplement Article 4 of the Draft Amendments accordingly, to avoid any arbitrariness or abuse of power.**

3.4. Searches within the Context of Criminal Investigations

30. Article 9 of the Draft Amendments seeks to amend Article 227 of the CPC to specifically allow the replacement of attesting witnesses who are not available, with “the representative of condominium,” “community servants” (presumably meaning community employees of some kind) and, in Yerevan, the “community servants from the staff of the administrative district.” It is unclear whether these “community servants” are civil servants. **The Draft Amendments should clarify their status and, if applicable, stress that employees of the executive branch cannot act as attesting witnesses, in line with a previous recommendation made in pars 21-23 *supra*.**¹⁴
31. **Searches in Armenia require judicial authorization (Article 225 of the CPC), which is in conformity with international law and best practices.**¹⁵ In most post-Soviet countries, a search must also be accompanied by attesting witnesses.¹⁶

¹³ *Camenzind v. Switzerland*, ECtHR judgment of 16 December 1997 (Application No. 136/1996/755/954), available at <http://hudoc.echr.coe.int/eng?i=001-58125>; many countries formerly belonging to the Soviet Union also require the presence of an adult occupant of the inspected dwelling, or, if one is not available, a member of the condominium organization or of local administrative organs; see Article 220 par 15 Criminal Procedure Code Kazakhstan; Article 260 par 12 Criminal Procedure Code Turkmenistan (local executive or administrative organ); Article 177 par 11 Criminal Procedure Code Kyrgyzstan; Article 183 par 8 Criminal Procedure Code Tajikistan (condominium administration, or local administrative organ). Uzbekistan makes no provisions for such persons to be present.

¹⁴ In order to find appropriate language clarifying the identity of the attesting witnesses, it is helpful to look at the language of similar provisions in Western European codes for comparative analysis. Article 105 par 2 Criminal Procedure Code Germany provides: “Where private premises, business premises, or enclosed property are to be searched in the absence of the judge or the public prosecutor, a municipal official or two members of the community in the district of which the search is carried out shall be called in, if possible, to assist. The persons called in as members of the community may not be police officers or officials assisting the public prosecution office.” The owner or occupant of the place to be searched cannot qualify as a “search witness.” The reasons for requiring “search witnesses” are to protect the person searched from excesses committed by the searching officers, but also to protect the police from unjustified complaints by the affected persons in relation to the conduct of the search; see Meyer-Goßner, L, *Strafprozessordnung*, 54th Ed., Munich: C.H. Beck (2011), p. 435, margin notes 10-11; 1; Article 250 par 1 Criminal Procedure Code Italy, provides that, in serving a search warrant, a copy of the warrant should be handed to the accused or suspect, if he or she is present and to the person who actually owns or has control over the premises to be searched and that both should be advised of the possibility of calling a representative to assist them during the search if such person can be quickly summoned and is suitable to act as such. If the suspect or accused or the owner or controller of the premises are not present, then the copy of the warrant and the advice is given to a relative, a co-habitant, a collaborator, or, if they are not present, the doorman, or some other person with authority. In Spain, which still has investigating magistrates, it is the investigating magistrate who authorizes searches of dwellings. During searches, the interest party (suspect) or his or her legitimate representative must be present. If this is not possible, an adult relative must be invited to participate. If this is not possible, then two witnesses who live in the same town are asked to be present (Article 569 Criminal Procedure Code Spain).

¹⁵ Judicial authorization is also required by Article 112 par 1 Criminal Procedure Code Georgia; Article 12 Criminal Procedure Code Russia; Article 192 par 1 Criminal Procedure Code Tajikistan; Article 234 par 2 Criminal Procedure Code Ukraine. This is still not the case in Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan.

¹⁶ See Article 331 par 1 Criminal Procedure Code Georgia; Article 254 par 4 Criminal Procedure Code Kazakhstan (2015); Article 184 par 3 Criminal Procedure Code Kyrgyzstan (2014); Article 192 par 5 Criminal Procedure Code Tajikistan; Article 275 par 1 Criminal Procedure Code Turkmenistan.

