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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ARMENIA

JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE

ON

THE DRAFT AMENDMENTS TO THE CRIMINAL CODE AND THE CRIMINAL PROCEDURE CODE CONCERNING THE COLLECTION OF EVIDENCE WITHOUT CONSENT IN CRIMINAL INVESTIGATIONS

Adopted by the Venice Commission
at its 140th Plenary Session
(Venice, 11-12 October 2024)

on the basis of comments by

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Opinion co-funded by the European Union

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I. Introduction

1. By letter of 14 May 2024, Mr Grigor Minasyan, Minister of Justice of Armenia, requested a joint opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law (DGI) on the draft amendments to the Criminal Code and the Criminal Procedure Code of Armenia concerning mandatory personal inspection, expert examination and providing samples during criminal investigations (CDL-REF(2024)030 - "draft law").

2. Ms Renata Deskoska and Mr Thomas Rørdam acted as rapporteurs on behalf of the Venice Commission. Ms Lorena Bachmaier-Winter acted as a rapporteur on behalf of DGI.

3. On 10 September 2024, a delegation of the Venice Commission and DGI held online meetings with representatives of the Ministry of Justice, the Investigative Committee, the Prosecutor General's Office, the Court of Cassation as well as the members of the Standing Committee on State and Legal Affairs of the National Assembly from the majority and opposition. Meetings were also held with representatives of the Human Rights Defender's Office, the Bar Association, civil society and Academia. The Venice Commission and DGI are grateful to the Council of Europe Office in Armenia for the support provided in organising the online meetings.

4. Following the online meetings, the Court of Cassation and the Prosecutor General's Office of Armenia provided their observations on 10 and 11 September 2024, respectively. The Venice Commission and DGI are grateful to all the interlocutors for their input.

5. This Joint Opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.

6. This Joint Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 10 September 2024. Following an exchange of views with Mr Karen Karapetyan, Deputy Minister of Justice of Armenia, it was adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024).

II. Background and content of the draft law, scope of the Joint Opinion

7. Armenia's criminal justice system has recently undergone major changes with the adoption of the new Criminal Code (CC) and the Criminal Procedure Code (CPC), both entered into force on 1 July 2022. The new Codes aim, *inter alia*, at shifting from a punitive to a rehabilitative approach, better protecting human rights and balancing public and private interests in criminal proceedings, improving the role of the courts at the pre-trial stage and the role of defence lawyers in gathering evidence.[1] Following the adoption of the new Codes, work continues to harmonise legislative and institutional frameworks with the Council of Europe standards and to develop the capacities of legal practitioners to ensure the effective implementation of the new substantive and procedural criminal legislation.[2]

8. The CPC foresees the obligation of private participants in criminal proceedings to undergo, at the request of the body administering the proceedings, certain investigative actions for the purpose of collecting evidence in criminal investigations. In particular, for an arrested/accused person - to undergo a medical examination, fingerprinting, personal inspection, expert examination, to be photographed or to provide samples (Article 43, para. 2.2), for a victim - to submit samples and undergo personal inspection and expert examination (Article 50, para. 3.3) and for a witness - to submit samples and undergo personal inspection and expert examination if it is necessary to verify his/her testimony (Article 58, para. 2.3).[3] As explained by the Ministry

[1] See CM(2023)166, Council of Europe Action Plan for Armenia 2019-2022, Final Report, p. 11.
[2] See CM(2022)121, Council of Europe Action Plan for Armenia (2023-2026), p. 12.
[3] See Criminal Procedure Code of Armenia.

of Justice and the Investigation Committee (the author of the draft law), specific provisions as to the compulsory procedure in case of refusal to voluntarily undergo the above-mentioned investigative actions and the consequences thereof are absent in the material and procedural criminal law. Therefore, the draft law aims to introduce the rules that will make it possible to enforce this obligation. The proposed amendments can be summarised as follows.

