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OPINION

**OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF
THE COUNCIL OF EUROPE**

**ON THE DRAFT CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF
ARMENIA**

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Executive Summary

This Opinion examines the compliance of the draft Republic of Armenia Criminal Procedure Code with European standards. It is comprised of General Comments regarding the nature of the changes that would be effected by the adoption of the draft Code, the structure for the criminal justice process that it embodies and the types of issues that need to be addressed to fulfil the requirements of European standards. These are then examined in more specific terms through a section by section analysis of the draft, which focuses only on provisions that seem problematic and which provides recommendations for resolving them. The most significant issues requiring attention concern the rights following Arrest and the exercise of judicial control over various investigative measures. Other matters that need to be addressed involve the need to make certain points more explicit or to elaborate standards that have been prescribed. In addition, there are instances where some restructuring of provisions might be beneficial and some provisions or aspects of them seem unnecessary. Finally, there are various points where clarification is required as to what is intended or what is dealt with in other provisions. None of the recommendations or suggestions for action should cause great difficulties in adopting. Their adoption would turn the good draft into a Code of Criminal Procedure that accords fully with European standards, and thereby contribute to ensuring that the criminal justice system in Armenia is one that enjoys wide public confidence.

A. Introduction

1. This Opinion is concerned with the draft Republic of Armenia Criminal Procedure Code (“the Draft Code”) prepared by a working group of the Ministry of Justice. The Draft Code, while re-enacting some of the provisions in the Republic of Armenia Criminal Procedure Code that was adopted on 1 July 1998 (“the 1998 Code”), is intended to replace many of them.
2. The present comments review the compliance of the Draft Code with European standards and, in particular, with the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ('the European Court').
3. Another important consideration in relation to the evaluation of the Draft Code is the need for legal certainty – i.e., the ability to act within a stable framework without fear of arbitrary or unforeseeable State interference – and the extent to which the proposed amendments satisfy the requirements of clarity and foreseeability.

4. Remarks will not be made with respect to those provisions in the Draft Code that are considered appropriate or unproblematic unless this is relevant to an appreciation of their impact on other provisions.
5. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised*
6. The opinion first addresses some general issues relating to the Draft Code and then turns to a section by section examination of the proposed provisions. It concludes with an overall assessment of the compatibility of the proposed amendments with European standards.
7. This opinion has been based on an unofficial English translation of the Draft Code.
8. The preparation of the opinion has greatly benefited from the discussions with members of the working group regarding provisions in an earlier version of the Draft Code in the course of meetings held in Strasbourg on 21-22 January 2016 and in Yerevan on 15-17 April 2016.
9. The comments on which the opinion has been based have been prepared by Jeremy McBride¹ and Lorena Bachmaier Winter² under the auspices of the Project “Supporting the criminal justice reform and combating ill-treatment and impunity in Armenia”, funded within the European Union and Council of Europe Programmatic Cooperation Framework in the Eastern Partnership Countries for 2015-2017.

B. General Comments

10. The Draft Code reflects a considerable amount of work undertaken by the authorities of the Republic of Armenia and, in particular, of the members of the Working Group that prepared it. Much care has been taken to try and ensure that it takes account of European standards - including the developing case law of the European Court - and builds on the reform previously effected by the 1998 Code. As a result, it can be regarded as generally providing for a balanced set of rules for investigating and adjudicating criminal cases.
11. Positive developments include:

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- the adoption of an exclusionary rule of evidence relating to statements made when an Accused had been interviewed as a witness when actually being suspected of having committed the offence concerned (Article 97.3(4));
- the adoption of an exclusionary rule for testimony given by an Accused in the absence of a defence lawyer and not deposited if he or she refuses them in court (Article 97.6);
- the provisions to safeguard seized objects that are pieces of evidence and to destroy them when their storage is not appropriate, too risky or too costly (Article 98);
- the recognition of the right to redress for a person whose rights have been violated during an Arrest (Article 288.8); and
- the definition of “having material significance for the consistent application of the law” in respect of the admission of a cassation appeal (Article 380).

12. However, mentioning these particular examples does not take account of the fact that various earlier proposals for inclusion in the Draft Code had been dropped when it became apparent that they would either directly conflict with the requirements of the European Convention or give rise to a serious risk that this would occur. Moreover, it does not recognise the incremental improvements made in addressing various issues with more precision and in organising the relationship of different provisions to each other.
13. The pre-trial proceedings begin with a preliminary investigative stage, initiated *ex officio* or upon report. Within this investigation, there might also be an inquiry (i.e., the undertaking of undercover investigative actions and operative-intelligence measures). This preliminary investigative stage is carried out under the supervision of the Prosecutor, who will take decisions on merger of investigations and also on the relocation of the investigation in the case of offences committed in various places. The Prosecutor decides also on issues of competence among the diverse investigative bodies. Although the autonomy of Prosecutors and Investigators is guaranteed, some attention to the way instructions are issued, either to subordinate Prosecutors or to Investigators, is required to ensure that this is respected.
14. A criminal prosecution only starts once a specific accused person is engaged, either upon petition of the Investigator to the Prosecutor or upon the decision of the Prosecutor on his own initiative.
15. Various improvements are required with respect to the rights of Participants in the Proceedings, particularly those of the Arrested Person and the Accused. The latter only has the right to be informed and get familiarised with the materials of the case only once the preliminary investigation ends³. Unless he or she is arrested before this occurs, a suspect will not be involved in the investigation nor have access to any

³ Article 43.22.

evidentiary materials relating to the case. Any delay in the decision to engage a suspect as an Accused would mean that, his or rights to defence during the pre-trial stage would then effectively be postponed to that moment. As the adversarial approach should be promoted during the pre-trial stage it will be important as a matter of practice not to delay the designation of someone as an Accused once there are enough indications that he or she is probably involved in the commission of a crime.

16. The rules on gathering, producing and assessing evidence are, in general, adequate and correctly drafted but various improvements that could or should be made are noted in the following section. Of particular concern are the arrangements for judicial control over various investigative measures, as well as the possible use of intelligence materials. Some improvements are also required with respect to the interrogation of minors and the rules on requesting information from third persons.
17. Moreover, there are no major shortcomings in the regulation of the structure and principles governing the trial stage. However, there are certain instances where the role prescribed for the judge could run counter to the principle of adversarial proceedings and lead to his or her impartiality being called into question. Moreover, dividing the trial stage into three hearings – preliminary hearing, main hearing and additional hearing – might not always be desirable from the viewpoint of efficiency. Furthermore, the breadth of the issues that can be addressed during the cassation stage might be worth reconsidering.
18. The comments made in the following section involve some aspects of the Draft Code where there are actual or potential conflicts with European standards but in many instances the issues noted are ones where clarification is required – possibly as a result of translation issues – where the formulation could be improved or where certain text seems unnecessary.

C. Section by Section Analysis

19. This section of the Opinion follows the order of the Sections in the Draft Code, addressing only those issues that seem to require attention.

Section 1. Criminal Procedure Legislation and the Criminal Proceedings

Article 4. Effect of the Criminal Procedure Code in Time

20. The stipulation in paragraph 2 of this provision that the admissibility of evidence is to be governed on the basis of the law in force at the time the evidence concerned was

obtained seems unproblematic at first sight. However, such a stipulation does not take into account the possibility that the law in question – in particular that laid down in the 1998 Code - might be incompatible with the standards elaborated by the European Court and thus the admission of such evidence would be contrary to the requirements of the European Convention. Although Article 1 provides that criminal procedure is regulated by, *inter alia*, the international treaties of the Republic of Armenia (which include, of course, the European Convention), it would be preferable for the admissibility of evidence to be made clearly subject to the requirements of the European Convention.

21. *Paragraph 2 should thus be amended to make it explicit that the admissibility of evidence in all proceedings is subject to the requirements of the European Convention regardless of when the evidence concerned was obtained.*

Article 6. Definitions of Key Terms Used in This Code

22. There are several aspects of the definitions provided in this provision that require attention.
23. Firstly, the similar but not identical definitions for the two terms “Criminal Case File” and “Criminal Case” in sub-paragraphs 1.2 and 1.3 could be source of confusion. In fact the former term is used predominantly in the Draft Code and only two of the six provisions in which the latter is used actually seem consistent with the definition given for it⁴.
24. Secondly, it does not seem appropriate to refer in sub-paragraphs 1.10 and 1.11 to a court and a judge as being respectively “a state body” and “a state official”. The use of in these provisions of the terms “a public body” and “a public officer” would be more consonant with the notion of judicial independence.
25. Thirdly, the notion of a “deceased person subject to criminal prosecution” found in sub-paragraph 1.30 is not something that the European Court considers appropriate since it has emphasised on a number of occasions that it “is a fundamental rule of criminal law that criminal liability does not survive the person who committed the criminal act”⁵. The possibility of a deceased person being subject to criminal prosecution in this and in other provisions⁶ is thus not justified.
26. Finally, the definition in sub-paragraph 1.56 of a “House” does not seem to be sufficient to cover apartments as they only form part of “a building or structure” and they are not included in the illustrations that follow the latter term. This shortcoming might be addressed either by specifically referring to apartments in the definition or adding a phrase such as “or a part thereof” to the term “a building or structure”.

⁴ Namely, in Articles 352.3 and 448.1(7). The others are in Articles 289.4, 472.1, 472.6, 472.8 and 472.11.

⁵ See, e.g., *Vulakh and Others v. Russia*, no. 33468/03, 10 January 2012, at para. 34.

⁶ See paras. 30-33 below.

27. *The concerns raised in the foregoing paragraphs thus need to be addressed in the manner suggested in them.*

Article 9. Attributes and Binding Nature of a Procedural Act

28. The purpose of paragraph 2 seems unclear in that it stipulates what is effectively a presumption that a Procedural Act will be “lawful and grounded” in the absence of the “opposite” not being “confirmed in the result of its inspection within the framework of proper legal procedure”. However, paragraphs 3 and 4 specify the circumstances that determine whether or not a Procedural Act is to be “lawful and grounded” and there is provision elsewhere in the draft Code for Procedural Acts to be subject to appeal⁷. The burden of proof will lie on anyone challenging a Procedural Act in an appeal and the content of the proposed paragraph 2 does not really add anything useful to that requirement.

29. *This provision should thus not be retained.*

Article 12. Circumstances Precluding Criminal Prosecution

30. The cross-referencing in paragraphs 3 and 4 seems unclear. Thus, it does not seem obvious in the former that the cross-reference should be to sub-paragraph 1.8 rather than sub-paragraph 1.7 given that the latter expressly refers to “the deceased”. Furthermore paragraph 4 refers to sub-paragraph 1.10 twice, on the second occasion as a replacement for a cross-reference to sub-paragraph 1.11.

