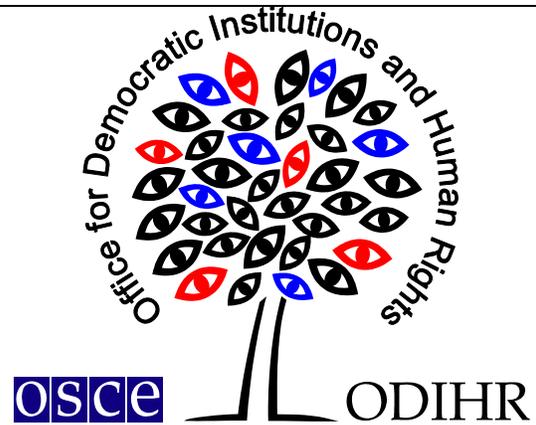


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COMMENTS
ON THE DRAFT AMENDMENTS
TO THE CODE OF CRIMINAL PROCEDURE
OF THE REPUBLIC OF ARMENIA

1. SCOPE OF REVIEW

This is not a comprehensive review, but rather a comment on the draft amendments to the Code of Criminal Procedure of the Republic of Armenia (hereinafter referred to as the Draft), prepared as a result of assistance provided by the OSCE Office in Yerevan to the Government of the Republic of Armenia.

The analysis intends to (a) assess the compliance of the draft legislation with international standards pertaining to the protection of crime witnesses and of victims of trafficking in human beings, and (b) to propose recommendations considering both the relevant international standards and other countries' best practices.

2. RECOMMENDATIONS

1. Reform of the criminal procedure should encompass out-of-court as well as in-court witness protection, and should be accompanied by incorporation of provisions related to trafficking victim assistance in other legislative acts. These should, *inter alia*, provide for clear and accessible procedures whereby victims can seek or claim compensation or restitution.
2. It is recommended to reword the definition of protected person in Article 98, para 1, to make it clear whether it would apply only when testimony is actually given (or when it is apparent that testimony will be given) or its application can be extended to all cases when the person in question possesses information material to the criminal proceedings.
3. It is recommended that the relevant provisions specify the duration of protection.
4. It is recommended that the Armenian legislator consider extending protection not only to those persons who provide testimony but to all those endangered persons who assist in the investigations or collaborate with justice.
5. It is recommended that the definition of protected person is reviewed to make it clear that protection shall be extended to the family members or persons close to the witness (not limited to relatives) if the latter may be endangered.
6. It is recommended that the legislator consider introducing amendments that would

- allow the testimony of witness without their physical presence at trial (such as closed-circuit television), to avoid placing them in danger or retraumatizing them.
7. The Draft should make it clear that the provisions concerning witness protection are also applicable to organized criminal group members who have cooperated with the investigation. It is recommended that the relevant provisions be modified to ensure that in case of witnesses who are or may be also offenders, appropriate safeguards are in place to protect the public from any possible future offenses. At the same time, it is recommended that victims be exempt from prosecution for offenses related to their status as trafficked persons.
 8. It is recommended that the Draft include a provision introducing victim impact statements or victim statements of opinion, to be presented to the judge prior to trial.
 9. It is recommended that oral consent of the protected person be removed from the provisions concerning the legal basis for the interception of communications. It is also recommended that the law retain its current stance rendering any intercepted communications obtained in the absence of a court order inadmissible as evidence.
 10. It is recommended that relevant legislation provide for special measures to ensure protection for child witnesses and victims of crime.

3. INTRODUCTION

Witness protection is centrally important in the fight against human trafficking. Without effective witness protection, successful prosecution of perpetrators is hardly feasible, as in trafficking cases victims are especially often threatened or blackmailed and therefore more than ever reluctant to testify against their tormentors for fear of retaliation.

However, witness protection in the anti-trafficking context cannot be viewed separately from victim assistance. These two issues are closely interrelated but not congruent and warrant different legislative approaches. International standards require that protection be extended to all victims – and not only to those summoned to provide testimony. The victims should also receive comprehensive assistance beyond protection, including ready access to compensation or restitution.