32. Article 227 of the CPC requires the presence of the person whose place is being searched. **While this is in line with international good practice, the best protection against manipulation of the results of searches, including planting or tampering with evidence, is to require not only the presence of the suspect or interested party, but also the presence of the suspect/accused’s lawyer, at least in cases in which this would not jeopardize the outcome of the search and the person has legal counsel.**
33. The right to counsel was recognized by the ECtHR in *Salduz v. Turkey*¹⁷ during the conduct of preliminary investigations as being an integral aspect of the right to a fair trial under Article 6 of the ECHR. Although most of the post-*Salduz* cases deal with the right to counsel in the context of interrogations, some, such as the *Lisica v. Croatia* case, have also clarified that such right also exists in relation to searches, at least where the person is in custody and has counsel who is able to attend the search.¹⁸ Even before *Salduz* and *Lisica*, Spanish courts recognized the right of a detained suspect to be present with counsel during searches of dwellings or automobiles.¹⁹
34. **It is hence recommended to include a provision in the CPC stating that a person’s counsel shall be present at a search if the person so wishes. At the same time, in particularly time-sensitive cases where waiting for counsel to arrive may jeopardize the success of the search, a search can be conducted without the counsel present, contrary to the wishes of the person whose home is being searched. In such cases, the reasons for conducting the search without the legal counsel shall be stated in the investigative record.**

3.5. Exhumations required by Criminal Investigations

35. Article 5 of the Draft Amendments seeks to amend Article 219 of the CPC and eliminate the mandatory requirement that attesting witnesses need to be present during the exhumation of corpses. Article 219 of the CPC requires the presence of forensic medical specialists and “other specialists” during exhumations²⁰ and since the procedure of exhumation is very technical, it may indeed be difficult for attesting witnesses who lack the respective expertise to detect any improprieties even if they were present. **While the elimination of the presence of any independent third person as attesting witness, for this reason, seems non-objectionable, the Draft Amendments could be improved by requiring present medical specialists to be independent or by additionally requiring the presence of a medical expert from the defense team.**

3.6. Identification Procedures

36. Article 6 of the Draft Amendments proposes to amend Article 221 par 8 of the CPC, dealing with identification procedures, to provide for the use of attesting witnesses at

¹⁷ *Salduz v. Turkey*, ECtHR judgment of 27 November 2008 [GC] (Application No. 36391/02), available at <http://hudoc.echr.coe.int/eng?i=001-89893>.

¹⁸ See *Lisica v. Croatia*, ECtHR judgment of 25 February 2010 (Application No. 20100/06), pars 55-60, available at <http://hudoc.echr.coe.int/eng?i=001-97213>. In *Lisica*, the court emphasized that the reliability of the police testimony as to how the search was consummated was called into question due to the absence of the suspect/accused and his lawyer.

¹⁹ Decision of the Spanish Supreme Court of 30 October 1992, RJ 1992, No. 8553, 11247; Decision of the Spanish Supreme Court of 14 November 1992, RJ 1992, No. 9661, 12662, at 12664, both excerpted in English language in Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach*.

²⁰ The same provision can be found in Article 227 par 1 Criminal Procedure Code Kazakhstan (2015).

- line-ups, where witnesses to a crime attempt to identify the perpetrator within a line-up of other persons with similar features to those described by the witness or other identification procedures.
37. Overall, modern criminological and psychological research has noted that these types of identification procedures are quite prone to error.²¹ In particular the CPC requires at least three persons (including the suspect) to take part in the line-up, which is a very small number. Legislation in other OSCE participation States requires a larger number of persons, e.g. the Police and Criminal Evidence Act (1984) in England and Wales foresees at least eight other persons to be in the line-up with the suspect, which provides a greater safeguard against wrongful identification. The already quite detailed Article 221 could be enhanced by requiring that witnesses be told that the person whom they saw on the prior occasion might not be in the line-up, and that they should look at each person at least twice before coming to a decision. They should also be reminded to honestly say if they are not able to make a positive identification.²²
38. Even though this may go beyond the scope of the present Opinion, some improvements may be helpful in this respect. In addition, some U.S. States now require that line-ups be “double-blind”, i.e., that the officer who organizes the line-up not know who the suspect is. Finally, it is now considered to be preferable to show the witness or victim each person separately, and ask them identify the person in question, rather than showing them in a grouping of a number of other persons. **It is recommended that the Armenian stakeholders consider revising and providing greater safeguards during such identification procedures to avoid, to the greatest extent possible, the wrongful identification of an innocent person. In order to achieve this, at a minimum, the number of persons in a line-up should be increased and some of the above-mentioned techniques employed to ensure the objectivity of the identifying person and the police officers involved.**²³
39. Providing for attesting witnesses is a potential safeguard to avoid at least procedural errors in such “one-way” identification procedures.²⁴ It would, however, be preferable to also allow defense counsel to be present behind the one-way glass or in the protected area where the identification is undertaken. Although suspects participating in line-ups appear to have the right to counsel pursuant to Article 73 pars 1 and 3 of the CPC, it is unclear whether they have a right to be present when the witness or victim makes their identification. It is during the conversations between officials and witnesses behind the glass that officials might unlawfully use suggestive practices to induce a witness to identify the suspect. The ECtHR has found a violation of Article 6 of the ECHR (right to a fair trial) in the past because, *inter alia*, a suspect was denied the right to counsel at