31. *There is a need, therefore, for the cross-referencing to be checked and, if necessary, amended.*

32. The exception to the circumstances precluding criminal prosecution in sub-paragraph 1(7) – namely, the “person has died, with the exception of cases in which the Criminal Proceedings need to be continued for reinstating the rights of the deceased” – does not adequately deal with the problem previously noted about deceased persons being the object of criminal proceedings as the Draft Code does not provide any elaboration as to what those “legitimate interests” are and – apart from the provision in Article 44.2 for recognition of a close relative of the deceased as his or her Lawful Representative - does not specify how such proceedings are to be satisfactorily conducted in the absence of the person best placed to advance his or her defence.

33. *Thus, in the event of retaining the possibility envisaged by this provision, there is a need for greater precision as to what is meant by “legitimate interests” and as to the actual manner of conducting the relevant proceedings.*

Article 13. Grounds of Discontinuing the Criminal Proceedings

⁷ In Articles 49.1(16) and 50.1(16).

34. This provision has only a few of the circumstances specified in Article 12 as precluding criminal prosecution. Those included are appropriate but it is not evident that there should be a distinction between the two provisions in terms of the basis for preventing a case against someone being pursued. Although Article 12 is supposed to require that an initiated prosecution be terminated, this may not actually occur and a decision on discontinuance might thus be necessary. A more appropriate approach might be to merge Articles 12 and 13 so that there is a comprehensive set of grounds for preclusion, termination or discontinuance of criminal proceedings.

35. *Articles 12 and 13 should thus be revised accordingly,*

Article 15. Publicity of the Proceedings

36. The various ideas found in the six paragraphs of this provision are in themselves unobjectionable. However, they are formulated in quite a general manner and do not really afford any real guidance as to how the balance between public and private interests is to be struck. This will not help an investigator or prosecutor to determine the amount of detailed information that he or she can provide to the media about a case.

37. Furthermore, it is not clear why the reference in paragraph 3 to the need for impartiality on the part of judges is included; as a concept it might seem more relevant to the following provision on equality before the law. Insofar as it might be concerned with the effect of media coverage of proceedings, it would be more helpful to address this in more explicit terms.

38. *Consideration should thus be given to reformulating the present provision to give clearer guidance as to the application of the principles enunciated or merging it with the provisions in Article 28 that also deal with the publicity of court proceedings.*

Article 16. Equality of All before the Law

39. It is entirely consistent with, and indeed required by, the European Convention to preclude any discriminatory treatment of persons involved in criminal proceedings. However, the statement in paragraph 2 that the procedure stipulated by the Draft Code “is common for all Persons Engaged in the Proceedings” is inaccurate since a wide range of different procedural capacities – dependent on the specific role of individual actors - are envisaged by it.

40. *This provision should thus be recast to embody a simple prohibition of discrimination in respect of any participant in criminal proceedings, whatever role being undertaken.*

41. Furthermore, although the stipulation that the “Legal positions expressed in the Judicial Acts of the European Court of Human Rights, the Constitutional Court of the Republic of Armenia, and the Cassation Court of the Republic of Armenia shall be

binding for the Body Conducting the Criminal Proceedings” is certainly appropriate, this is not really part of the equality before the law concept.

42. *Paragraph 4 should thus be separately located in Chapter 3’s enunciation of the principles of criminal proceedings.*

Article 18. Liberty and Security of Person

43. The effective presumption against the use of detention as a coercive measure in paragraph 3 is appropriate. However, the formulation requires some reconsideration as the concept “proper behaviour” is too imprecise and does not reflect the grounds identified by the European Court as justifying restrictions on liberty under Article 5 of the European Convention in connection with criminal proceedings, namely, risk of flight, interference with the proceedings and commission of further offences, as well as a risk to public order. Certain of these are to be found in circumstances set out in Article 116 as justifying the use of a restraint measures - which could include a deprivation of liberty – but no link is made to that provision.

44. Moreover, there appears to be an assumption that this proper behaviour necessarily requires the imposition of some form of coercive measures when it may be that the evidence does not suggest that any of the risks identified by the European Court actually exist.

45. *There is a need, therefore, for this provision to be recast in a manner that more accurately reflects the approach required by the European Court.*

46. The formulation of paragraph 6, at least in the English text seems unduly complicated in expressing the idea that physical coercion is justifiable only where necessary to secure compliance with a lawful order and should be no more than the minimum required for this purpose.

47. *Consideration should thus be given as to whether the Armenian text is formulated more clearly than the English translation.*

Article 19. Provision of Legal Aid

48. The stipulation in paragraph 1 that legal aid should be secured for “everyone” is inapt as the intention behind the present provision is surely not to provide it for prosecutors and interpreters, amongst others.

49. Furthermore, as the Draft Code refers to the notion of an Arrested Person in addition to that of an Accused, it should be stipulated that legal aid is also to be secured for such a person.

50. *Paragraph 1 should thus be recast to specify the provision of legal aid only for those mentioned in paragraphs 2 and 3 of this provision, as well as for arrested persons.*

Article 22. Proper Proving

51. The sense of paragraph 3 is unclear in that it refers to substantiation that precludes “any reasonable suspicion regarding” the factual circumstances constituting a part of the Accusation. This might mean that there is a duty to identify such evidence that could exonerate an Accused Person as much as that which points to his or her guilt. This would be appropriate but it is not certain that this is what is intended.
52. *There is a need, therefore, to clarify that this is the aim of this provision and to ensure that similar uncertainty does not attach to the text in the Armenian original.*
53. It should be noted that the test used in paragraph 7 is potentially stricter than that now formulated by the European Court since it is prepared to accept that a conviction will not result in a violation of Article 6 of the European Convention where this is based solely or to a decisive degree on the evidence of a witness who is absent from the trial but where sufficient counter-balancing factors to ensure fairness exist⁸. Nonetheless, adherence to the stricter – and simpler - requirement would be advisable given all the other changes that will be effected by the Draft Code.

Article 24. Reasonable Period of Proceedings

54. Although it is impossible to be precise about what period would be “reasonable” in the absence of the specific circumstances of the case, the formulation of this provision could be strengthened by stipulating that judges and prosecutors have a duty to ensure that the conduct of criminal proceedings in which they are involved is being diligently pursued.
55. *A requirement to ensure due diligence should thus be added to this provision.*

Article 28. Publicity of Court Proceedings

56. As has already been noted, there is an overlap between the provisions in this Article and those in Article 15⁹.
57. *It would thus be desirable to deal with the issue of publicity in a single Article.*
58. The provision in paragraph 3 for holding proceedings in camera is not intrinsically incompatible with the requirement under Article 6(1) of the European Convention for hearings to be in public. However, while such a ruling may be permissible, the apparent absence of any possibility for media organisations to challenge it – whether in its entirety or as to its particular scope – may entail a violation of the right to an

⁸ *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

⁹ See paras. 36-38 above.

effective remedy under Article 13 in respect an arguable claim that in a given case this interferes unjustifiably with their right to freedom of expression under Article 10¹⁰.

59. *There is thus a need to clarify that there is a possibility for such an appeal by media organisations or to introduce one into the Draft Code.*

Article 29. Prohibition of Illegitimate Conduct

60. It is not necessarily incompatible with the European Convention for a court to take action against a defendant whose conduct disrupts the conduct of proceedings¹¹ or of other participants who cause prejudice to them¹² or anyone who discloses material that should remain confidential¹³. The present provision should thus be understood in that context but it is important that it is not used for taking a wide view of what conduct is to be regarded as prohibited and thus undermining the ability of an Accused to defend him or herself effectively

Section 2. The Bodies and Persons Engaged in Criminal Proceedings

Article 35. Autonomy and Responsibility of the Public Participants in the Proceedings

61. Paragraph 2 states that the responsibilities of the prosecutor include the initiation of “a case for the protection of state interests”. It may be that this intended to refer to the reference in Article 39.2(4) to the Prosecutor initiating claims for the protection of the interests of the state against the Accused or other persons bearing responsibility for his or her actions but it could equally refer to some form of supervisory function unconnected to the criminal process.

62. *There is a need, therefore, to clarify what is the precise scope of this responsibility.*

Article 36. Relationship between Public Participants in the Proceedings and Article 37. Powers of the Higher-Ranking Prosecutor in Pre-Trial Proceedings

63. It is not inappropriate for a Prosecutor to give instructions to his or her subordinates or to Investigators. However, the safeguarding of the autonomy of subordinate Prosecutors and of Investigators – which is recognised in Article 35 – would benefit from those instructions being reasoned and being provided in writing.

64. *It would thus be highly desirable for these provisions to be revised to require that instructions are reasoned and are provided in writing should this be requested by the subordinate Prosecutor or the Investigator concerned.*

¹⁰ See *Crook and National Union of Journalists v. United Kingdom* (dec.), no. 11552/85, 15 July 1988.

¹¹ See, e.g., *Ensslin, Baader and Raspe v. Federal Republic of Germany* (dec.), no. 7572/76, 8 July 1978.

¹² See, e.g., *Dallas v. United Kingdom*, no. 38395/12, 11 February 2016.

¹³ See, e.g., *Furuholmen v. Norway* (dec.), no. 53349/08, 18 March 2010.

Article 38. Powers of the Supervising Prosecutor during the Pre-Trial Proceedings

65. Sub-paragraph 1(15) refers to the terms “accusatory conclusion, accusatory act, conclusive act”, which appear also in subsequent provisions. However, there is no definition in the Draft Code regarding these terms.

66. *There should, therefore, be a definition provided for these terms.*

Article 43. Rights and Obligations of the Accused

67. Certain of the other rights set out in this provision – notably concern those in sub-paragraphs 1(4) and (5) are specific to an Arrested Person, for whom rights are set out in Article 110. It would be clearer if these rights were instead set out in this provision.

68. *Articles 43 and 110 should be amended accordingly.*

69. However, the possibility envisaged in sub-paragraph 1(4) of the delay before someone is informed of the Arrested Person’s whereabouts lasting for up to 12 hours would be inappropriate in most cases and could facilitate his or her improper treatment. In most cases, no more than a short interval following an Arrest could be objectively justified.

70. *It would, therefore, be appropriate to amend this provision so that the notification requirement is to be fulfilled “as soon as possible but no later than 12 hours” following the arrest.*

Article 44. Lawful Representative of the Accused

71. The stipulation in sub-paragraph 6(1) that the representative has the right to “know what the Accused is accused of” seems unnecessary in view of the stipulation in paragraph 5 that a representative shall have all the rights of the Accused since that is one of the latter’s rights and it is not one covered by the exception for rights that “are inseparable from the person of the Accused”.

72. *Consideration should thus be given to the need to retain this provision.*

73. The stipulation in paragraph 9 that an Accused’s representative “may be summoned and questioned as a witness” is not objectionable in itself but its use in particular cases could not only compromise the independence of the representative by subjecting him or her to a form of improper pressure¹⁴ but it could also mean that he or she would be unable to continue to act as the representative since this would be incompatible with professional ethics. This is so even though it is assumed that the Defender’s role as a witness must be subject to him or her being prohibited by Article 49.2 from disclosing information that became known to him or her during the performance of the defence.

¹⁴ See, e.g., *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013.