9. Draft para. 10 of Article 18 (Freedom and personal inviolability of a person) of the CPC provides that "The body administering proceedings may discharge proportionate physical force as an exceptional measure, based on a decision of the court, in the cases and in the manner provided for by this Code, to the extent it is necessary to ensure the fulfilment of the obligation to undergo investigation and expert examination or give samples, unless otherwise possible to ensure the fulfilment of those obligations by other means". Draft para. 1.5 of Article 41 (Powers of the investigator) allows the investigator to apply to the court with motions for imposing the compulsory personal inspection, expert examination or compulsorily obtaining samples. Draft para. 3 of Article 227 (Personal inspection) provides that in case of refusal to voluntarily undergo personal inspection, a protocol shall be drawn up, and clarification shall be provided on the possibility of compulsorily conducting it upon the decision of the court. Draft para. 8 of Article 254 (Obtaining a sample for examination) prohibits torture or inhuman or degrading treatment or causing severe physical or mental pain or suffering to a person during the compulsory conduct of the above-mentioned investigative actions. Draft para. 9 of the same Article provides that an accused/victim/witness shall be warned about the criminal liability under the new draft Article 503.1 of the CC.

10. Draft Article 503.1 provides for penalties, aggravating circumstances and exemption from criminal liability as follows: Refusal by a witness or victim shall be punished by a fine up to ten times the monthly income of the person concerned, by restriction of freedom for up to one year, or by short-term imprisonment for up to two months. Refusal by an arrested/accused person shall be punished by a fine up to twenty times the monthly income of the person concerned, by restriction of freedom for up to three years, by short-term imprisonment for up to four months, or by imprisonment for up to three years. A refusal committed with mercenary motives or in the context of a grave or particularly grave crime is an aggravating circumstance, which may lead to imprisonment for up to five years. Exemption from criminal liability applies if, before the court retires to deliberate on coercive measures, before the dismissal of proceedings during the preliminary investigation, or before the court retires to deliberate on a criminal judgment or decision, the person who committed the above-mentioned acts voluntarily submits to sampling, undergoes personal inspection or expert examination, and the samples provided in a timely manner have not lost their evidential significance.

11. Such a legislative initiative is not a novelty. In 2017, Article 457 (refusing or avoiding to undergo personal inspection, expert examination, medical examination, or giving samples) was added to the draft CC. However, following an opinion of DGI that recommended *omitting* or *amending* that provision,[4] the authorities did not finally include it in the CC. The Prosecutor General's Office and the Criminal Chamber of the Court of Cassation adopted opinions (shared with the Venice Commission and DGI - see para. 4 above) on the previous version of the draft amendments in December 2021 and January 2022, respectively. The Human Rights Defender's Office also provided their input in 2022.

[4] Opinion on Draft Criminal Code of the Republic of Armenia, DGI, Council of Europe, September 2017, para. 213: "This provision should be omitted from the Draft Code or amended by making it clear it does not apply to a suspect or defendant; ensuring that the offence can only be committed if the person concerned has failed to obey specific order of the court to comply and that they have had an opportunity to participate in those proceedings; and that those proceedings give reasons for the order, base any decision on the specific reasons found that justifies that decision and consider the issues that might be raised by Articles 3, 6, 8, and 10".

12. The draft provisions raise a number of complex questions for which, further to be regulated in the laws or by-laws and interpreted by the domestic courts, implementation will be of crucial importance for upholding human rights in accordance with European standards.

13. This Joint Opinion will assess the compatibility of the draft law with the relevant Council of Europe standards. The absence of remarks on other aspects of the draft law should not be interpreted as their tacit approval.

III. Applicable standards

14. The duty of the State to fight against crime involves the active protection of individuals' rights by putting in place effective criminal-law provisions and law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. On the other hand, the duty of individuals to give evidence in criminal proceedings is a normal civic duty in a democratic society governed by the rule of law.[5]

15. Rules on obtaining bodily samples and obliging the suspect/accused, a witness or a victim to undergo personal inspection or expert examination are provided in most legal systems since the information and evidence that can be obtained through those measures are of crucial relevance for the investigation of crime and for ensuring road safety.

16. Using force to compel a person to undergo personal inspection, expert examination or provide samples raises questions of interference with the physical and or mental integrity under Article 3 or Article 8 of the European Convention on Human Rights (ECHR), which, *inter alia*, provides protection of physical and moral integrity under the respect for private life head. In that case, an act constituting an interference will be in breach of Article 8 para, 1 unless it can be justified under its para. 2 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.[6] Questions might also arise with regard to the right to legal assistance and, in specific circumstances, depending on the means used to obtain evidence[7] with regard to the privilege against self-incrimination - under Article 6, paras 1 and 3 (c) of the ECHR. Therefore, in analysing the draft law, the Venice Commission and DGI will mostly refer to the well-established case law of the European Court of Human Rights (ECtHR).

