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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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by the Council of Europe

Joint Programme between the European Union and the Council of Europe on Transparency and Efficiency of the Judicial System of Ukraine (TEJSU project)

Strasbourg, 2 November 2011 DG-I (2011)16

OPINION ON THE DRAFT

CRIMINAL PROCEDURE CODE

OF UKRAINE

Prepared by

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I. INTRODUCTION

1. This opinion examines the compatibility with European standards, particularly the European Convention on Human Rights ("the European Convention") and its Protocols, of the draft 2011 Criminal Procedure Code 2011 ("the Draft Code") whose adoption is currently under consideration by Ukraine. The opinion has been prepared by Lorena Bachmaier Winter[1], Jeremy McBride[2] and Eric Svanidze[3] following Ukraine's submission of the Draft Code to the Council of Europe for an expertise

2. Earlier proposals for revision of the Criminal Procedure Code have been submitted for expertise by the Council of Europe in 2004[4], 2007 ('the 2007 Draft')[5] and 2009[6]. The opinion endeavours to identify the progress made in addressing the comments and recommendations in the opinions that were previously prepared at the Council of Europe's request.

3. Legislation such as the Draft Code has an important role to play in ensuring that the rule of law in society is maintained since those who break the criminal law should, insofar as is practicable, be brought to justice; if perpetrators of crimes are allowed to escape with impunity the law is displaced by arbitrariness.

4. Such legislation must also govern the process by which justice is done and this requires both clarity in its formulation and due respect for the human rights and fundamental freedoms of all involved. The position of persons suspected and accused of crimes is of particular importance because the authority which a criminal justice system must yield in order to be effective gives plenty of scope for their rights and freedoms to be infringed. Although no system of justice can ever ensure that persons will not be wrongly convicted and punished, there must be scrupulous efforts to ensure that this risk is minimised to the greatest possible extent and that the end of securing 'justice' is not used to justify the use of improper means to obtain it.

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4 Comments on the Draft Criminal Procedure Code (PCRED/DG1/EXP (2003) 63, 2 September 2004).

[5] J Herrmann, *Expert Opinion on the Draft Criminal Procedure Code of Ukraine*, September 2007.

[6] J Herrmann, *Expert Opinion on the Draft Criminal Procedure Code of Ukraine, Draft of March 10, 2009*, (PC-TC (2009) 50, September 2009).

5. However, important as respect for the rights and freedoms of a suspect or accused is, the formulation of legislation such as the Draft Code must additionally ensure that the rights and freedoms of those who may be victims of offences and anyone else caught up in the criminal justice process are safeguarded. This makes the formulation of such legislation especially challenging but ensuring a successful outcome is likely to be of inestimable value for the society in which it will operate, although it needs to be borne in mind that ensuring it is properly applied is potentially an even greater challenge.

6. Apart from the European Convention and its Protocols and the case law of the European Court of Human Rights ("the European Court") and the former European Commission of Human Rights ("the former European Commission"), account was taken in preparing this opinion of the previous expertise by the Council of Europe and the experience of modern criminal justice systems.

7. The opinion is based on the English translation of the Ukrainian text of the Draft Code[7]. It begins with a review of the principal issues relating to criminal procedure in Ukraine that have been the subject of rulings by the European Court. Thereafter it provides an overview of the Draft Code's provisions, noting both positive developments and some continuing conceptual shortcomings, before commenting on specific provisions of the Draft Code in turn insofar as these are not covered in the general overview. This section is followed by a review of the changes to be effected by the provisions in the Annex to the Draft Code. There is then a summary of the recommendations being made and the opinion concludes with an overall assessment of the compatibility of the Draft Code with European standards.