74. *There is a need, therefore, not only to ensure that such summoning and questioning is closely monitored and that the power is exercised only where there is a well-grounded basis for doing so. Moreover, effective arrangements would need to be in place to ensure that any questioning does not encroach upon lawyer-client confidentiality and that it is possible to replace a lawyer who becomes disqualified from acting as a representative without the defence of the Accused being adversely affected.*

Article 45. Grounds and Conditions of the Defender's Participation in the Criminal Proceedings

75. The arrangements for ensuring that a Defender can act on behalf of an Accused are generally appropriate. However, although paragraph 1 envisages that an attorney can be invited to act as the Defender for an Accused by his or her Legal Representative, a Close Relative or some other, there is no stipulation that the Accused should be informed of such an invitation so that he or she might agree instead to the appointment of an attorney by the Chamber of Advocates of the Republic of Armenia, which would be inconsistent with the need for any choice of a Defender to be an informed one¹⁵.

76. *This provision should, therefore, stipulate that the Accused must be informed of any invitation made to an attorney by his or her Legal Representative, a Close Relative or some other person so that he or she can decide whether or not to choose that person instead or in place of one appointed by the Chamber of Advocates of the Republic of Armenia.*

77. Furthermore, although the appointment of an attorney by the Chamber of Advocates of the Republic of Armenia may in many instances be satisfactory, there should be a possibility of rejecting someone and requiring a fresh appointment where the attorney concerned does not have the requisite competence or there is a well-founded basis for the Accused lacking confidence in him or her because of their past dealings¹⁶.

78. *Such a possibility should thus be introduced into this provision.*

Article 47. Waiver of a Defender

79. The arrangements to restrict waiver of a Defender by an Accused are generally appropriate. However, the notion in paragraph 4 that someone is “obviously abusing his right to waive a Defender” is in need of clarification as it does not provide any guidance as to the basis for reaching such a conclusion.

80. *The notion of obvious abuse should thus be elaborated in paragraph 4.*

Article 49. Rights and Obligations of the Defender

¹⁵ *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2013.

¹⁶ See *Croissant v. Germany*, no. 13611/88, 25 September 1992, at para. 30.

81. It is appropriate for sub-paragraph 1(2) to provide that the number and duration of a Defender's meetings with an Accused should not be subject to "any arbitrary restrictions". However, the latter term does not provide practical guidance as to the basis on which restrictions might be imposed on such meetings or as to how their imposition might be judged to be arbitrary.
82. *It would, therefore, be more helpful if the provision stated that there were no restrictions on the number and duration of meetings except for specified reasons and that their imposition should not have the effect of impeding an Accused's defence.*
83. It is also appropriate for a Defender to be given sufficient notice about the time and place of court hearings but the term "proper" used in sub-paragraph 1(15) is too vague for this purpose¹⁷.
84. *This provision should thus be amended to require that a Defender be given notice that is sufficient for him or her to be able to attend the court hearing concerned.*

Article 54. Authorised Representative of a Victim

85. It is correct that the Authorised Representative should not perform any action that contradicts the Victim's interests. However, the bald statement in paragraph 4 of this proposition followed by a list of matters for which the Victim's special authorisation is required gives the impression that there might be other impermissible matters that could be construed as against the Victim's interests without elaborating them or explaining who is to determine whether a contradiction of those interests has occurred or is threatened. This provision can be contrasted with the formulations in Article 49.3 and Article 56.5 in which it is stated that there are certain matters that cannot be done by the Defender or a Property Respondent's Authorised Representative respectively without specific instructions.
86. *It would be preferable for this provision to be reformulated in the style of Articles 49.3 and 56.5, with all actions considered to contradict the Victim's interests being enumerated.*

Article 66. Circumstances Precluding the Participation of a Judge in the Proceedings

87. It is appropriate for a Judge whose impartiality might be doubted not to participate in the proceedings. However, the formulation of paragraph 1 could be simplified since the statement in sub-paragraph 1.1 that "He is prejudiced towards any Person Engaged in the Proceedings" is satisfactorily covered by sub-paragraph 1(5) and the deletion of sub-paragraphs 1(1) to (4) would then cover specific instances where impartiality might be doubted.

¹⁷ It should be noted that Article 55.1(8) provides for the giving of "due notice" of a court hearing to a Property Respondent which is slightly more appropriate.

88. *Sub-paragraph 1(1) should amended accordingly.*

89. It is correct that participation in preliminary hearings will not necessarily mean that there is reason to doubt a Judge's impartiality. However, the statement in paragraph 2 that this shall not be "a circumstance precluding his subsequent participation in the respective proceedings" is too absolute as it does not envisage the possibility that a Judge may have had to reach a conclusion as to an Accused's guilt in the course of a preliminary hearing.

90. *Paragraph 2 should, therefore, be amended by the insertion of "automatically" between "shall not" and "be a circumstance" in its second sentence.*

Article 69. Circumstances Precluding the Participation of a Lawful Representative in the Proceedings

91. The notion in sub-paragraph (3) that the conduct of a Lawful Representative "obviously harms the interests of the person represented by him" is in need of clarification as it does not provide any guidance as to the basis for reaching such a conclusion.

92. *The notion of obvious abuse should thus be elaborated in paragraph 3.*

Article 85. Grounds and Procedure of Terminating a Means of Special Protection

93. It would be inconsistent with obligations under Articles 2 and 3 of the European Convention for the means of special protection to be automatically withdrawn where false testimony has been given or the obligations stipulated in Article 84.2 have not been carried out but there continues to be a risk to a person's life or well-being¹⁸. Paragraph 1 allows for such a withdrawal but, although not required by it, there is no obligation to consider whether the relevant risk still exists before this occurs.

94. *This provision should be amended to ensure that no withdrawal of protection occurs where the risks that justified its conferment continue to exist.*

Section 3. Evidence and Proving

Article 87. The Testimony of an Arrested Person

95. It is not entirely clear why it is considered necessary to define separately the testimony of an Arrested Person and an Accused given that this testimony relates to the same person. Furthermore, it is questionable why only the written deposition ("written data") is considered as "testimony" in this provision since it seems to restricting the

¹⁸ See *R R v. Hungary*, no. 19400/11, 4 December 2012 (which concerned the withdrawal of protection from the family members of a person who had concluded a plea bargain).

evidentiary value of the testimony given before the person's formal recognition as an Accused. As such, this provision can be contrasted with both Articles 88 and 89 in which testimony is considered to cover both oral and written depositions by the Accused and the victim respectively.

96. *There is thus a need to clarify the object of this provision and the distinction between it and other provisions as regards the forms of testimony.*

Article 91. The Conclusion of an Expert Article 92. The opinion of an Expert

97. Contrary to the initial impression, both provisions are referring to what is generally known as an expert witness opinion. The use in them of the different names: "conclusion" and "opinion" would seem to be differentiating between expert opinions ordered by the Court and those ordered by a Private Party. Such a distinction is unusual and might not only lead to confusion and even to downgrading of the value accorded to expert witness opinions not ordered by the Court.

98. *The present distinction between the two forms of opinion should not be retained but they could be distinguished by referring to them as "Court-ordered expert opinions" and "Private Party expert opinions".*

Article 96. Off-Proceeding Documents

99. Paragraph 3 allows for the introduction into the criminal proceedings of video, audio and other objective documents obtained in the result of operative-intelligence activities conducted outside the scope of the criminal proceedings to be recognized as Off-Proceedings documents and to be attached to the materials of the proceedings. Such materials will include not only documents but also image recording and communications interceptions. Even if their admissibility is limited to ones obtained while investigating the alleged crime or person and their use is – as the provision provides - subject to the authorization of the court, the blurring of the border between intelligence and criminal investigation entails considerable risks for the procedural safeguards¹⁹. As a rule, intelligence should not be admitted as evidence, as the ways of obtaining such elements is not subject to the same guarantees as required within the criminal proceedings.

100. *There is thus a need to amend this provision so that it requires the circumstances and conditions in which such evidentiary materials have been obtained to be clarified and, if this is not possible, to stipulate that they should not be admissible.*

101. The importance of classifying an object as a document or physical evidence - the possibility of which is provided for in paragraph 4 – is unclear. This was important in the past where different rules regarding the authenticity of the documents or the different evidentiary value of official and private documents played a major role.

¹⁹ This can be contrasted with the requirements for the Collection of Evidence in Article 103.

However, with the increasing use and relevance of electronic documents, the distinction between objects and documents has become less relevant. In any event, it is clear that if an object does not fit into the category of “document”, it will be considered as “physical evidence”.

102. *The retention of this provision thus does not seem to be necessary.*

Article 97. Evidence Permissibility and Restrictions of Its Use

103. Except in cases of small or medium-gravity offences, the use of intelligence as evidence is authorised by paragraph 10. Furthermore, while some restrictions are stipulated as to when this evidence must have been obtained before the criminal proceedings, this does not address the concerns already noted as regards the risks for procedural safeguards when using such evidence. In any event, these restrictions are not applicable to all offences.

104. *There is thus a need to amend this provision so that it requires the circumstances and conditions in which such evidentiary materials have been obtained to be clarified and, if this is not possible, to stipulate that they should not be admissible.*

Article 98. Safeguarding Physical Evidence

105. The various provisions made regarding the safeguarding of seized objects that are pieces of evidence and the possibility of destroying them when their storage is not appropriate, is too risky or too costly can be viewed as very positive. However, they do not seem to ensure that - before their transfer or destruction - the owner, if known and not party to the proceedings is to be informed about the destiny of the physical evidence concerned. Certainly, the sale of objects should not, as a rule, be ordered where there is evidence that they have a legal owner and referring the claims of the owner to a subsequent civil claim will not be a sufficient safeguard for his or her interests.

106. *There is thus a need to amend this provision so as to meet these concerns.*

Article 102. Factual Circumstances Subject to Proving

107. Although other European Codes only refer to “facts” in general, there can be no objection to the approach followed in this provision of mentioning each type of fact that might be proved in criminal proceedings and of mentioning other facts that might be necessary. However, there appears to be a lack of precision in sub-paragraph 1(9) in the formulation “circumstances with which the person substantiates his pecuniary claims” since “the person” is the damaged or the civil party (i.e., the Victim).

108. *More precise terminology should, therefore, be used in this provision.*

Article 105. Assessment of Evidence

109. This provision seeks to impose a certain control upon the relevance, credibility and admissibility of evidence in each of the stages of the proceedings by each of the procedural actors involved (i.e., Investigator, Prosecutor and Judge). This approach is welcome but the formulation of paragraph 3 regarding the assessment of evidence seems problematic. Such assessment is, in practice, only done in a public hearing before the trial judge or court. During the previous stages, the police and prosecutors will evaluate the significance of such evidence as has been collected for continuing the investigation, deciding on suspects, triggering other investigations, following a lead, or finally decide upon the indictment or not. All these activities require an assessment of the importance and credibility of the evidence collected. Thus, despite the interdiction in paragraph 3 on treating some evidence as “more or less significant than others until assessed in the framework of a due process of law”, it does not seem possible that such a weighing of the evidence can be avoided

110. *There is, therefore, a need to clarify the aim of this paragraph and possibly to revise its formulation.*

Article 106. Legal Presumption of Fact

111. The stipulation in sub-paragraph 1(4) that a “fact that the Accused knows or should have known as a circumstance of exclusive awareness” is to be deemed proven unless the opposite is proven during the criminal proceedings seems unclear. In particular, it is not evident what kind of knowledge could be considered as being known by the Accused as a circumstance of his or her exclusive awareness

112. *A more precise formulation should, therefore, be used in this provision.*

Article 107. Circumstances Confirmed by Certain Evidence

113. The restriction effected by paragraph 2 on the ability of an expert witness to clarify his or her written opinion – through its stipulation that testimony cannot substitute that opinion - is inappropriate as it precludes the possibility of points raised during his examination or the results of other expert opinions leading him or her to change some aspect of his or her written assessment.