17. The Venice Commission, in its Rule of Law Checklist, underlined the duty of the state bodies to implement laws effectively, noting that such a duty is threefold, implying "obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers. […] Proper implementation of legislation may also be obstructed by the absence of sufficient sanctions (*lex imperfecta*), as well as by an insufficient or selective enforcement of the relevant sanctions. […]".[8]

IV. Analysis

A. Law making process

18. As it appears from the explanatory report and online discussions, the reform in question was initiated several times before and after the entering into force of the new Codes. Draft amendments were developed, discussed among the national stakeholders and analysed by

[5] ECtHR, Van der Heijden v. the Netherlands [GC], no. 42857/05, judgment of 3 April 2012, paras 62-64.
[6] ECtHR, Wainwright v. The United Kingdom, no. 12350/04, judgment of 26 September 2006, para. 43. See also Caruana v. Malta, (Dec), no. 41079/16, 15 May 2018, paras 26-27.
[7] ECtHR, Jalloh v. Germany [GC], no. 54810/00, judgement of 11 July 2006, paras 94-123.
[8] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), paras 53 and 55.

international experts (see paras 4 and 11 above) without, however, being considered by Parliament. During the online meetings, several interlocutors informed the delegation about the absence of information/consultations on the draft law. In this regard, it is noted that the draft law has not yet been transmitted to Parliament.

19. The Venice Commission and DGI underline the importance of wide and substantive consultations when it comes to the draft legislation on issues of major importance for society, such as criminal justice[9] and raising a number of complex human rights-sensitive issues. The law-making process should be accompanied with inclusive discussions involving all political groups in Parliament. Consultations with external participants (i.e. professionals in the relevant field) and representatives of social, professional and/or other groups affected by the draft legislation might also be required. External input may also be obtained through public consultations and discussions in the media and in civil society.[10]

20. Therefore, the authorities are invited to ensure, at the subsequent stages of the legislative process, to ensure meaningful dialogue amongst different political forces and involvement in this dialogue of civil society and all other relevant stakeholders (judges, prosecutors, investigators, lawyers, expert bodies, civil society, media, Academia, etc.) in order to reach a broad consensus.

B. New procedure

21. The draft law refers to "samples" without specifying the types thereof. However, Article 254, para. 2 of the CPC provides a non-exhaustive list of samples (blood, semen, hair, nail clippings, microscopic skin scrapings; saliva, sweat and other excretions; imprint of skin patterns, molds of teeth and limbs; handwriting, signature, other materials expressing human skill; the recording; trial samples of finished products, raw materials, materials; weapon, shell, bullet; other materials and objects).

22. It is not the role of the Venice Commission and the DGI to analyse the procedure of obtention of each type of sample or to determine whether particular types of evidence may be admissible. At the same time, it is to be noted that the compulsory obtention of some types of samples (like saliva swamps or iris recognition) does not imply an interference with physical integrity, while the compulsory obtention of other samples (blood samples with a syringe, internal bodily searches (e.g., for drug search in body cavities) does imply an interference in physical integrity and privacy. Furthermore, some types of samples can be obtained without active cooperation from the person affected (e.g., hair samples), and for others, the refusal of the person to cooperate will make it impossible to obtain the sample (e.g., breathalyser, semen or writing samples). Therefore, the acceptability of interference with individual rights using physical force depends on the nature of the sample to be obtained. The Venice Commission and DGI invite the authorities to specify the categories of samples in this regard.

23. It is understood that for the purposes of the draft law, "the body administering the proceedings" means the investigator, who has the authority to conduct personal inspection and obtain samples independently or with the help of an expert when special knowledge in the field of science, technology, art or other fields is needed. The expert is appointed by the investigator's decision.[11]

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[9] Venice Commission, CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, para. 39.
[10] Venice Commission, CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paras 77 and 79. See also CDL-AD(2016)007, Rule of Law Checklist, *op. cit*., Benchmark II.A.5. Law-making procedures and CDL-PI(2021)003, Compilation of Venice Commission opinions and reports concerning the law-making procedures and the quality of the law.
[11] Article 226-227, 237 and 252-253 of the CPC.