II. UKRAINIAN CRIMINAL PROCEDURE BEFORE THE EUROPEAN COURT

8. The range of issues concerning criminal procedure that have given rise to findings by the European Court of violations of the European Convention is extensive. It is thus clearly imperative that an important goal in adopting the Draft Code should be the removal of legal provisions that are either clearly incompatible with the requirements of the Convention or too easily construed and applied so as to breach those requirements. However, the foundation of many violations is practice rather

[7] The Council of Europe was also provided with the original text of the Draft Code in Ukrainian. This text was consulted by the experts where the language and apparent technical mistakes in the English translation made it difficult to understand particular provisions. The shortcomings of the English translation can be illustrated by the following examples: while subparagraph 2.8 of Article 128 of the original text operates with the wording 'detention of an individual' (затримання особи), the English version refers to 'attachment of property'. Instead of the word combination 'with the view of' in the title of Article 186 and some other provisions regulating the issues of compelled appearance it uses 'in view of' thus altering an important attribute of the measure concerned. The original text of paragraph 3 of Article 242, which suggests that a decision to carry out a covert investigative action is to be taken by investigator, prosecutor and pre-trial judge upon motions of investigator and prosecutor as specified in relevant articles, has been translated as stipulating that an "investigator, public prosecutor, and pre-trial judge in cases specified by the present Code, upon request of public prosecutor or upon request of investigator approved by public prosecutor, shall take decision on the conducting of covert investigative (detective) actions". Although there are often more precise English terms which correspond better to the meaning of those in the original text, the opinion uses the language of the English translation.

than the law. This can partly be addressed by having clear provisions in the law as to the impermissibility of such practice but the latter will only be eradicated or significantly diminished if there is both effective training on the new rules and a sustained effort to develop a Convention compliant approach to criminal procedure.

9. A significant source of violations of the Convention at the pre-trial stage concern the right to liberty and security under Article 5.

10. The violations include instances of detention that is unlawful in Ukrainian and/or Convention terms, including: unregistered detention as a result of discrepancies between the drafting of the apprehension record and the time when the apprehension actually occurred[8]; the use of administrative arrest for criminal prosecution purposes[9]; detention after the investigation without any judicial authorisation[10]; the initial consideration of the application of preventive measures without the presence of the suspect and/or his or her lawyer[11]; the absence of any obligation for judicial authorities to state the grounds when authorising detention on remand[12] or to set any time limit for such detention[13]; the lack of a procedure for the detention of persons pending extradition[14]; and the arbitrary detention of minors[15].

11. In addition violations arise from the police or prosecution reliance on legal grounds without any substantiated reasoning for the use of detention[16]; the failure to bring arrested persons promptly before a judge[17]; the failure of both prosecutors and the courts to advance relevant and sufficient grounds for the use of detention on remand[18]; the failure of the courts to address arguments justifying release that were submitted to them[19]; and the failure to consider alternative - and less restrictive - preventive measures[20].

12. Prompt judicial control of the lawfulness of detention is impeded by such review being linked to other distinct issues in the processing of a case[21]. Furthermore it is not possible to challenge the investigator's decision by which a preventive

[8] E.g., *Osypenko v. Ukraine*, no. 4634/04, 9 November 2011.
[9] E.g. *Doronin v. Ukraine*, no. 16505/02, 19 February 2009 *and Garkavyy v. Ukraine*, no. 25978/07, 18 February 2010.
[10] E.g., *Nevmerzhitsky v.* Ukraine, no. 54825/00, 5 April 2003 and *Kharchenko v. Ukraine*, no. 40107/.02, 18 February 2011.
[11] E.g., *Molodorych v. Ukraine*, no, 2161/02, 28 October 2010.
[12] E.g., *Salov v. Ukraine*, no. 65518/01, 6 September 2005 and *Kharchenko v. Ukraine*, no. 40107/.02, 18 February 2011.
[13] E.g., *Yeloyev v. Ukraine*, no. 17283/02, 6 November 2008 and *Doronin v. Ukraine*, no. 16505/02, 19 February 2009.
[14] E.g., *Soldatenko v. Ukraine*, no. 2440/07, 23 October 2008.
[15] E.g., *Ichin and Others v. Ukraine*, nos. 28189/04 and 28192/04, 21 December 2010.
[16] E.g., *Tkachev v. Ukraine*, no. 39458/02, 13 December 2007.
[17] E.g. *Kornev and Karpenko v. Ukraine and Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011.
[18] E.g., *Nevmerzhitsky v.* Ukraine, no. 54825/00, 5 April 2003 and *Kharchenko v. Ukraine*, no. 40107/.02, 18 February 2011.
[19] E.g., *Svershov v. Ukraine*, no. 35231/02, 27 November 2008.
[20] E.g., *Doronin v. Ukraine*, no. 16505/02, 19 February 2009 and *Khayredinov v. Ukraine*, no. 38717/04, 14 October 2010.
[21] E.g., *Kharchenko v. Ukraine*, no. 40107/.02, 18 February 2011.

measure was imposed or extended under a prosecutor's warrant[22], there is no clear and foreseeable provision providing for challenging detention during the trial stage[23] and judicial decisions authorising detention at the trial stage cannot be challenged on appeal or in cassation[24].