114. *This provision should not, therefore, be retained.*

Section 4. Coercive Measures

Article 109. Arrest in Case of the Existence of Reasonable Suspicion that has Arisen Directly about Having Committed a Crime

115. There is some confusion in the basis for an arrest stipulated in paragraph 1. It rightly uses the test of “reasonable suspicion” and this can rightly be regarded as arising from

the first part of sub-paragraph (1) “caught during ... the alleged crime”), sub-paragraphs (2) and (3) and the first part of sub-paragraph (4) (i.e., “there are other grounds confirming his relationship to the commission of the crime”). However, a reasonable suspicion cannot be founded on the basis of being caught “immediately after committing the alleged crime” since this only places him or her at the scene of the crime but does not necessarily entail any involvement in it. That involvement could be provided by the “obvious traces” to which sub-paragraph (3) refers. There is, therefore, no need to retain the reference in sub-paragraph (1) to being caught immediately after committing the crime.

116. Furthermore, the second part of sub-paragraph (4) – “he has tried to hide from the Incident Scene or from the Body Conducting the Criminal Proceedings or he does not have a place of permanent residence or his identity has not been established” – does not point to reasonable suspicion of committing an offence but to grounds for considering that there is a risk of flight. The existence of such grounds would ensure that an arrest is not arbitrary but they are as applicable to the circumstances in sub-paragraphs (1)-(3) as to sub-paragraph (4) and they should thus be either stated as a separate requirement for arrest in all cases or be a factor to have regard to in deciding whether to arrest someone.

117. *Paragraph 1 should thus be amended accordingly.*

118. The stipulation in paragraph 9 that the “procedure stipulated by Paragraphs 7 and 8 of this Article shall extend also towards the application of house arrest and administrative supervision in pre-trial proceedings” does not seem to make sense as both those measures are imposed by a court²⁰ and there should be no use of them prior to the court ruling.

119. *Paragraph 9 should thus be deleted.*

Arrest 110. Rights and Obligations of a Person Arrested on the Basis of a Reasonable Suspicion that has Arisen Directly about Having Committed a Crime, Conditions and Safeguards of Their Exercise and Performance

120. The possibility envisaged in paragraph 1 of the delay before an Arrested Person acquires the rights of an Accused lasting for up to 6 hours would be inappropriate in most cases – notwithstanding the minimum rights provided in paragraph 2 - and could facilitate interrogation without the assistance of a lawyer or improper treatment. In most cases, no more than a short interval following an Arrest could be objectively justified.

121. *It would, therefore, be appropriate to amend this provision so that the notification requirement is to be fulfilled “as soon as possible but no later than 6 hours” following the Arrest.*

²⁰ Pursuant to Articles 123 and 124.

122. The stipulation in paragraph 3 that the rights in sub-paragraphs 2(3)-(5) – i.e., the rights to remain silent, to inform a person about his whereabouts and to invite an attorney – shall only arise from the moment of entering the administrative body of the Inquiry Body or of a body that has the power to conduct the proceedings is inappropriate since there is no basis for suspending the right to remain silent under the European Convention and, as regards the other rights, there is no indication as to the maximum interval between an Arrest and reaching the building concerned so as to judge whether such a postponement would be without prejudice to the rights of the Arrested Person.
123. *Paragraph 3 should thus be amended so as not to apply to sub-paragraph 2(3) at all and as regards sub-paragraphs 2(4) and (5) a short interval of no more than two hours should be specified for the effect of any postponement.*
124. The right to “invite an attorney” in sub-paragraph 2(5) needs some elaboration as the Arrested Person should be able not only to appoint an attorney but also to be able to meet with him or her before any interrogation takes place unless there are justifiable reasons for delaying this²¹. Such a right is found in Article 43 but it would be clearer to specify it here as well.
125. *This provision should be amended to provide for this possibility.*
126. The obligation in sub-paragraph 4(1) to abide by the Instructions of the Person performing the Arrest, the Inquiry Body and the Body Conducting the Criminal Proceedings can only apply to ones that are lawful.
127. *There is thus a need to confirm that there can be no liability for refusing to comply with unlawful Instructions and that a use of force to implement unlawful Instructions would itself attract criminal responsibility.*
128. It is not clear why paragraphs 6 and 7 provide for the possibility of postponing for up to 12 hours the right in sub-paragraph 2(3) – the right to remain silent – where “there are justified reasons to believe that the immediate exercise of such right may obstruct the prevention or deterrence of a crime or lead to destruction or damaging of the Evidence”. The right to remain silent has nothing to do with this risk and, in any case, is not a right that can be postponed consistently with Article 6 of the European Convention. An earlier draft referred to the postponement in respect of a notification of an Arrested Person’s whereabouts, which would not be inappropriate for the reasons specified.

²¹ See *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016.

129. *Insofar as paragraphs 6 and 7 do relate to the right to remain silent they should be deleted.*

130. It has already been noted that certain rights in Article 43 would be more appropriately located in this provision²².

131. *Article 110 should be amended accordingly.*

Article 111. Arrest for Taking Before the Court the Accused who is at Large

132. *There is a need to confirm that a person arrested under this provision has the rights of an Accused under Article 43.*

Article 113. Additional Rights of Arrested Foreign Citizens and Stateless Persons

133. Although the right of access to consular and related officials only arises under treaty obligations, it is regrettable that this provision only envisages the possibility of such access in cases where the Republic of Armenia has concluded such a relevant treaty with the state of which the Arrested Person is a citizen or a permanent resident. This fails to take account of Rule 27 of the Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse in Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody²³, the conditions in which it takes place and the provision of safeguards against abuse, which provides:

[1] A person who is the national of another country and whose remand in custody is being sought shall have the right to have the consul of this country notified of this possibility in sufficient time to obtain advice and assistance from him or her.

[2] This right should, wherever possible, also be extended to persons holding the nationality both of the country where their remand in custody is being sought and of another country.

134. *It would be appropriate, therefore, to delete the requirement that access be dependent upon a treaty obligation.*

Article 114. Release of an Arrested Person

135. The stipulation that an Arrested Person who has been released “may not be arrested again on the basis of the same suspicion” is, at least in the English text, inappropriately worded, even though the aim is appropriate. This is because the issue is not whether the suspicion is the same but whether the same grounds for a suspicion are being relied upon. Thus, a person may have been suspected of committing an offence on grounds *x* but he or she should not be arrested by reference to those grounds after his or her

²² See paras. 67-68 above.

²³ Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies.

release but could be arrested on grounds *y*, albeit that the offence of which he or she is suspected remains the same²⁴.

136. *This provision should thus be modified accordingly.*

Article 115. Purpose and Types of Restraint Measure

137. This provision refers in paragraph 2 to the purpose of restraint measures as being to prevent possible “illegal conduct”. This is – like the use of “proper behaviour” in Article 18 – far too broad a notion. Moreover, the reference to this purpose is unnecessary since the reasons for applying restraint measures are set out in Article 116.

138. Moreover, the reference in paragraph 1 as to who may apply restraint measures is also irrelevant as this covered adequately in other provisions.

139. *This provision should deal only with the setting out the types of restraint measures, i.e., the content of paragraphs 3 and 4.*

Article 116. Lawfulness of Applying a Restraint Measure

140. Only the first two of the three grounds for imposing restraint measures – preventing escape and preventing commission of a crime – are ones recognised by the European Court as compatible with the requirements of Article 5(3) of the European Convention.

141. This is only partly so in the case of the second one as it refers to preventing “the commission of a crime” and not the commission of an offence or offences of the same serious kind with which he or she is already charged. It might be that this more restrictive approach could be achieved through the interpretation given to sub-paragraph 2(2) but it would be better to restrict its scope more explicitly.

142. The third ground set out in sub-paragraph 2(3) is “to ensure the fulfilment by the Accused of an obligation placed on him by law or by Court decision”, which is quite different from a third ground recognised by the European Court, namely, the potential risk of interfering with the course of justice. Undoubtedly, the ground set out in sub-paragraph 2(3) could cover that in a case where the aim of the measure was, for example, to preclude contact with witnesses. However, there seems to be no ground covering interference with the administration of justice in the absence of a specific court order, which could prove problematic in practice.

143. *Consideration should thus be given to adding the existence of a well-founded risk of interference with the administration of justice to grounds set out in paragraph 2.*

²⁴ Cf. the more appropriate formulation found in Article 121.1 in connection with a further detention in respect of the same accusation.

144. The stipulation in paragraph 3 that there is no requirement to justify prevention of the commission of a crime as a ground for the imposition of house arrest for the first time and other alternative measures at any point. This is entirely inconsistent with the view of the European Court that there must be sufficient grounds for considering that there was a risk of further offences being committed, which means, for example, that reliance cannot just be placed on the antecedents of the accused²⁵ and consideration must be given to his or her capacity to commit similar offences²⁶. The need for justification is appropriately elaborated in paragraph 4 of Article 116 as regards the imposition of detention as a restraint measure.

145. *Paragraph 3 should thus be deleted.*

Article 117. Changing or Abolishing a Restraint Measure

146. The stipulation in paragraph 2 that a more stringent restraint measure should be applied if “the Accused violates the conditions of a restraint measure applied in relation to him” is too absolute an approach as it does not allow for consideration of the reasons for the violation or of the existence for being satisfied that the less stringent one will in future be observed. As a result it does not accord with the assessment of the individual circumstances of a case that is required by the European Court.

147. *Paragraph 2 should thus be revised to provide that a stricter measure may be applied if a less stringent one has been violated and this seems necessary.*

Article 118. Detention and Its Lawfulness

148. Once again²⁷, there is a reference in paragraph 2 to the vague and unhelpful concept of preventing “illegal conduct” rather the grounds for imposing restraint measures.

149. *This provision should be replaced by a reference to the grounds set out in Article 116.*

Article 123. House Arrest

150. The power in sub-paragraph 2(2) to prohibit an Accused from hosting other persons in his place of residence would need to be exercised having regard to the right other persons living there to respect for private and family life under Article 8 of the European Convention. Indeed, the provision is formulated with an apparent assumption that the Accused might have total control over the place of residence but he or she may not be its owner or tenant.

²⁵ *Muller v. France*, no. 21802/93, 17 March 1997.

²⁶ *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009.

²⁷ See para. 137 above.