24. Based on the draft law and current CPC provisions, the whole procedure would consist of the following steps.

25. In case an arrested/accused person, witness or victim refuses to voluntarily undergo personal inspection, expert examination, or provide samples, the investigator shall draw up a protocol and warn the person concerned about a) the possibility of compulsorily conducting the investigative actions(s), upon the decision of the court and b) the criminal liability for refusal (on this aspect, see Part D. below).

26. Once the protocol is drawn up, the investigator shall apply to the court with a motion for compulsorily carrying out the investigative measures. The motion must contain, *inter alia*, the detailed information on the compulsory investigative action requested, the conditions for its execution, deadlines, expected results, and the reasons justifying the necessity and proportionality of interfering with the constitutional rights of a person, including the reasonable impossibility of obtaining the expected result by means other than the use of force.[12]

27. Immediately after receiving the motion but not later than within three hours, the court shall decide to grant or reject the motion (Article 292, para. 9). During the consideration of the motion, the court may request the investigator to provide an additional explanation regarding the motion. Moreover, if the motion is granted, the court may, to the benefit of the person against whom the use of force is authorised, change the conditions and timeframe thereof. The court's decision shall be handed over to the investigator within three hours of its adoption (Article 293, paras 4 and 5). Therefore, the whole procedure, from introducing the motion to adopting the court decision and handing it over to the investigator, might take a maximum of six hours. Such a delay, with regards to some types of samples (for example, breathalyser or drug test), could lead to the loss of evidence, which might have decisive importance for both establishing the guilt or acquittal of the person concerned (see Part C. below).

28. In case the motion is granted, the investigator is allowed to use proportionate physical force, as an exceptional measure and to the extent it is necessary to ensure the fulfilment of the obligation, unless its fulfilment is possible by other means (draft para. 10 of Article 18 of the CPC). Depending on the investigative action or the type of sample to be obtained, the investigator shall do it himself/herself or take the person to the relevant location (expert body, hospital, etc.). In case of continuing refusal to undergo the expert examination or provide samples, the investigator is allowed to provide the necessary support to the expert (Article 256, para. 8 of the CPC). This may include, for example, immobilising the person while a doctor/expert forcibly proceeds with the examination/taking samples.

29. The Venice Commission and DGI underline that, in conformity with the principle of proportionality, the investigator must ensure that the objective pursued by the use of force cannot be achieved by other means, which must be exhausted. In this context, "other means" (for example, persuasion, dialogue) must not only precede the fact of refusal but also be used by the investigator after the court authorises the use of force. The investigator must seek the least violent methods of intervention. This implies that investigators should have the necessary skills to communicate effectively and try to de-escalate the situation before the use of force obviously becomes the only available option.

[12] Article 292, para. 2 of the CPC sets the detailed requirements as regards the content of the motion: The motion of the investigator shall contain: 1) the name of the competent court. 2) name, surname and position of the investigator; 3) the year, month, day, hour and minute of submitting the petition to the court; 4) the number of the proceedings. 5) the relevant data of the person whose constitutional right is requested to be restricted; 6) the mediated evidentiary action, as well as the relevant conditions for its execution, including the deadlines; 7) the expected result from the mediated evidentiary action; 8) in the case of a motion to extend the term of a secret investigative operation, the result obtained during the execution of a secret investigative operation; 9) the arguments that justify the necessity and proportionality of limiting the constitutional right of a person, including the reasonable impossibility of obtaining the expected result from the mediated evidentiary action in another way; 10) the list of materials attached to the petition.

30. Articles 3 and 8 of the ECHR do not, as such, prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain evidence from him/her. However, any recourse to a forcible medical intervention must be convincingly justified on the facts of a particular case. The seriousness of the offence in issue and alternatives to recover the evidence should be considered by the authorities. The manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his or her body must not exceed the minimum level of severity allowed by the ECtHR case-law on Article 3 of the Convention.[13] In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention, whether the forcible medical procedure was ordered and administered by medical doctors, whether the person concerned was placed under constant medical supervision and whether the forcible medical intervention resulted in any aggravation of his/her health condition and had lasting consequences for his/her health.[14]