²¹ E. g., Gary L. Wells and Eric P. Seelau, “Eyewitness Identification: Psychological Research and Legal Policy on Lineups”, *Psychology, Public Policy and Law* 1 (1995), p. 765-791; see also Beth Schuster, “Police Lineups: Making Eyewitness Identifications More Reliable”, *National Institute of Justice Journal* 285 (2007), 1-9, available at <https://www.ncjrs.gov/pdffiles1/nij/219603a.pdf>.

²² Annex B, Code D. PACE, See Paul Ozin, Heather Norton, Perry Spivey, *PACE. A Practical Guide to the Police and Criminal Evidence Act 1984* (3rd ed. 2013), Oxford: Oxford University Press, p. 149.

²³ Some additional issues which could be considered refer to the selection of the persons who appear in the line-up together with the person who is supposed to be identified and the role of the defense in selecting them; additionally, it is good practice to take photos of the entire line-up to later verify how each person looked and to keep multiple witnesses separated before, during and after line-up so they cannot communicate with or hear each other.

²⁴ In which the person for identification cannot see the person who is supposed to identify them; see e.g., Article 193 par 8 Criminal Procedure Code Russia.

the time when he was identified via such an identification procedure, in a case where this identification was crucial in the determination of guilt.²⁵ The right to have a lawyer present during such processes is also guaranteed in many Western European criminal procedure codes.²⁶ **Therefore, the Draft Amendments should clearly state that, in addition to attesting witnesses, defense counsel should be present at the place where the identification is undertaken.**

40. In a different identification procedure, Article 7 of the Draft Amendments seeks to amend Article 222 of the CPC and drop the requirement for attesting witnesses to be present when objects are being identified by witnesses to or victims of crimes.²⁷
41. While there are no clear international standards or clear comparative practices on the subject, it is not immediately clear why the Draft Amendments chose to eliminate the requirement of an attesting witness to be present during the identification of objects. While, theoretically, the witnesses' identification of the object can be repeated in court and the parties, through cross-examination, should be able to uncover any weaknesses in the alleged pre-trial identification, there may be cases where the identification cannot be repeated. This may be the case where traces of the object have faded or a substantive amount of time has passed and the witness cannot remember what the object looked like. Additionally, an attesting witness could guarantee that the chain of custody of the object has been correctly established. **Hence, it is recommended to keep the presence of an attesting witness as a requirement for the identification of objects pursuant to Article 222 of the CPC.**
42. Finally, Article 8 of the Draft Amendments seeks to amend Article 223 of the CPC to eliminate the required attendance of attesting witnesses during the identification of a corpse. **As the risk of manipulation by law enforcement personnel in the identification of a corpse seems to be low, there is no objection to this amendment.**

3.7. Seizure of Postal Correspondence

43. Article 10 of the Draft Amendments amends Article 240 of the CPC to eliminate attesting witnesses from the procedure of seizing and reviewing the postal correspondence of suspects. However, the director of the post office and “when necessary, other employees of the given office” are still required to be present when correspondence is opened and examined.²⁸

²⁵ *Mehmet Şerif Öner v. Turkey*, ECHR judgment of 13 September 2011 (Application No. 50356/08), par 21, available at <http://hudoc.echr.coe.int/eng?i=001-106197>.

²⁶ See Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (2d ed. 2008); Durham, NC: Carolina Academic Press, page 40; the Police and Criminal Evidence Act (1984) in England and Wales provides guidelines for line-ups or so-called “identification parades”, which ensure that the suspect may invite a lawyer (solicitor) or friend to be present and that such person must be in a position to hear everything that is said between the officials conducting the procedure and the witnesses.