151. *However, there is no need for any change in the terms of the provision; the risk of violating Article 8 can be precluded by taking account of the interests of all resident in the place concerned when imposing such a restriction.*

Article 125. Bail

152. The specification in paragraph 2 of a minimum amount for the bail that is payable precludes the Court from having regard to the particular circumstances of the Accused and is thus not consistent with the application by the European Court of Article 5(3) of the European Convention. Certainly, the absence of any minimum does not preclude an amount being set at a level that ensures that this is an effective measure of restraint.

153. *The first sentence of paragraph 2 should thus be deleted.*

Article 126. Suspension of the Term in Office

154. It is unclear from this provision whether the suspension from office of an Accused who is a public servant necessarily means that the person concerned will no longer be paid while such suspension is in effect. A loss of income could have serious consequences for the person concerned and his or her family members, particularly if it is not possible to undertake any other form of employment.

155. *There is thus a need to clarify the effect of this provision and what alternative sources of income will be open to an Accused in the event of him or her not being paid during the suspension.*

Article 131. Purpose and Grounds of Seizing Property

156. There does not seem to be any obvious justification for the use of a different evidential basis for seizure seen in respect of the first four grounds set out in paragraph 2 as compared with that used in the fifth ground.

157. *The evidential approach adopted in respect of the five grounds for seizure should thus be harmonised.*

Article 133. Procedure of Seizing Property

158. It would be appropriate to make it clear that the valuation of the property envisaged in paragraph 7 by an expert is not conclusive as otherwise the person affected by the seizure would have no basis for adducing evidence that this is actually flawed and thus would be denied a fair hearing on a key issue.

159. *Paragraph 7 should thus be amended accordingly.*

Article 137. Placement in a Medical Institution for Performing an Expert Examination

160. Paragraph 3 has no connection with the title or the first two paragraphs of this provision as it relates to the adoption of such placement as a security and not an evidential measure. It should be noted that there is an identical paragraph in Article

140 where this would be appropriate since this Article is concerned with medical supervision as a security measure.

161. *Paragraph 3 should thus be deleted.*

Article 144. Removal from Courtroom

162. The European Court accepts that there may be circumstances warranting the removal of an Accused from the courtroom because of his or her disruptive behaviour. However, this is likely to be more acceptable if the Accused can remain in contact with his or her lawyers and follow the proceedings remotely²⁸.

163. *It would be appropriate, therefore, for paragraph 4 to be modified to allow for an Accused to remain in contact with his or her lawyers and to follow the proceedings remotely in the event of a third or subsequent removal.*

Article 147. Removal from the Proceedings

164. The possibility envisaged in this provision for the removal of an attorney, Authorised Representative or Lawful Representative will need to be applied with considerable care given the potential this might have for undermining the defence or the participation of other Private Parties to the Proceedings. Although judicial supervision is a potentially important safeguard against such potential being realised, this will only be so if appeals to the court are expedited and the proceedings do not continue until the matter is resolved and, in the event of a removal being upheld, a replacement attorney, Authorised Representative or Lawful Representative has had adequate time to prepare him or herself.

165. *This provision should thus be amended accordingly.*

Section 5. Other General Provisions

Article 163. Solving a Property Claim

166. There is ground for concern about the possibility envisaged in paragraph 2 of granting a property claim fully or partially in the “case of rendering an acquitting judgment, stopping the criminal prosecution or discontinuing the proceedings as there is a risk that, in a particular case, this will result in a violation of the presumption of innocence guaranteed by Article 6(2) of the European Convention²⁹.”

²⁸ See, e.g., *Ensslin, Baader and Raspe v. Federal Republic of Germany* (dec.), no. 7572/76, 8 July 1978.

²⁹ See, e.g., cases such as *Geerings v. Netherlands*, no. 30810/03, 1 March 2007, *Vulakh and Others v. Russia*, no. 33468/03, 10 January 2012 and *Teodor v. Romania*, no. 46878/06, 4 June 2013.

167. *This risk does not require any amendment of the provision in order to be averted but it will be important to ensure that judges are fully apprised of it and the need for care in determining and reasoning any decision on the granting of a property claim.*

Article 164. Compensation of Property Damage at the Court's Initiative

168. There is a risk that the taking of an initiative by a judge that is envisaged by this provision will affect the appearance of his or her impartiality. It would be preferable for a Victim who is “deprived of the possibility of defending his property interests because of being dependent upon the Accused, being incapable or having limited capability, or any other reason” being provided with legal representation at public expense so that the judge does not give the impression of acting on behalf of a particular Party.

169. *This provision should be amended accordingly.*

Section 6. Pre-trial Proceedings

Article 173. Duty to Initiate Criminal Proceedings

170. Despite its title, this provision regulates both when a criminal investigation should and should not be initiated. In particular, paragraph 6 prohibits the investigation of information obtained from unknown sources. However, in most countries a preliminary investigation can be undertaken upon information received from anonymous sources which, despite being unknown, show certain credibility. The extent of the restriction in paragraph 6 is unclear as it also provides for a report of a crime from unknown sources to be checked, on the initiative of the prosecutor or investigator, in accordance with the procedure stipulated in the “Law on Operative-Intelligence Activities”.

171. *There is thus a need to clarify the extent of this restriction.*

172. Paragraph 4 accepts that the *notitia criminis* can come from certain information published in the mass media. This reflects a common approach in Europe as the credibility of all sources of the *notitia criminis* is to be assessed by the investigators or prosecutors and, in principle, is not limited by law. However, it is questionable whether the mass media should be granted the status of “person reporting a crime” and given the corresponding rights to this status. Certainly, information published in the mass media is not an act of reporting and, as a result, it is not in the same position as other persons reporting a crime.

173. *The granting of the status of “person reporting a crime” should thus not be granted to the mass media publishing information on which the initiation of an investigation is based.*

Article 174. Direct Report by a Natural Person

174. Reporting a crime is a civil duty in most countries, and conversely, false reporting can entail criminal liability. However, the reference in paragraph 3 to warning a natural person reporting a crime of the criminal liability for “false accusation” is inappropriate since reporting a crime does not amount to an “accusation”.

175. *This provision should thus be corrected.*

Article 178. The Procedure for Initiating Criminal Proceedings

176. There is a degree of overlap between the first two paragraphs of this provision and paragraphs 2 and 3 of Article 173 as regards the duty to initiate criminal proceedings and this may lead to confusion in practice.

177. *It would be desirable, therefore for these provisions to be consolidated and located in just one Article, ideally Article 173.*

Article 179. Course of Proceedings after Initiation

178. The stipulation in paragraph 5 that new proceedings should be initiated if another alleged crime is discovered during an investigation is, in principle correct.

179. *However, in the interests of the efficiency of investigation, the application of this provision should not preclude both crimes being investigated jointly if there is a connection between them.*

Article 181. Investigative Subordination

180. This provision sets out lists the various competent bodies to carry out the investigative phase under the supervision of the public prosecutor. The array of bodies concerned and the scope for overlap between the offences over which they have respective jurisdiction have together the potential to create confusion and jurisdictional conflicts, which can hardly be in the interests of effective law enforcement.

181. *Consideration should thus be given to simplifying the number of investigative bodies involved.*

182. Moreover, there is in some instances a lack of clarity as to the identity of particular body. Thus, paragraph 5 refers to the “Investigators of the Investigative Body”.

183. *Such uncertainty would be removed by including a reference to the relevant legislative provision establishing the investigative body concerned.*

184. The power conferred on the Prosecutor General to re-assign an investigation of crimes in which public officials might be involved is very broad as the criterion for doing so is the vague concept of “where necessary”. In other jurisdictions the conferment of such a power has been a matter of concern since it has led to a loss of confidence that corruption-related offences by public officials are not being effectively investigated.

185. *There is thus a need for more specific criteria to govern any re-assignment of responsibility for conducting an investigation.*

Article 188. The Grounds, Beginning and the End of an Inquiry

186. According to paragraphs 2 and 3, undercover actions can only be carried out under the instruction of the Investigator but operative-intelligence measures can be carried out at the initiative of both the Investigator and the Inquiry Body. The reason for this difference in approach is unclear.

187. *It would thus be desirable to clarify the rationale for this difference in approach.*

Article 189. Initiation of Public Criminal Prosecution

188. The stipulation in paragraph 6 that the Prosecutor “may not instruct the Investigator to present a Petition on engaging a person as the Accused with a particular content. A Prosecutor may not draft such a decision” affords some guarantee as to the autonomy of the Investigator in deciding whether or not to accuse a certain investigated person. However, the content of this Article overlooks the competence of the Prosecutor – specified in Article 38.1(5) and also an aspect of the issues addressed in Article 190 – to accuse someone on his or her own initiative. The omission of any reference to this competence in the present provision could create confusion and misunderstandings.

189. *The present provision should thus be revised to address such a possibility.*

Article 190. Presenting the Accusation

190. Paragraph 2 envisages the possibility of the Investigator opposing an accusation by the Prosecutor through filing an objection with the supervising Prosecutor. No time limit for determining this objection is specified and it needs to be clarified whether there any general rules that would remedy such a gap. Moreover, it is unclear what will thereafter be role of an investigator who objects to considering a person as an accused.

191. *There is thus a need for clarification on the foregoing points.*

Article 193. Grounds of Suspending Public Criminal Prosecution

192. The formulation of one of the grounds for suspending a criminal prosecution – namely, that “The Accused cannot participate in the proceedings because of being outside the borders of the Republic of Armenia” – could be improved as the fact of being abroad does not necessarily mean that an Accused “cannot participate”. He or she may be willing to do so but only through his or her Defender.

193. *It might, therefore, be more appropriate to state that suspension is possible where the Accused is outside the borders of the Republic of Armenia and is unwilling to participate in the proceedings concerned.*

194. The linkage in paragraph 4 between the maximum duration of any suspension of a criminal prosecution to the statutory period of limitation is not inappropriate but does not address the issue of whether or not such suspension has the effect of interrupting that period.

195. *Consideration should thus be given to whether there are adequate provisions in place governing the interruption of the statutory period of limitation in such cases.*

Article 200. Procedure of Becoming Familiar with the Criminal Case File before Preparation of the Accusatory Conclusion

196. Making the Criminal Case File available to the parties is crucial for the preparation of an adequate defence and this will only be satisfactory if there is a possibility of copying materials and enough time is granted to review them. Both issues are addressed in the present provision.

197. Nonetheless, as regards copying – which can be expensive– there is no clarity about the cost involved or as to who is to pay for it.

198. *It would be appropriate, therefore, to ensure that the cost of copying is not an impediment to the preparation of an Accused's defence. Moreover, Defenders should be given access to a room suitable for reviewing the Criminal Case File and becoming familiarised with its contents. However, it should also be noted that the provision to the parties of an e-file containing the Criminal Case File would obviate the need for copying and this would also be easier and less costly to handle.*

199. As regards the time allowed to review the materials, paragraph 6 refers to an Investigator setting a “certain” period of time for this task, which does not give any guarantees as to its adequacy or any guidance as to its interpretation.