31. The Venice Commission and DGI do not see contradictions between the wording of the draft para. 10 of Article 18 and the draft para. 8 of Article 254, as such, and international standards. Taken together with the existing provisions of the CPC as described in para. 27 above, the amended CPC would provide that the use of physical force must be preceded by a warning; physical force shall only be exercised upon a judicial warrant and within a precise scope, which must be provided in the investigator's motion (with the adjustments to the benefit of the person concerned - if the judge considers it necessary) and the judicial warrant, be reasonable and proportionate to the objective pursued. This is positive. However, concerning the forcible interference with the person's physical and mental integrity or dignity and given the prohibition in of torture and inhuman or degrading treatment or punishment by the ECHR and the draft law (see para. 9 above), the Venice Commission and the DGI recommend to specify, based on the categories of samples (see para. 22 above), the circumstances under which the force may be used; to specify that "other means" must also be used after the judicial warrant was obtained and before the compulsory investigative actions are processed.

32. Furthermore, the Venice Commission and DGI emphasise that following the adoption of the draft law, its proper implementation and respect for the principles of necessity and proportionality in the narrow sense are crucial for upholding human rights in accordance with European standards. While granting the investigator's motion, the domestic courts should carefully balance the interests of the individual and the needs of the criminal investigation to determine whether the public interest in securing a conviction is substantial enough to justify the use of compulsorily collected evidence. The Venice Commission and DGI agree with those interlocutors (representing the authorities and civil society) who argue that due to the absence of domestic practice and the case law in this specific regard, training and awareness-raising of investigators and judges as well as guidelines for the expert community (when it comes to specific types of samples listed in the CPC), are needed.

33. Therefore, the Venice Commission and DGI recommend to develop specific guidelines[15] for the investigators and judges regarding the international standards on the use of force for the obtention of evidence without consent in criminal investigations, to provide training to

[13] See, for example, ECtHR, Bouyid v. Belgium [GC], no. 23380/09, judgment of 28 September 2015, paras 86-88: "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. … Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others. … In respect of a person who is deprived of his liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3".

[14] ECtHR, Jalloh v. Germany, *op. cit.*, paras 70-74.

[15] Further to the ECtHR case law, as a source of information, see, for example, Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Amnesty International, 2015.

investigators with a focus on human rights standards in criminal proceedings, on alternatives to the use of force (the methods of persuasion, negotiation, etc.), to develop protocols on the detailed procedure to be followed by the experts regarding each type of samples listed in the CPC. The Armenian authorities are invited to make full use of the cooperation programmes implemented by the Council of Europe in this regard.

C. Cases of urgent necessity

34. Another important observation the Venice Commission and DGI would like to make concerns the absence of provisions regulating the situations where the investigative action may also be carried out without an *ex ante* judicial warrant, for example, when a delay may make it impossible to obtain evidence (e.g., breathalyser or drug test), in particular in cases in which the investigation has been launched for alleged grave or particularly grave crimes or when there exists a risk of injury or death of the person concerned.[16]

35. Article 211, para. 1 of the CPC provides that the performance of an investigative action is prohibited from 10:00 p.m. to 7:00 a.m. unless its delay can reasonably lead to the loss or damage of the evidence expected as a result of the given investigative action. However, the situations of urgent necessity and the procedure thereof are not specified in the draft provisions related to the compulsory personal inspection, expert examination or obtention of samples. Therefore, the Venice Commission and DGI recommend that the authorities adapt the draft legislation in this regard.

D. Penalties

36. The wording of the draft Article 503.1 would imply that a refusal to submit samples and undergo personal inspection and expert examination could lead to both the use of physical force and criminal liability to enforce the obligation (see para 25 above). Therefore, the logical course of action to be taken by the investigator, further to sumbit a motion on the use of physical force to the court (as provided in draft para.1.5 of Article 41), would be to initiate a new criminal prosecution against the person concerned, and the court would decide to apply the penalties provided in the draft Article 503.1. This draft provision is problematic both in terms of the scope of application and the severity of penalties.

37. In this context, distinction should be made between the purpose of the judicial warrant and the purpose of the criminal sanctions.

38. As described in para. 27 above, when considering the investigator's motion, the court shall check the motion and attached materials in detail. It may request the investigator to provide additional explanation and, if the motion is granted, it may, to the benefit of the person against whom the use of force is authorised, modify the conditions and timeframe thereof. It is also recalled that draft para. 8 of Article 254 CPC prohibits torture or inhuman or degrading treatment or causing severe physical or mental pain or suffering to a person during the compulsory conduct of the investigative actions.