This review is limited to draft amendments to the Code of Criminal Procedure and therefore does not purport to analyze the entire legal framework pertaining to witness protection and victim assistance and protection in Armenia. However, since the point of departure for this work is Armenia's efforts to step up fight against human trafficking, it is essential to mention from the outset that amendments to the criminal procedural legislation alone cannot guarantee effective victim/witness protection. Reform of the criminal procedure should encompass out-of-court as well as in-court witness protection, and should be accompanied by incorporation of provisions related to victim assistance in other legislative acts. These should, *inter alia*, provide for clear and accessible procedures whereby victims can seek or claim compensation or restitution.

4. SPECIFIC ISSUES THAT REQUIRE PARTICULAR ATTENTION

4.1 Definition and meaning of “protected person.” The definition of “protected person” is given in Article 98, para 1, of the Draft and is worded as follows:

Every party to criminal proceedings, who is able to provide information that may be significant for solving the crime and identifying its perpetrator, which endangers his, his family members', or close relative's life and safety, shall be entitled to protection.

It remains unclear from the language of the provision whether it would apply only when testimony is actually given (or when it is apparent that testimony will be given) or its application can be extended to all cases when the person in question possesses information material to the criminal proceedings. **It is therefore recommended to reword Article 98 to eliminate vagueness. It is also recommended that the Armenian legislator consider extending protection not only to those persons who provide testimony but to all those endangered persons who assist in the investigations or collaborate with justice. It is also recommended that the provision specify the duration of protection.**

The definition as provided for by Article 98 is also not clear with regard to the status of the threatened family members. It follows from the wording of the provision that whenever a family member of a witness is threatened, it will be the witness rather than the endangered

family member who is eligible for protection measures. In addition, it is recommended that protection not be limited to relatives of the witness, but instead be extended to persons close to the witness,¹ which group would then naturally involve the witness's loved ones or victim assistance NGO members whose personal security may often be endangered. **It is recommended that the definition of protected person is reviewed to make it clear that protection shall be extended to the family members or persons close to the witness (not limited to relatives) if the latter may be endangered.**

4.2 Improved Witness Safety During Testimony. The Draft provides for an extensive selection of physical protection arrangements available to protected persons through witness protection scheme. However, it largely overlooks the issue of evidentiary rules providing for improved safety of the witness (see above recommendation concerning the importance of in-court protection). **It is recommended that the legislator consider introducing amendments that would allow the testimony of witness without their physical presence at trial** (such as closed-circuit television), to avoid placing them in danger or retraumatizing them. However, means of protection preventing the disclosure of witness identity (anonymous testimony) should be approached with extreme caution and are not recommended at this stage, especially considering that Armenia is still in the process of reforming its legislation and institutions to ensure true equality of arms.

4.3 Protection of collaborators of justice. The Draft should make it clear that the provisions concerning witness protection are also applicable to organized criminal group members who have cooperated with the investigation, which would bring the Draft fully in line with the requirements of the United Nations Convention Against Transnational Organized Crime² in this respect. **It is recommended that the relevant provisions be modified to ensure that in case of witnesses who are or may be also offenders, appropriate safeguards are in place to protect the public from any possible**

¹ See Council of Europe, Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence, Article 2.

² United Nations Convention Against Transnational Organized Crime, Article 26, Measures to Enhance Cooperation with Law Enforcement Authorities, para 4 (“*Protection of such persons shall be as provided for in article 24 of this Convention.*”).

future offenses. This recommendation, however, does not intend to negate the importance of the principle of non-punishment of victims, as provided for by the draft Council of Europe Convention on Action against Trafficking in Human Beings.³ Although still a draft, the Convention is valuable as it reflects the stance of Council of Europe member States – including Armenia as one of the States which have actively contributed to the preparation of the draft Convention. **It is recommended that victims be exempt from prosecution for offenses related to their status as trafficked persons,** such as illegal border crossing.

It should be mentioned that the extant Armenian legislation⁴ already provides for mitigation of sentences for those who cooperate, which is in line with the requirements of Article 26, para 2, of the Convention Against Transnational Organized Crime.⁵

4.4 Victim participation in criminal proceedings. Article 25 of the Convention Against Transnational Organized Crime requires the States Parties to “*enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*” Neither the extant Code of Criminal Procedure nor the Draft include any provisions for victim participation, apart from a rather general provision in the current Code affording victim the right to “*to demand, during the participation in investigatory or other procedure action, the inclusion into the protocol of the mentioned action or the court session the records on the circumstances, which, upon his/her opinion, have to be mentioned.*”⁶

³ Article 26 (“Each Party shall, in accordance with the basic principles of its national legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”).