200. *There is thus a need for paragraph 6 to specify that the time allowed must take account of the volume and complexity of the material in the Criminal Case File.*

Section 7. The Proving Actions

Article 209. Grounds for the Performance of Investigative Actions

201. This provision's title is not completely accurate as only paragraph 1 deals with the grounds for undertaking an investigative measure, whereas paragraph 2 lists the actions that can be carried out by the Investigator without judicial warrant.

202. *It would thus be appropriate for this provision to be given a more accurate title.*

203. While the initial inspection of a House that is the Incident Scene (i.e., the scene of a crime) without a judicial warrant – as is envisaged in sub-paragraph 2(1) - might be compatible with Article 8 of the European Convention, there is no urgency being specified showing a need for the powers listed in sub-paragraphs 2(2)-(4) to dispense with the need for an Investigator first to obtain such a warrant before conducting an exhumation, a search or a seizure.

204. *It would thus be appropriate to limit the possibility to exercise the powers listed in sub-paragraphs 2(2)-(4) without first obtaining a prior judicial warrant to just situations where there was a well-grounded fear that evidence would otherwise be destroyed, damaged or otherwise compromised. Insofar as is necessary, the related provisions to these powers in the present section – i.e., Articles 234-40 - should also be revised accordingly*

205. In any event, even in cases of such urgency, a computer or a smartphone seized in a case of such urgency should only be searched afterwards under the authority of a judicial warrant.

206. *This requirement should thus be explicitly provided in the present provision, as well as in Article 236 on the procedure of performing a search.*

Article 210. Participants in an Investigative Action

207. Two “procedure observers” are envisaged by paragraph 5 as being involved in certain investigative actions, namely, checking testimony on the spot, inspection, exhumation, examination, experimentation, recognition, search and seizure. Such observers are a kind of requested witness who voluntarily intervenes in the investigative acts but he or she is also paid³⁰. The provision for their use in under European continental criminal procedure codes is no longer frequent anymore, having been replaced by a mandatory recording of all actions undertaken. Nonetheless, their involvement in investigative actions could be an adequate safeguard in cases where the Accused does not have a Defender. However, a more satisfactory safeguard would be to make the recording of the investigative actions mandatory in all cases and not just – as paragraph 7 provides – where the procedure observers are not available.

208. *This provision should thus be amended accordingly.*

³⁰ Pursuant to Article 62.

Article 212. Peculiarities of an Investigative Action Performed with the Participation of a Minor or a Disabled Person

209. The intervention of the psychologist envisaged by this provision in the performance of investigative actions involving minors seems to be unduly restricted. To the end of protecting the minor, especially when it is the victim, the psychologist should be given sufficient leeway to decide the form in which the minor should be questioned, as well as to indicate which questions would not be appropriate.

210. *It would thus be appropriate to revise this provision accordingly.*

211. It may be an oversight but paragraph 3 provides for the obligation not to give false testimony to be explained to a minor but not to a disabled person. There seems no justification for treating disabled persons differently as it should not be assumed that they are unable to understand the scope and meaning of the obligation to state the truth while testifying.

212. Paragraph 3 should thus be modified to require this explanation to be given to disabled persons.

Article 218. Questioning a Witness

213. Although generally adequate, this provision could be improved by specifying that, if there are any doubts at the outset of the proceedings as to the possibility of the supposed witness being in some way involved in the commission of the offence concerned, there was a requirement to inform him or her of the right to call a lawyer and the right to remain silent if some answers may lead to a self-incrimination. In any event, it should be specified that the questioning is to be suspended until the assistance of a lawyer is obtained where this is requested by the witness on account of the questions showing that he or she is being considered as a possible suspect.

214. *The provision should thus be amended accordingly.*

Article 221. Questioning the Accused

215. Paragraph 4 provides that, if the Accused expresses a desire to give testimony, “the investigator shall inform him on the obligation to give truthful testimony and the liability prescribed for giving false testimony. This fact shall be confirmed by the signature of the accused”. There is no objection from the perspective of the European Convention to an offence of perjury being applied to a defendant who is willing to testify.

216. However, this is not the approach followed in most European continental legal systems, which rather opt for a broad understanding of the right to defence and avoid the risks that criminalising a defendant’s untrue testimony might entail for the prohibition on self-incrimination.

217. The existence of liability for giving false testimony in this context is also problematic in that there is a danger that the subsequent prosecution of the defendant for perjury will require the second criminal court, in practice, to reconsider the guilt or innocence of defendant of the crime that was the subject of the first trial. Such a procedure can be abused and could lead to a violation of the prohibition of double jeopardy provision in Article 4 in Protocol No. 7.

218. *Further consideration might thus be given to whether the imposition of liability on an Accused for giving false testimony is actually necessary or appropriate for the Armenian criminal justice system.*

Article 226. Inspection

219. Paragraph 6 goes beyond inspection as this term is described in paragraph 1 - i.e., “visual observation ... for the purpose of determining circumstances of significance to the proceedings and finding traces of the alleged crime” – in that it provides for the making of computer and paper copies of computer software, websites and automated data. Such action should more properly be characterised as a taking of documents under Article 233 or a search and seizure under Articles 234, 236 and 239. Furthermore, the actual examination of the material concerned should only take place pursuant to specific judicial authorisation.

220. *There is thus a need to appropriately characterise this aspect of the proposed power in paragraph 6 and to ensure that specific judicial authorisation is required for the examination of material taken pursuant to it.*

221. The meaning of the second sentence of paragraph 7 – authorising the taking of “objects or documents taken out of circulation under the legislation, regardless of their relationship to the proceedings at hand” – needs to be clarified since it would appear to allow the taking of property which is not required for criminal proceedings and this would be contrary to the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1.

222. *There is thus a need to clarify the aim and scope of the part of paragraph 7.*

Article 228. Experimentation

223. Insofar as such an investigative measure is considered necessary, it should only be carried out by persons with the specialised knowledge and the appropriate facilities to conduct the experimentation concerned and to evaluate its results for the purpose of a criminal investigation and for providing evidence at a trial. However, such a requirement is not specified in the present provision.

224. *There is thus a need to introduce such a requirement into this provision.*

Article 230. Recognition of a Person

225. The regulation proposed for this action is generally appropriate but no provision is made for the persons performing it not being seen by the persons to be recognised and for the presence of the Defender at the process. In most European criminal investigations it is now the practice for the person who is to make the identification being granted protection from being seen so that he or she does not feel intimidated and is inhibited from making a more precise recognition of the suspect. A requirement to ensure that the Defender is present during the recognition process would be appropriate as he or she could then be satisfied that the legal requirements were observed, which would be beneficial if the recognition is intended to be used as evident at a later trial.

226. *It would, therefore, be appropriate to amend this provision so as to address these concerns.*

Article 232. Demand for Information

227. The exception provided in this provision as regards the obligation to provide information requested by an Investigator is too narrow. Certainly, it could be appropriate to protect secrets protected by law but, while the provision should generally apply to other official information, there should be no obligation for someone to disclose personal information concerning him or herself or anyone else without a prior judicial as otherwise there would be a violation of the right to respect for private life under Article 8 of the European Convention. Furthermore, a demand for information should not be capable of requiring the official concerned to incriminate him or herself contrary to the prohibition on this under Article 6(1) of the European Convention.

228. *There is thus a need for this provision to be revised to take account of these concerns.*

Article 235. Persons Participating in a Search

229. This provision is presumably intended to supplement the requirement in Article 210.5 for the presence of two procedural observers during a search. However, this could be overlooked as this is not specifically referred to in the present provision.

230. *It would thus be appropriate for the present provision to refer to the earlier provision in the Draft Code.*

Article 236. Procedure of Performing a Search

231. Notwithstanding the title of this provision, paragraph 5 is also concerned with the seizure of objects found during the search. Although generally appropriate in this regard, there is no reference to the proportionality principle, namely, that only those elements that appear to be related to the crime should.

232. *Such a stipulation should thus be included in paragraph 5.*

Article 237. Search of a Person and Article 238. Search Protocol

233. The present provision do not indicate whether or not the person being searched might be required to undress, the circumstances in which this might take place, the possibility of examining body cavities and a requirement that searches should not normally be conducted by or in the presence of persons of the opposite sex. These issues need to be addressed to ensure that a search does not humiliate or degrade the person concerned, contrary to the prohibition in Article 3 of the European Convention.

234. *These provisions should thus be revised to require additionally that searches that require a person to undress should be based on specific grounds relating to the concealment of a prohibited item and that this should not occur in a public place unless such item is a weapon. Furthermore, it should be provided that the examination of body cavities should be subject to observing standards of hygiene and should not entail the person concerned being fully undressed. Finally, there should be a requirement that searches should normally be conducted by a person of the same sex and should take place only in the presence of other persons required by law to be there.*

Article 243. Safeguards of the Lawfulness of Undercover Investigative Actions

235. The bar in paragraph 1 on using any evidence obtained in undercover investigative actions that was not covered by the judicial warrant - albeit with an exception for acts in good faith - is possibly wider than in some European systems but is certainly not incompatible with the European Convention. However, the specification that those materials that were gathered beyond the scope of the warrant should be destroyed does not take into account any possible ownership rights relating to them. At the same time, where this is not an issue, there is no indication as to how or when such destruction is to take place and who is responsible for supervising this³¹. Moreover, there is no clarity as to who has the burden to prove that the agent, who acted beyond the warrant, performed his/her activities in “good faith” or as to the circumstances in which this is to be determined.

236. *Paragraph 1 thus needs to be revised to take account of these concerns.*

237. Furthermore, although paragraph 7 rightly provides protection for certain confidential communications, there is insufficient guidance as to how this is to occur in practice. Such guidance is especially important given that the paragraph specifically refers to information obtained as a result of monitoring such communications being “destroyed immediately”, which underlines that it is anticipated that the proposed protection will not be effective. In addition, the reference to a “designated confession priest” may – given the diverse character of religions - be inadequate to capture all comparable communications with religious leaders.

³¹ Cf. the arrangements for destruction in Article 249.5 regarding data not taken by the Inquiry Body.

238. *Paragraph 7 thus needs to be revised to take account of these concerns.*

Article 245. Protocol of an Undercover Investigative Action

239. It is unclear from paragraph 5 whether its prohibition on transferring the Protocol of the undercover investigative action to anyone other than the Investigator who gave the Instruction to perform such an action means that the Prosecutor will not have access to it, which would be strange.

240. *There is thus a need to clarify whether this is indeed the effect of the prohibition and whether or not this is intentional.*

Article 251. Simulation of Taking or Giving a Bribe

241. It is appropriate to require that such an investigative measure can only be ordered when there is enough suspicion regarding the offence of bribing. However, the specification that this investigative measure should be based on a “written statement of a person who received an offer of receiving or giving a bribe” is not sufficient for this purpose since the fact of the statement being in writing does not address the credibility of what is stated in it.