39. From the wording of the above-mentioned provisions, it appears that further to authorising the use of force to secure evidence, the court must exercise oversight over the investigator to make sure that the measure requested is necessary and proportionate, provides for the exact scope of action and prevents arbitrariness. It is also to be borne in mind that a sample, obtained in compliance with the judicial warrant, may discharge the person. Therefore, apart from the necessary and proportionate force - which already implies interference with the person's rights -

[16] See, for example, ECtHR, the case of Bogumil v. Portugal, no. 35228/03, of 7 October 2008, where surgery was performed on a drug-trafficker without his consent. The Court held there was no violation of the Convention, because sufficient safeguards were in place, and the operation had been required by medical necessity as the applicant risked dying from intoxication and had not been carried out for the purpose of collecting evidence.

to be used in order to obtain evidence, the judicial warrant does not aim at punishing the person concerned but instead controls the exercise of the investigator's power.

40. Turning to the second aspect, the Venice Commission and DGI note that the draft Article 503.1 of the CC has been provided in the Chapter on Crimes Against the Interest of Justice. According to Article 7, para 1 of the CC, "subjecting a person who has committed a crime to criminal responsibility, punishment or other measures ... must be fair, ensuring the proportionality of both the applicable legislation and the state response to the crime committed, the circumstances of its commission, and the personality of the offender".

41. Draft Article 503.1 provides for the imposition of criminal liability on a person after his/her obligation to undergo personal inspection and expert examination and to provide samples has been fully enforced through the use of physical force authorised by the justice (i.e., the interest of justice to obtain evidence in a criminal investigation has been secured). Therefore, the Venice Commission and DGI consider the provision disproportionate and recommend reconsidering it.

42. The Venice Commission and DGI emphasise that, as a rule, the use of physical force and the imposition of criminal liability must not be cumulative but alternative measures. The law needs to clearly establish the categories of cases subject to the use of force or penalties. In the case of the use of force to ensure fulfilment of the obligation in response to the refusal, criminal liability to punish the same refusal should be excluded. However, if, following the obtention of the judicial warrant, the compulsory fulfilment of the investigative measure is still impossible due to, for example, the violence/threat of violence, injury to the investigator, doctor, or expert, damage caused to the persons/property or other offences provided in the CC, by the person concerned, the criminal liability under the respective CC provisions could arise. The Venice Commission and DGI recommend to reconsider the provisions of the draft Article 503.1 in this regard.

43. The severity of the penalties - in general but also regarding the categories of the persons concerned - is another source of concern. According to the ECtHR case law, individuals have different roles in criminal proceedings. It follows that when it comes to the refusal, the situations of an accused, a victim, and a witness are not comparable.[17] While accused are usually more commonly subjected to compulsory evidence collection, greater protection is afforded to victims and witnesses, given their role and the potential impact on them, particularly in sensitive cases concerning sexual offences,[18] domestic violence, etc. Victims generally have more discretion in deciding whether to provide evidence, especially when it involves personal or sensitive information. Unlike witnesses, victims are rarely penalised if they refuse to provide evidence. Courts are typically sensitive to the needs of victims, especially in cases involving trauma or vulnerability, and may take special measures to accommodate their situation rather than impose penalties.

44. Consequently, imposing severe penalties such as large fines, restriction of freedom, or imprisonment could lead to secondary victimisation. Therefore, the Venice Commission and DGI recommend to adjust and better differentiate penalties depending on the legal status and role of the participant in criminal proceedings.

E. Procedural safeguards and remedies

45. The procedural safeguards will vary depending on the measure to be carried out and interference with the right to private life and physical/mental integrity or dignity. As a rule, in the execution of any measure, there should be complete information in an understandable language about the measure and the consequences of refusal to cooperate. If the measure is of minimum

[17] ECtHR, Caruana v. Malta, *op. cit*., para. 40.
[18] ECtHR, Y. v. Slovenia, no. 41107/10, judgment of 27 May 2015, para. 103.

interference, some safeguards to be considered are who can carry it out, who shall order it, and whether the procedural steps in question are to be carried out by an expert.[19]