²⁷ Attesting witnesses are not required during identifications of objects in Article 131 Criminal Procedure Code Georgia (2010), Article 230 Criminal Procedure Code Kazakhstan, Article 198 Criminal Procedure Code Kyrgyzstan and Article 128 Criminal Procedure Code Uzbekistan (2012). They are however, still required by Articles 170 par 1 and 193 Criminal Procedure Code Russia, Article 206 par 8 Criminal Procedure Code Tajikistan (2010), Article 268 par 8 Criminal Procedure Code Turkmenistan and Article 323 par 7 Criminal Procedure Code Ukraine.

²⁸ Article 185 par 5 Criminal Procedure Code Russia also does not require attesting witnesses but relies on cooperation by postal authorities. Article 187 par 5 Criminal Procedure Code Kyrgyzstan (2014) achieves the same purpose by requiring the attendance of “attesting witnesses (*poniatie*) from the workers of the postal

44. *Prima facie*, this amendment would not appear to raise concerns under international human rights law, as the director and staff of a post office could already be regarded as *de facto* attesting witnesses. At the same time, Article 239 of the CPC does not require judicial authorization to intercept mail and other types of correspondence during criminal investigations, which could raise some issues with respect to the right to privacy and correspondence of individuals protected by Article 17 of the ICCPR and Article 8 of the ECHR. Given the invasive nature of the **seizure and interception of correspondence, such measures should require prior judicial authorization, including sufficiently precise reasons for the seizure of correspondence, and a narrowed scope focusing only on the correspondence to be seized.**²⁹
45. Additionally, while Article 239 CPC includes “letters, telegrams, radiograms, parcels (printed matter), cases, post containers, transmissions, fax and e-mail messages” as the type of correspondence which can be monitored and intercepted, Article 240 only seems to extend to mail delivered to a post office. **Lawmakers should consider making these two provisions consistent.**

3.8. Examination of Surveillance Recordings

46. Article 11 of the Draft Amendments proposes to eliminate the required presence of attesting witnesses when an investigator examines and listens to surveillance recordings, as currently required by Article 241 par 6 of the CPC. Pursuant to Article 241 of the CPC, surveillance measures are subject to a court order.³⁰
47. **Generally, there is a danger that such recordings could be altered or partially destroyed. While surveillance is subject to court order and it should therefore be the authorizing judge who takes responsibility for guaranteeing the reliability of the recordings, the presence of an attesting witness offers additional safeguards to ensure that the recording has not been tampered with. Such witnesses could also recall what the recording looked or sounded like and what, if anything, the police may have done or said while listening to or examining the surveillance recording. Furthermore, an attesting witness could attest to the chain of custody as enshrined in Article 117 of the CPC. For these reasons, it is recommended to maintain the presence of an attesting witness while examining surveillance recordings.**
48. At the same time, the Armenian wiretapping and electronic surveillance provisions are problematic in other respects, notably because they allow such measures to be

institution.” Attesting witnesses, without more, are required by Article 281 par 4 Criminal Procedure Code Turkmenistan and Article 167 Criminal Procedure Code Uzbekistan. Attesting witnesses are not required during such investigative measures in other post-Soviet legal systems.

²⁹ See e.g., *Robathin v. Austria*, ECtHR judgment of 3 July 2012 (Application No. 30475/06), available at <http://hudoc.echr.coe.int/eng?i=001-111890>; see also Articles 99 and 100 of the German Criminal Procedure Code pursuant to which, a court order is generally required; in exceptionally urgent circumstances, the prosecution service can also order the seizure of mail.

³⁰ In comparison, Article 352 Criminal Procedure Code Uzbekistan does not require the presence of attesting witnesses during this stage and Article 238 Criminal Procedure Code Kazakhstan (2015) does not require the presence of attesting witnesses during secret investigative activities. Article 188 par 7 Criminal Procedure Code Kyrgyzstan (2008) and Article 284 par 5 Criminal Procedure Code Turkmenistan (2010), however, still require attesting witnesses at this stage, but it is to be emphasized that there is no obligatory judicial control of wiretapping and other interception of confidential communications, so the use of witnesses might still offer some additional theoretical protection against manipulation by the investigator or prosecutor. Article 196 par 6 Criminal Procedure Code Tajikistan (2010) still required attesting witnesses as of 2010, even though judicial authorization is required for wiretaps. Pursuant to Articles 170 par 2 and 186 par 7 Criminal Procedure Code Russia, the use of attesting witnesses is within the discretion of the investigator at this stage.