242. *This provision should thus be revised to require that the statement concerned by a credible one.*

243. Furthermore, it should be noted that bribery is only one of the situations in which undercover police operations might lead to the entrapment of offenders, which would render a trial unfair pursuant to Article 6(1) of the European Convention. The Draft Code does not deal with entrapment generally and it is unclear whether or not this would result in any evidence obtained thereby being rendered inadmissible.

244. *There is thus a need to clarify the extent to which, if at all, other forms of entrapment are impermissible.*

Article 258. Additional and Repeat Expert Examinations

245. It is not necessarily inappropriate for repeat and additional expert examinations to be undertaken, whether by the same expert or by another. However, it would be inappropriate if the aim was to tailor the results to a particular objective. In order to avoid the risk of this occurring, it is important that all expert reports that have been conducted should be attached to the Criminal Case and thereby be available to all the Parties. However, it is unclear from the present provision whether or not this is actually required.

246. *The present provision should thus be revised to require that all expert reports be attached to the Criminal Case.*

Section 8. General Conditions on Court Proceedings

Article 272. Participation of the Accused in a Court Session and the Consequences of His Failure to Attend

247. Although a requirement that an Accused be present at his or her trial is not necessarily incompatible with Article 6 of the European Convention and is the best way to ensure his or her right to defence, the European Court recognises that the right to be present can be waived. Moreover, allowing exceptions. However, a trial in the absence of the Accused might serve the interests of efficiency, particularly where less serious offences are involved or the Accused intentionally absconds, so long as there are appropriate safeguards for the fairness of the proceedings concerned. The Draft Code does not seem to recognise that an insistence on the absolute requirement of the Accused's attendance might not be appropriate.

248. *Consideration should thus be given to relaxing the requirement in a manner that accords with the case law of the European Court.*

249. As has previously noted³², it would be appropriate for an Accused who has been removed from the Court to be able to follow the proceedings – whether by a video-link or through a window with audio facilities – and he or she should not only be legally represented but should be able to communicate with his or her Defender.

250. *The present provision should thus be amended to provide the foregoing possibilities.*

Article 274. Participation of Victim, Property Respondent, Their Representatives, or the Lawful Representative of the Accused in the Court Session and the Consequences of their Failure to Attend

251. The present provision envisages a general obligation of the listed persons to attend Court session, subject to the Court allowing them not to attend particular ones and the possibility of sanctions being imposed for non-compliance. This is a potentially onerous requirement when the persons concerned may not actually be needed for particular sessions. It would be more appropriate for the Court to specify the sessions for which attendance is required, subject to account being taken of an insurmountable difficulty of attending them (such as a scheduled medical operation).

252. *The formulation of the present provision should thus be revised accordingly.*

Article 276. Scope of the Court Examination

253. This provision sets out of certain elements of the accusatorial model, namely, the facts cannot be amended by the Court and the accusation as a rule cannot amend the factual basis contained in the complaint. However, paragraph 2 allows for the indictment to be

³² See paras. 162-163 above.

amended after the Principal Accuser has produced its evidence at court where “the Evidence examined during the principal hearings confirmed factual circumstances that were not and could not be known during the Pre-Trial Proceedings and, as such or in conjunction with other factual circumstances, make it necessary to present a new Accusation to the Accused”. The requirement that the facts “could not be known during the pre-trial proceedings” is perhaps too exacting and it might be more appropriate to state that those facts were not known. At the same time, it should not be possible to change the indictment as a result of the facts that were already known.

254. *Consideration should thus be given to modifying paragraph 2 accordingly.*

255. Paragraph 4 respects the accusatorial principle by requiring discussion with the Parties before the Court changes the legal assessment of the factual circumstances underlying the accusation. However, it does not address the possibility that this new qualification might entail the possibility of imposing a higher penalty in the event of a conviction. In such circumstances, without this different qualification being adopted by the Principal Accuser, the Court would – contrary to the requirements of the accusatorial principle - be introducing elements of accusation *de officio*.

256. *Paragraph 4 should thus be amended to address this concern.*

Article 279. Documenting Court Session

257. The arrangements for the recording of court sessions are appropriate but the acceptance that computer-based audio recording might not be available reflect the reality arising from financial constraints. Until it becomes feasible to make computer-based audio recording generally available, it might be appropriate to ensure that this is used in cases of particular complexity or involving serious offences.

258. *Consideration should thus be given to the allocation of cases of particular complexity or involving serious offence to courts where computer-based audio recording is available.*

Article 282. Delivering a Judgment for Execution

259. Paragraph 2 departs from the idea, that an acquittal means that there is evidence that the person acquitted did not commit the offence. This is not always the case: when there is not enough evidence to prove the guilt or when there are reasons of criminal liability exemption. Thus, an acquittal sentence does not lead automatically to initiating another investigation to find the perpetrator of the crime.

260. *Thus, this provision should be redrafted for more precision.*

Section 9. Judicial Safeguards of the Pre-trial Proceedings

Article 288. Decision Regarding the Petition to Apply a Restraint Measure or to Prolong the Term of a Restraint Measure Applied

261. For the purposes of Article 5 of the European Convention, a decision on imposing a measure of restraint need not – as sub-paragraph 2(5) envisages - be conditioned by the existence of a prior legitimate arrest, so long as there are still enough suspicions of the person concerned having committed a crime and a need to apply the measure in question. However, this conditionality is qualified by the need for the circumstances specified in paragraph 3 that involve serious breaches of the requirements under Article 5 and the approach being followed can be seen as an attempt to put an end to such impropriety and is not objectionable.

Article 289. Petition to Abolish Detention or to Apply an Alternative Restraint Measure Instead and the Examination of Such a Petition

262. Paragraph 1 requires an Accused who is detained or his or her Defender or Lawful Representative to file a petition to abolish the detention or change it for another measure can only be filed by the defendant “not later than seven days before the end of the detention term”. Although courts need to be able to organise their proceedings in an orderly fashion, the present provision fails to take account of possible difficulties that might be encountered in filing the necessary petition. Moreover, insofar as Article 285.6 provides for the filing of a petition on prolonging the detention by the Investigator within five days before the end of the term for which this restraint measure was imposed, the Court would suffer no inconvenience from a later filing where it has to consider all aspects of the issue of whether or not prolongation is warranted.

263. *Paragraph 1 should, therefore, be modified to provide that a failure to file the petition within the specified deadline should not preclude the Court considering the Accused’s submissions as to why his or her detention should not be prolonged or another measure of restraint should be adopted.*

Article 292. Petition to Perform a Proving Action

264. The requirement in paragraph 4 that a petition to perform undercover investigative acts referring to digital or telephone interceptions should include the telephone number or the e-mail address is not generally inappropriate. However, it does not take account of situations where the number or address is not known. Although such situations could be remedied through resort to International Mobile Subscriber Identity (IMSI) catchers and a computer’s Internet Protocol (IP) address, it is not clear whether their use would be covered by this provision.

265. *Insofar as the aim is not exclude their use, paragraph should be amended to authorise this.*

Article 294. Scope of Judicial Safeguards of the Lawful Limitations of Ownership Rights-Article 298. Petition to Abolish a Limitation of a Property Right and its examination

266. As has already been noted³³, the Draft Code envisages the possibility of property being seized by the Investigator without prior judicial authorisation and instead being subject to subsequent judicial control. It has already been suggested that this would be inconsistent with Article 8 of the European Convention except where an urgent intervention was required. The present provisions are, however, generally appropriate for judicial control over situations in which seizure required such an intervention without prior judicial authorisation. One shortcoming is the six-month period prescribed by Article 298.1 within which the owner of seized property or others having a property interest therein must file a Petition on abolishing the seizure. Although this period is unlikely to be problematic in most cases, as the preceding provisions recognise, there may be situations in which the persons concerned are unaware of a seizure and may discover this too late to file a Petition.

267. *Article 298.1 should thus be modified to specify that the period runs from when the person concerned learnt of the seizure. Furthermore, Articles 294-298 will need to be revised to take account of their applicability to situations in which it was not possible to obtain prior judicial authorisation for a seizure.*

Article 299. Scope of Judicial Safeguards of the Lawfulness of Pre-Trial actions

268. The detailed formulation of this provision is such that, as a result, it is not so easy to identify which decisions or acts are not subject to appeal. More clarity would be achieved by just specifying those decisions which are not appealable.

269. *This provision should thus be revised accordingly.*

Article 300. Procedure of Judicial Appeal of a Pre-Trial Action

270. The requirement that, before filing an appeal to the Court against a Pre-Trial Action, there must first have been an appeal against it to the Prosecutor reflects the supervisory role that the latter has over the conduct of the pre-trial investigation. However, as no deadline for the determination of such an appeal is specified in Article 38(11), it is unclear from the present provision whether or not the issue can be considered by the Court only after this has occurred.

271. *There is a need, therefore, to clarify whether an appeal to the Court must await a prior determination by the Prosecutor and, if so, a strict time-limit of three days for such a determination should be specified.*

Article 309. Procedure of Deposition of Testimony

272. This and the preceding three Articles are designed to allow pre-trial statements to be secured from the Accused (i.e., a confession) and from witnesses who may not be able

³³ See paras. 203-204 above.

to be present at the trial or where there is a reasonable assumption that they will not provide reliable testimony during it³⁴. However, the present position is essentially concerned with the taking of a deposition from the Accused. Although the content of the present provision is generally appropriate, it should be noted that paragraph 2 envisages only postponing the proceedings on one occasion should there be a failure of the Defender to attend the relevant court session. As a result a deposition could be taken from an Accused in circumstances where he or she does not have the assistance of a lawyer, which is likely to render any deposition problematic from the perspective of Article 6(1) of the European Convention. It is, of course, appropriate to try and prevent the organisation of Court proceedings being frustrated by a Defender's intentional non-attendance but the paragraph 2 fails to take account of the possible good cause for non-attendance and makes no provision to ensure that the Accused is legally represented.

273. *It would be appropriate, therefore, to allow further postponements where there is good cause for a Defender's absence and for alternative legal representation to be provided for the Accused if the Defender's absence is found not to be justified.*

274. Paragraph 8 of this Article provides for the audio-recording of the depositions given during this pre-trial stage. Although useful, they will not be as satisfactory as a video-recording that enables the trial court to see the whole interrogating procedure.

275. *It would thus be appropriate to require that the giving of deposition testimony be video-recorded.*

Section 10. Court Examination at the First Instance

Article 310. Scheduling Preliminary Court Hearings

276. Paragraph 3 requires the Court to return the Criminal Case File to the Prosecutor without rendering any decision on conducting a preliminary court hearing where the time period specified in Article 206.2 has not been met. Under the latter provision there is a requirement that, in cases where the Accused is detained, the accusatory conclusion and the Criminal Case File must be delivered to the Court hearing at least 15 days prior to the end of the Accused's detention period. Not only is it unclear what the requirements in paragraph 3 and Article 206.2 are designed to serve but also what the consequences will be for the processing of the case concerned; is it brought to an end or can there be a further transmission of the Criminal Case File to the Court? The latter possibility raises the prospect of a case falling foul of the requirement in Article 6(1) of the European Convention for a determination within time.

³⁴ Article 306.