46. In this specific regard, the ECtHR acknowledged that Article 6 ECHR does not compel a court to hear a suspect before ordering the taking of a blood/saliva sample or breath tests, which aims at gathering evidence during the preliminary proceedings where no formal criminal charge has been brought against him/her. If the sample shows a different result, it will discharge the person, and no criminal charge will be made against him/her.[20]

1. Privilege against self-incrimination

47. The right not to incriminate oneself is commonly understood in the legal systems of the Contracting Parties to the ECHR and elsewhere to be primarily concerned with respecting the will of an accused person to remain silent. This is also the case in Armenia, where privilege against self-incrimination has a constitutional rank. Article 65 of the Constitution stipulates that "no one shall be obliged to testify about himself or herself, his or her spouse or close relatives if it is reasonably assumed that it may be used against him or her or them in the future. Article 503, para. 3 of the CC provides a similar wording.

48. The ECtHR has consistently held that right not to incriminate oneself does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsion but which has an existence independent of the will of the accused, such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing.[21] However, the ECtHR has given the principle a broader meaning and found violations of Article 6, para. 1 of the ECHR in cases where the applicant was compelled to disclose evidence other than a confession (e.g., documents) and thereby to provide evidence of offences he had allegedly committed,[22] or where such evidence (e.g., drug) was obtained by forcible interference with the applicant's bodily integrity, rendering his trial as a whole unfair, although the evidence had not been obtained "unlawfully" in breach of domestic law as the national courts found that the Criminal Procedure Code permitted the impugned measure.[23] Therefore, this specific aspect of the ECtHR case law, which differentiates self-incriminating statements and other types of evidence, is of particular importance and should be taken into consideration by the judges and investigators when examining/granting the motions and implementing coercive measures, respectively.

2. Access to a lawyer

49. Article 6, para. 1 of the ECHR requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify the denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.[24] The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing,[25] in particular - when it comes to the compulsory obtention of evidence - whether the defendant has the right to be assisted by a lawyer during the compulsory execution of these investigative actions.

50. In this specific regard, the ECtHR acknowledged that submitting a person involved in a car accident to blood or breath tests is not contrary to the presumption of innocence, and the absence

[19] ECtHR, Caruana v. Malta, *op. cit*. and Dragan Petrović v. Serbia, no. 75229/10, judgment of 14 April 2020.
[20] ECtHR, Schmidt v, Germany (dec.), no. 32352/02, 5 January 2006.
[21] ECtHR, Saunders v. The United Kingdom, no. 19187/91, judgment of 17 December 1996, para. 69.
[22] ECtHR, Funke v. France, no. 10828/84, judgment of 25 February 1993, para. 44.
[23] ECtHR, Jalloh v. Germany, *op. cit*., para. 110.
[24] ECtHR, Salduz v. Turkey, no. 36391/02, Judgment of 27 November 2008, para. 55.
[25] ECtHR, John Murray v. The United Kingdom [GC], no. 18731/91, judgment of 8 February 1996, para. 63.

of legal representation while such tests are performed does not affect the person's right to legal assistance under Article 6, para. 3 (c) of the ECHR as the purpose of such a measure is not to question the person about the alleged offence, but to secure evidence for the suspected offence at a moment when no further investigative measure other than the compulsory obtention of samples is envisaged.[26] Thus, in such situations, the ECtHR does not require the mandatory assistance of a lawyer in cases where the lapse of time makes the alcohol or drug traces disappear.

51. According to Article 46, para. 1 of the CPC, the participation of a defence attorney in the proceedings is mandatory from the moment the detention order is delivered to the arrested person, and if it is not delivered within the time limit set by this Code, from the moment six hours have passed after the actual deprivation of liberty or from the moment the person is charged with criminal offence.

52. In order to ensure that the protections afforded by the right to a lawyer and privilege against self-incrimination are practical and effective, a person "charged with a criminal offence" has the right to be notified of these rights. When access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence takes on particular importance.

53. If the coercive investigative measure is to be implemented towards the accused person, the right to have a lawyer present should be guaranteed. If the measure implies a more serious interference in the rights of the accused, the presence of a lawyer should, as a rule, be granted to ensure that the consent is given willingly and conscientiously, and only when reasons of necessity do not allow to wait for the lawyer to be present, exceptions to the right to legal assistance should be exempted. Otherwise, there should be a judicial warrant.