13. There is also no enforceable procedure to obtain compensation for breaches of Article 5 of the European Convention[25].

14. The pre-trial stage also suffers from various problems affecting the investigation which have resulted in findings of violations of the right to life and the prohibition on inhuman and degrading treatment under Articles 2 and 3 of the European Convention.

15. These include: the inadequacy of measures to gather evidence[26]; the absence of medical screening on arrival to detention facilities;[27] the failure to order and delays in ordering forensic medical examinations[28], as well as the fact that such examinations are not comprehensive[29]; the inadequate assessment of statements by witnesses[30]; the failure to institute criminal proceedings or delays in doing so[31]; the failure to carry out an investigation that meets the criteria of its independence and promptness;[32]; the impossibility of the relatives of a deceased person to participate in an investigation[33]; the absence of independent investigating authorities in military forces[34]; and the absence of independent examination of complaints against the actions of investigators and prosecutors[35].

16. There have also been actual findings of ill-treatment by the police[36].

17. Insufficient clarity has been found in the scope of powers concerning surveillance measures and the conditions governing their use, contrary to Article 8 of the European Convention[37]. In addition there have been found to be no appropriate safeguards with respect to the actual use of such measures[38].

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[22] E.g., *Molodorych v. Ukraine*, no, 2161/02, 28 October 2010 and *Pleshkov v. Ukraine*, no. 37789/05, 10 February 2011.
[23] E.g., *Sergey Volosyuk v. Ukraine*, no. 1291/03, 12 March 2009.
[24] E.g., *Molodorych v. Ukraine*, no, 2161/02, 28 October 2010.
[25] E.g., *Dubrovik v. Ukraine*, no. 33210/07 and 41866/08, 15 October 2009 and *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011.
[26] E.g., *Khaylo v. Ukraine*, no. 39964/02, 13 November 2008 and *Mikhalkova v. Ukraine*, no. 1091905, 13 January 2011.
[27] E.g., *Vergelskyy v. Ukraine*, no. 19312/06, 12 March 2009.
[28] E.g., *Lyubov Efimenko v. Ukraine*, no. 75726/01, 25 November 2010.
[29] E.g., *Muravskaya v. Ukraine*, no. 249/03, 13 November 2008 and *Myronenko v. Ukraine*, no. 15938/02, 18 February 2010.
[30] E.g., *Sergey Shevchenko v. Ukraine*, no. 32478/02, 4 April 2006.
[31] E.g., Myronenko v. Ukraine, no. 15938/02, 18 February 2010.
[32] E.g., *Kucheruk v. Ukraine*, no. 2570/04, 6 September 2007.
[33] E.g., *Sergey Shevchenko v. Ukraine*, no. 32478/02, 4 April 2006 and *Kats v. Ukraine*, no. 29971/04, 18 December 2008.
[34] *Ibid.*
[35] E.g., *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008.
[36] E.g., *Afanasev v. Ukraine*, no. 38722/02, 5 April 2005 and *Mikhalkova v. Ukraine*, no. 1091905, 13 January 2011.
[37] E.g., *Mikhalyuk and Petrov v. Ukraine*, no. 11932/02, 10 December 2009.
[38] E.g., *Vladimir Polischuk and Svetlana Polischuk v. Ukraine*, no. 12451/04, 30 September 2010.

18. The use of the preventive measure involving the duty not to abscond has been found to be an unjustified restriction on the right to liberty of movement under Article 2 of Protocol No. 4 as a result of its duration[39] but also its use in respect of offences that were moderately serious[40] or even fairly trivial[41].

19. Inactivity on the part of investigators has been of the reasons for finding criminal proceedings to be unreasonably long, contrary to Article 6 of the European Convention[42]. However, such a finding has also resulted from: other factors such as remittals by the courts for additional investigations, expert assessments and re-trials and [43], the failure of courts to ensure the presence of witnesses and experts[44] and considerable intervals between hearings[45].