277. *There is thus a need to clarify both the rationale for these requirements and the consequences that flow from a failure to observe them.*

Article 313. Discussion of the Issue of Self-Recusal, Recusal or Dismissal from the Proceedings

278. It is unclear from paragraph 2 what, if any procedure should follow, if a judge rejects his recusal.

279. *What should follow should thus be clarified but, if nothing is currently provided, it would be desirable for such a rejection to be subject to appeal.*

Article 314. Discussion of the Issue of Jurisdiction

280. The formulation of this provision gives the impression that the lack of jurisdiction is something only discovered *ex officio* by the Court. However, it could equally be something raised by one or more of the Parties.

281. *It would thus be appropriate for this latter possibility to be made explicit in the present provision.*

Article 320. Discussion of the Issue of Permissibility of Evidence

282. The formulation of this provision only requires an issue relating to the permissibility of evidence to be considered if it is raised by one of the Parties. However, this is something that might also occur to the Judge *ex officio* and this would be appropriate where reliance on the evidence concerned would be incompatible with the European Convention.

283. *This provision should thus be modified so that the Judge, where he or she has doubts about the permissibility of certain evidence, can require the Parties to make submissions on this issue.*

Article 322. Scheduling a Principal Hearing

284. This provision does not take account of the possibility that the Court is not entitled to schedule a principal hearing in those cases where the absence of jurisdiction over it has been established.

285. *It would thus be appropriate for the phrase “unless the court has declared its lack of jurisdiction” to be inserted at the end of paragraph 1.*

Article 323. The Beginning of a Principal Hearing

286. The arrangements made in this provision to preclude contact between witnesses who have already given testimony and those who have yet to do so are appropriate. However, they do not deal with the possibility of witnesses matching their testimonies while waiting to be questioned.

287. *It would, therefore, be appropriate to provide for the possibility of requiring witnesses to wait separately where there is concern about the possibility of them colluding.*

Article 326. General Procedure of Questioning

288. The possibility envisaged in paragraph 3 of a person being called for questioning by Court *ex officio* runs counter to the principle of adversariality, in particular if this witness and its statements are not in the pre-trial record. In such cases it could affect its impartiality.

289. *Consideration should thus be given to restricting or deleting this possibility.*

Article 329. Peculiarities of Questioning a Victim or a Witness Who is A Minor

290. The arrangements made in this provision for questioning minors are not generally inappropriate. However, it would be preferable for such interrogation to be handled by or at least under the supervision of an appropriately trained psychologist. Furthermore, depending upon the age of the minor and the advice of the psychologist, it may be more appropriate for them to be questioned only at the pre-trial stage.

291. *The formulation of this provision should thus be revised to take account of these concerns.*

Article 333. Performance of Other Proving Acts

292. Paragraphs 2 and 3 envisage the carrying out of expert examinations during the course of the trial. However, this is something that should be regarded as exceptional since this is something that should generally have been done before the trial stage commenced.

293. *This provision should thus be modified to require appropriate justification for such an exceptional step.*

294. The possibility envisaged in paragraphs 4 and 5 of the Court requesting *ex officio* objects and other pieces of evidence and performing inspections or examinations runs counter to the principle of adversariality and could affect its impartiality.

295. *These possibilities should thus be deleted from paragraphs 4 and 5.*

Article 334. Supplementing the Body of Evidence Subject to Examination

296. The possibility envisaged in paragraph 4 of the Court having the power *ex officio* to take measures to supplement the body of evidence runs counter to the principle of adversariality and could affect its impartiality, notwithstanding that this possibility is limited to instances where it considers the failure to take the measures concerned “may cast doubt on the fairness of the proceedings”.

297. *It would thus be appropriate to replace this possibility and require the Parties to consider whether such measures are necessary.*

Article 335. Discussion of the Issue of Evidence Impermissibility

298. As in Article 320, this provision only considers the possibility of the Parties raising the impermissibility of evidence when it might legitimately occur to the Judge. As was indicated in respect of Article 320, where this occurs it would be appropriate for the Judge to ask the Parties to make submissions on the issue before determining it.

299. *This provision should thus be harmonised with the modification recommended for Article 320.*

Article 342. Issues to be Solved by the Court when Rendering the Verdict

300. The requirement in paragraph 5 to discuss again the issue of the culpability of the Accused where his or her culpability or ability to account for and control his or her actions “arose during the Preliminary Investigation or the Court examination, in respect of which a medical psychological expert examination has been ordered” seems insufficiently precise since, at this stage, the need is not simply for a discussion but for the reaching of a conclusion.

301. *There is thus a need for this provision to be formulated more precisely.*

Article 344. Publishing the Verdict

302. Paragraph 2 allows for the presenting of request for examining evidence at an additional hearing after the verdict is made public but there is no indication as to what such evidence might concern. Thus, it is not clear whether this evidence could concern new or newly discovered facts – which does not seem appropriate - or is relevant either for the determination of the sentence to be imposed in the event of a conviction or the assessment of any compensation payable in the event of an acquittal.

303. *There is thus a need to clarify what is the object of the hearing of further evidence following the publication of the verdict in a case.*

Section 11. Judicial Review

Article 352. Institutions of Judicial Review

304. The arrangements in this provision – and the following Articles – concerning cassation are quite unusual in European criminal proceedings since they seem to envisage this being applicable even to interlocutory decisions that have been the subject of special review in an appellate court. As a result the Supreme Court becomes almost an ordinary instance, giving rise to a huge workload that has to be later limited

through admissibility grounds. The possible problems that may arise by broadening the scope of the jurisdiction of the cassation court and then allowing it to limit its own competence at the admission stage could result to certain inconsistencies in decision-making. Furthermore, even decision-making with respect to admissibility will be quite time-consuming.

305. *Consideration should thus be given to whether or not this is really the most appropriate model of cassation review to adopt.*

Article 353. Right to Lodge a Judicial Review for Appeal

306. The rationale for giving the possibility to file appellate review to “persons that did not participate in the proceedings” is unclear and it is not European practice to allow non-parties to proceedings to interfere with them in this way.

307. *Insofar as this possibility might be retained, there is thus a need first to clarify the reason for creating this possibility and to explain why this would not be prejudicial to the interests of those who were parties to the proceedings.*

Article 381. Cassation Appeal

308. It appears that the reference to Article 386 in paragraph 1 should be now to Article 380.

309. *There is a need to correct this reference.*

Article 403 Grounds of Lodging an Appeal for Extraordinary Review

310. On the assumption that the proposal is for the reopening of a case after an acquittal, it should be noted that the formulation used in this provision – “other new circumstances which remained unknown” – is not identical to that in Article 4(2) of Protocol No. 7, namely, “new or newly discovered facts”, allowing for the reopening of a case without infringing the prohibition on being tried twice. In any event, there is a risk that the reopening of proceedings by reference to either formulation will in practice not be based on anything new but be just a device to overturn closed proceedings which had simply failed to determine all the relevant facts that were available to the court. This would be clearly be inconsistent with Article 4(2) of Protocol No. 7, as well as the principle of legal certainty. Including such a provision is risky given the absence of a body of case law regarding the latter provision.

311. *Consideration should thus be given to the wisdom of allowing for the reopening of a case after an acquittal at this moment but, in any event, the formulation to be used should follow that of Article 4(2) of Protocol No. 7.*

Section 12. Peculiarities of Proceedings Conducted in Respect of Specific Persons

Article 415. Arrest or Detention of a Minor

312. There appears to be some inconsistency between the stipulations in this provision regarding the maximum period of detention for minor since the maximum period is said to be one month for pre-trial proceedings but longer periods are also prescribed.

313. *There is a need to simplify this provision and to ensure its overall coherence.*

Article 417. Termination of Criminal Prosecution in Proceedings Related to a Crime Attributed to a Minor

314. This provision does not seem to include any arrangement for the involvement of the Victim in the termination decision.

315. *There is a need to clarify what role a Victim may play in any decision relating to termination and to introduce such a role if none is currently envisaged in the Draft Code.*

Section 13. Peculiarities of Conducting Certain Types of Proceedings

Article 443. Preliminary Court Hearing of the Private Accusation and Article 444. Principal Hearing of the Private Accusation

316. The provision for settlement of a criminal claim in these two Articles do not make it clear whether or not the requirements for settlement agreements – which are stated in Article 447 to be applicable to Public Accusation Proceedings – are also to be applied to the conclusion of settlements in Private Accusation Proceedings. Certainly the stipulation in paragraph 2 of the former Article and paragraph 4 of the latter one that “an agreement that contradicts the law” shall not be approved by the Court is insufficient for this purpose. Without such requirements being applicable, it is likely that some settlements could be seen as incompatible with Article 6(1) of the European Convention³⁵.

317. *There is a need, therefore, for appropriate guarantees to be included in the present provision to ensure that any settlement is reached in a genuinely voluntary manner with both parties being fully aware of the facts of the case and the legal consequences.*

³⁵ See *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014.

Section 14. Final and Transitional Provisions

Article 465. Final Provisions

318. The proposed date of entry into force – 1 July 2017 – will come quite soon after the anticipated adoption of the Draft Code by the National Assembly. It is doubtful whether this really gives all affected by the significant changes which will be made to criminal procedure to be properly prepared - in terms of training and administrative arrangements - to implement them.

319. *Consideration should thus be given to ensuring that there is an interval of at least nine months between the adoption of the Draft Code and its entry into force.*

D. Conclusion

320. The Draft Code represents the culmination of extensive work of reviewing the text of the 1998 Code, problems arising from its application and the requirements of the European standards, particularly those elaborated in the case law of the European Court.

321. It in many respects provides a suitable basis for the investigation and prosecution of crime in accordance with human rights and fundamental freedoms, while protecting the public interests and those affected by criminal conduct.

322. There are, however, various matters which the section by section analysis indicates need to be addressed so as to ensure that the Draft Code is fully in conformity with the requirements of European standards.

323. The most significant ones are those that concern rights following an Arrest and the exercise of judicial control over various investigative measures. The changes required concerning the former are mainly matters of detail but those needed for the latter will entail a change in the structure of the relevant provisions so that prior judicial control over the taking of such measures is the norm.

324. Other matters requiring attention are generally ones concerned with either making certain points more explicit or elaborating on the standards that have been prescribed. There are also instances where the organisation of provisions might benefit from some restructuring without any fundamental change of content. In addition, some provisions or aspects of them seem unnecessary. However, some comments only concern points to be borne in mind once the Draft Code is adopted, as practice can run counter to what is intended. In this connection, it is emphasised that there should be an

appropriate interval between the adoption of the Draft Code and its entry into force so that those charged with the latter responsibility are suitably prepared to undertake it.

325. Finally, there are various points where clarification is required as to what is intended or what is dealt with in other provisions, although it is recognised that the request for clarification may stem from the way in which particular provisions have been translated into English.

326. None of the recommendations or suggestions for action would seem to be ones that should cause great difficulties in adopting. Furthermore, their adoption would make for a Code of Criminal Procedure that accords fully with European standards and would contribute to ensuring that the criminal justice system is one in which there is wide public confidence.