54. In addition, access to legal assistance should be granted to ensure that the force used in obtaining the evidence or carrying out the inspection/examination is proportionate. This is not a mandatory requirement under the ECtHR case law. However, if the traces of evidence are not lost by waiting, and the person expresses the desire to have his/her lawyer present, this should be granted, save exceptional circumstances provided by law.

F. Interplay with administrative proceedings

55. Distinguishing administrative and criminal offences is another important aspect. In the case of road traffic checks, the refusal to undergo an alcohol/drug test is sanctioned by an administrative fine. Taking samples out of a criminal procedure, in the realm of road traffic safety measures, is regulated under the administrative proceedings. In such proceedings, the refusal to undergo the alcohol and/or drugs test entails an administrative sanction. The draft law concerns the investigative actions. A criminal investigation is launched from the moment when features of an apparent crime are discovered (Article 37, para. 1 and Article 38, para. 2 of the CPC). Therefore, there needs to be an ongoing criminal investigation following a road traffic incident falling under the scope of the CC and not the Code of Administrative Offences.

56. The Venice Commission and DGI recall that the administrative sanctions[27] may fall within the concept of criminal charge according to the Engel Criteria.[28] It would not be coherent to accept

[26] ECtHR, El Khalloufi v. The Netherlands (dec.), no. 37164/17, decision of 26 November 2019, paras 39-40.

[27] For example, road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications (*Ziliberberg v. Moldova*, no. 61821/00, judgment of 1 February 2005; Igor Pascari v. the Republic of Moldova, no. 25555/10, judgment of 30 August 2016; Lutz v. Germany, no. 9912/82, judgment of 25 August 1987; Schmautzer v. Austria, no. 15523/89, judgment of 23 October 1995; Malige v. France, no. 27812/95, judgment of 23 September 1998; Marčan v. Croatia, no. 40820/12, judgment of 10 July 2014).

[28] The first of these criteria is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. See ECtHR, Engel and Others v. The Netherlands [GC], no. 5100/71, judgment of 8 June 1976, paras 82-83.

without any questioning the imposing of a sanction for the refusal to cooperate within the administrative sanctioning procedure and oppose the sanctions for non-cooperation within the criminal proceedings. Therefore, it is recommended to ensure consistency between the existing administrative and new criminal rules. In this context, the Venice Commission and the DGI also recall Part C above concerning the situations of urgent necessity when the investigative action may also be carried out without *ex ante* judicial warrant but subjected to *ex post* judicial control.

V. Conclusion

57. The initiative of the Armenian authorities to improve the Criminal Code and the Criminal Procedure Code is commendable. The Venice Commission and DGI invite the authorities to ensure, at the subsequent stages of the legislative process, meaningful dialogue amongst different political forces and involvement in this dialogue of civil society and all other relevant stakeholders (judges, prosecutors, investigators, lawyers, expert bodies, etc.).

58. The Venice Commission and DGI make the following key recommendations and note that further detailed recommendations are to be found in the text of this Joint Opinion:

- to specify in the law the categories of samples depending on the degrees of interference with human rights;
- to specify the circumstances under which the force may be used; to specify that other means must also be used after the judicial warrant was obtained and before the compulsory investigative actions are processed, in conformity with the principle of proportionality;
- to develop specific guidelines for the investigators and judges regarding the international standards on the use of force for the obtention of evidence without consent in criminal investigations; to provide training to investigators with a focus on human rights standards in the criminal proceedings, on alternatives to the use of force (the methods of persuasion, negotiation, etc.); to develop protocols on the detailed procedure to be followed by the experts regarding each type of samples listed in the CPC;
- To provide the possibility of *ex post* judicial control in situations of urgent necessity (loss of evidence, risk of injury or death, etc.);
- To ensure access to a lawyer's legal assistance save for exceptional circumstances to be provided by law;
- To ensure consistency between the administrative and criminal rules;
- To establish clearly in which cases the use of force is allowed and in which ones the penalties shall apply, to ensure that the use of physical force and the imposition of criminal liability be not cumulative but alternative measures;
- To adjust and better differentiate penalties depending on the legal status and role of the participant in criminal proceedings; to prevent secondary victimisation.

59. The Venice Commission and DGI remain at the disposal of the Armenian authorities for further assistance in this matter.