⁴ Criminal Code of the Republic of Armenia, Article 64, (“*If there are exceptional circumstances concerned with the motives of the crime and its purpose, the role of the perpetrator, and his behavior when committing the crime and thereafter, which essentially reduce the extent of danger of the crime for the society, as well as, **if a member of the group crime actively assists in solving the crime,** a softer punishment can be assigned than the minimal envisaged punishment in the appropriate article of the Special Part of this Code, or a softer type of punishment, than envisaged in that article, or no compulsory supplementary punishment may be applied.*”) (Emphasis added.)

⁵ Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offense covered by this Convention.

⁶ Code of Criminal Procedure of the Republic of Armenia, Article 59.

It is recommended that the Draft include a provision introducing victim impact statements⁷ or victim statements of opinion,⁸ to be presented to the judge prior to trial. Written statements are preferable to live interventions, especially should Armenia in the future opt for introducing jury trials, since the victim is not normally prepared or represented by legal counsel, and there should be safeguards in place to prevent information not admissible as evidence (impact statement/statement of opinion does not technically constitute evidence) to become available to the trier of fact and affect the final determination of guilt.

4.5 Interception of communications. The draft amendments allow to intercept the protected person’s telephone or other communications upon his/her “*written request or oral consent.*”⁹ The draft also allows to record the wiretapped communications.

The inclusion of oral consent as a legal basis for wiretapping proves particularly problematic since it may lead to abuse by the law enforcement.

It also remains unclear from the text of the draft amendments if wiretapping is only envisaged as an additional measure to ensure swift response by the witness protection agency should there be an imminent threat to the protected person, or wiretapped communications may be subsequently used as evidence in court. The latter case scenario would obviously run contrary to the Article 14 of the Code of Criminal Procedure which explicitly prohibits the interception of communications in the absence of a court order.¹⁰

It is recommended that oral consent of the protected person be removed from the provisions concerning the legal basis for the interception of communications. It is also

⁷ A victim impact statement provides an opportunity for the victim to state how the offense has affected him or her personally, both in terms of material or financial damage and of disruption of life.

⁸ A victim statement of opinion, in addition to a general statement of the impact of the offense on the personal situation of the victim, provides an opportunity to express the victim’s opinion of what, in the victim’s view, should be done about the matter.

⁹ Draft amendments, Article 98⁵.

¹⁰ Code of Criminal Procedure of the Republic of Armenia, Article 14 (“Imposition of arrest on postal and telegraph correspondence, its examination, wire-tapping and interception of conversations over the telephone or other means of communication, may be ordered in the course of criminal proceedings only upon a decision of the court and in the manner prescribed by law.”).

recommended that the law retain its current stance rendering any intercepted communications obtained in the absence of a court order inadmissible as evidence.

4.6 Special measures for child witnesses and victims. The draft amendments do not foresee any special measures to accommodate the needs of child witnesses and victims. The Convention on the Rights of the Child¹¹ specifically requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹² The best interest of the child as a principle of paramount importance is emphasized by the UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking¹³ and the UNICEF Guidelines on the Protection of Children Victims of Trafficking in SEE.¹⁴ A number of non-binding international standards refer to the situation of the child as witnesses and victims of crime in general. Thus, the U.N. Guidelines for Action on Children in the Criminal Justice System¹⁵ encourages the States to “review, evaluate and improve, as necessary, the situation for children as witnesses of crime in their evidential and procedural law to ensure that the rights of children are fully protected.” **It is therefore recommended that relevant legislation provide for special measures to ensure protection for child witnesses and victims of crime.**

¹¹ Acceded to by the Republic of Armenia on 23 June 1993.

¹² Article 3, para 1.

¹³ Principle 10 (“Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs”).

¹⁴ Article 2.2 (“In all actions concerning child victims, whether undertaken by public or private social welfare institutions, police, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration”).

¹⁵ Recommended by the U.N. Economic and Social Council resolution 1997/30 of 21 July 1997.