undertaken for six months based upon a single judicial authorization decision. The ECtHR has not established general maximum durations for surveillance measures and rather tends to look into the whole legal framework, rather than just the duration. Generally, the Court has in the past treated a six-month limitation with the possibility of renewal differently depending on the facts of the cases.³¹ At the same time, most countries who have ratified the ECHR allow for much shorter periods of time, usually not exceeding three or four months. Article 267 par 3 of the Criminal Procedure Code Italy sets an even shorter limit at 15 days but allows for renewed authorizations by judges. Additionally, in the United States, wiretaps and other bugging devices may be installed for only 30 days and any renewal must be approved by a judge. **In light of the fundamental right to privacy and international good practice, it is therefore recommended to review the provisions on length and renewal of court orders in order to adequately take into account the individual's right to privacy.**

3.9. Investigative Experiments

49. Article 12 of the Draft Amendments proposes to eliminate the use of attesting witnesses during the conduct of experiments used to verify information and evidence received.³² Given that this subject-matter is rarely regulated in codes of criminal procedure, there is no clearly established practice or international standards to draw from. While the use of attesting witnesses during investigative experiments is still obligatory in many post-Soviet states, it is discretionary pursuant to Articles 170 par 2 and 181 Criminal Procedure Code Russia, and no longer required in Article 28 Criminal Procedure Code Kazakhstan (2015) and Article 130 Criminal Procedure Code Georgia. In the United States and in many Western European countries the investigative experiment is not given special attention in criminal procedure codes. **Hence, there is no objection to Article 12 of the Draft Amendments eliminating the use of attesting witnesses during investigative experiments.**

3.10. Collection of Bodily Substances

50. Article 13 of the Draft Amendments adds a new paragraph to Article 253 of the CPC that would require attesting witnesses present during the collection of bodily substances (see Article 255) to be of the same sex as the person from whom the sample is taken. The ECtHR has held that a person's body "concerns the most intimate aspect of private life".³³ Additionally, even minor interferences with a person's bodily integrity may fall within the ambit of Article 8 if these interferences are carried out against a person's will.³⁴ **Requiring attesting witnesses present to be of the same sex as the examined**

³¹ In *Iordachi and Others v. Moldova*, the court is critical of a six months' limitation with the possibility of renewal, while similar measures were not criticized in *Kennedy v. The United Kingdom*; see *Iordachi and Others v. Moldova*, ECtHR judgment of 10 February 2009 (Application No. 25198/02), par 45, available at <http://hudoc.echr.coe.int/eng?i=001-91245>; and *Kennedy v. The United Kingdom*, ECtHR judgment of 18 May 2010 (Application No. 26839/05), available at <http://hudoc.echr.coe.int/eng?i=001-98473>.

³² Article 242 par 1 on investigative experiments reads: "In order to check and clarify the information relevant for the case that can be checked by experiments and other investigatory tests, the investigator is entitled to conduct investigatory experimentation".

³³ *Y.F. v Turkey*, ECtHR judgment of 22 July 2003 (Application No. 24209/94), par 33, available at <http://hudoc.echr.coe.int/eng?i=001-61247>.

³⁴ *Storck v Germany*, ECtHR judgment of 16 June 2005 (Application No. 61603/00), available at <http://hudoc.echr.coe.int/eng?i=001-69374>.

individual is thus an improvement of the current provisions.³⁵ However, it would be preferable if the CPC would specify that the sample of bodily substances may only be obtained on the basis of a court order and if conducted by accredited medical professional.³⁶ Furthermore, the CPC should clearly state that the substances collected may be used for the purposes of criminal investigations or proceedings in question only and that they should be destroyed afterwards. In line with relevant ECtHR jurisprudence, an exception can be made for investigative DNA databases, but only in cases where this is proportionate and not with regard to persons who were not charged or later acquitted.³⁷

[END OF TEXT]

³⁵ It appears as if attesting witnesses are no longer needed in Articles 170 and 202 Criminal Procedure Code Russia, Article 265 Criminal Procedure Code Kazakhstan (2015) or Article 207 Criminal Procedure Code Kyrgyzstan and are not required by Article 81a Criminal Procedure Code Germany or Article 326 Criminal Procedure Code Croatia. Attesting witnesses for the collection of bodily substances are, however, still required by Article 215 par 3 Criminal Procedure Code Tajikistan, Article 307 par 2 Criminal Procedure Code Turkmenistan and Article 193 Criminal Procedure Code Uzbekistan.

³⁶ This is the case, e.g., pursuant to Article 81a Criminal Procedure Code Germany.

³⁷ *S. and Marper v The United Kingdom*, ECtHR judgment of 4 December 2008 (Application Nos. 30562/04 and 30566/04), available at <http://hudoc.echr.coe.int/eng?i=001-90051>.

ANNEX:

Draft

CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA

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

Article 1. To amend Part 5 of Article 29 of Criminal Code of the Republic of Armenia from July 1, 1998 (hereinafter “the Code”) with a new paragraph by the following content:

“Requirements set for technical means used in the course of procedural actions, conditions of their usage shall be defined by the government of the Republic of Armenia”.

Article 2. In Article 81 of the Code:

1) To formulate Part 1 in the following wording:

“1. Attesting witness is any adult citizen of the Republic of Armenia, disinterested personally in the criminal case, who, upon the invitation of the body conducting proceedings, participates in the implementation of investigatory action for the verification of the fact of its implementation, the substance, the course and the results.

The attesting witness shall be involved in the investigatory action upon his/her consent, except for cases prescribed by law.

The investigator, the body of inquest may invite attesting witnesses also from the condominium or community service and in the city of Yerevan from community servants of the staff of administrative district who are obliged to arrive upon the call of the body conducting proceedings”.

2) To amend with the following content by Parts 21 and 22:

“21. Participation of the attesting witnesses is mandatory in cases stipulated by this Code. If the implementation of investigatory action may be dangerous for life or health or it is impossible to invite attesting witnesses to the given place or in the given time, as well as in remote areas or in case of absence of appropriate means of communications, investigative actions may be conducted without participation of attesting witnesses. In these cases the course and results of the investigation action shall be fixed by use of video-audio recording. The investigator, the body of inquest shall indicate about reasons

of not inviting an attesting witness and the use of video-audio recording in the protocol of investigation action.

22 If attesting witness is not invited to examination of the scene of crime, the investigative experimentation, exhumation, presenting the corpse, person or items for identification, except for cases in places out of sight, in conducting search, except for the search of residence and personal search, their course and results shall be fixed by the use of video-audio recording”.

3) To recognize void Clause 1 of Part 3.

Article 3. To amend Part 2 of Article 167 of the Code with the word “, local self-government bodies” words after the word “institutions”.

Article 4. To formulate Part 1 of Article 218 of the Code in the following wording:

“1. Examination, as a rule, shall be conducted in the daytime. The examination of residence shall be conducted with the participation of attesting witnesses.”

Article 5. To withdraw from Part 2 of Article 219 of the Code the sentence “The presence of attesting witnesses is mandatory”.

Article 6. To formulate Part 8 of Article 221 of the Code in the following wording:

“8. Presenting the person for identification from a spot out of sight shall be conducted with the participation of attesting witnesses”.

Article 7. To recognize void Part 4 of Clause 222 of the Code.

Article 8. To recognize void Part 3 of Clause 223 of the Code.

Article 9. In Article 227 of the Code:

1) To formulate Part 1 in the following wording:

“1. The search of residence and the seizure of residence shall be conducted with the participation of attesting witness”.

2) To formulate 2nd sentence of Part 3 in the following wording:

“In case their presence is not possible, the representative of condominium is invited, and attesting witness are invited from community servants and in the city of Yerevan the

community servants from the staff of administrative district are invited as witnesses to a search”.

Article 10. In Part 1 of Article 240 of the Code to replace the words “with participation of attesting witnesses selected from the number of employees of the given institution” with the words “with their participation”.

Article 11. In Part 6 of Article 241 of the Code to replace the sentence “Examination and listening of records by the investigator is done with the participation of attesting witnesses, and when necessary, experts” with the sentence “Examination and listening of records by the investigator shall be conducted with the participation of the expert, if necessary”.

Article 12. To withdraw from Part 2 of Article 242 of the Code the following sentences: “When performing investigatory experimentation attesting witnesses must be present.” and “The investigator is entitled to use technical means.”.

Article 13. To amend Article 253 of the Code with the following content by 21 Part:

“21. Taking human samples shall be conducted in the presence of attesting witnesses of the same sex”.

Article 14. To replace the words “ and in the presence of attesting witnesses” in Part 2 of Article 225 of the Code with the words “in the presence of attesting witnesses in case stipulated by Part 21 of Article 253 of this Code”.

Article 15. This Law shall come into force on the 10th day following its official publication.

President of the Republic of Armenia S. Sargsyan

2016 -----

Yerevan