20. The trials themselves have been found not to comply with the fairness requirement in Article 6 of the European Convention as a result of shortcomings such as the following: the inability of defendants and their lawyers to cross-examine witnesses benefiting from the witness protection programme[46]; the investigator's power to decide on legal assistances issues, including the removal of a suspect's lawyer[47]; inadequate time and facilities for the preparation of one's defence[48]; the absence of a public hearing[49]; the practice of interrogating a person as a witness under criminal liability for refusal to testify and with no legal aid and then using the statements obtained in the prosecution of that person[50]; the admissibility of evidence obtained by the prosecutor under coercion and without a lawyer being present during interrogation[51]; the failure to secure an equality of arms as result of the non-disclosure of material[52]; the failure to take account of specific, pertinent and important points made by the defence in a judgment leading to a conviction[53]; the hindering of an appeal by not providing a reasoned judgment[54]; unlimited time-frame for lodging an application for supervisory review against a procedural decision that had become final;[55] and the inability of a defendant - but not the prosecutor - to participate in the preliminary hearing in admissibility of a cassation appeal[56].

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[39] E.g., *Ivanov v. Ukraine*, no. 15007/02, 7 December 2006.
[40] E.g., *Pokhalchuk v. Ukraine*, no. 7193/02, 7 October 2010.
[41] E.g., *Nikiforenko v. Ukraine*, no. 14613/03, 18 February 2010.
[42] E.g., *Merit v. Ukraine*, no. 66561/01, 30 March 2004 and *Ivanov v. Ukraine*, no. 15007/02, 7 December 2006.
[43] E.g., *Antonenkov and Others v. Ukraine*, no. 14183/02, 22 November 2005 and *Vergelskyy v. Ukraine*, no. 19312/06, 12 March 2009.
[44] E.g., *Yushchenko and Others*, no. 73990/01, 8 April 2010.
[45] E.g. *Shalimov v. Ukraine*, no. 20808/02, 4 March 2010 and *Izzetov v. Ukraine*, no. 23136/04, 15 September 2011.
[46] E.g., *Kolesnik v. Ukraine*, no. 17551/02, 19 November 2008.
[47] E.g., *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008.
[48] E.g., *Kornev and Karpenko v. Ukraine*, no. 1744/04, no. 21 October 2010.
[49] E.g., *Shagin v. Ukraine*, no. 20437/05, 10 December 2009.
[50] E.g., *Shabelnik v. Ukraine*, no, 16404/03, 19 February 2009.
[51] E.g., *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008. and *Kolesnik v. Ukraine*, no. 17551/02, 19 November 2008.
[52] E.g., *Salov v. Ukraine*, no. 65518/01, 6 September 2005.
[53] E.g., *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011
[54] E.g., *Salov v. Ukraine*, no. 65518/01, 6 September 2005.
[55] *Ibid.*
[56] E.g., *Zhuk v. Ukraine*, no. 45783/05, 21 October 2010.

III. GENERAL OVERVIEW

21. The Draft Code is a substantial document which embodies many positive developments but which, at the same time, is still afflicted by a number of conceptual shortcomings. The former clearly give effect to many of the requirements of the European Convention, as elaborated by the case law of the European Court, but the latter will mean that there are still a significant number of those requirements that will not be fully implemented.

Positive developments

22. The Draft Code has reinforced the intention of the 2007 Draft to depart from the repetitive and cumbersome Soviet type three-step criminal procedure. It rejects the concept of a 'pre-investigative inquiry' that is inherent in the current model, where it precedes and affects a formal criminal (pre-trial) investigation followed by trial and eventual appeals. These inquiries are now carried out by the widest range of law-enforcement officers and other officials of executive authorities. Such a wide scope of bodies and officials vested with actual investigative powers has undermined the independence and efficiency of investigations, pre-trial process and criminal justice in general.

23. It is important, therefore, that the Draft Code has done away with the need to take a formal decision on initiating a criminal case or refusing to do so. It replaces this approach by an immediate recording of a commencement of criminal procedures in the Integrated Register of Pre-Trial Investigations. Besides that, by reinstating the overall principle of direct examination of evidence by trial courts, the Draft Code attempts to counter-balance the current dominance of the pre-trial investigation. Moreover, in contrast with the open-ended approach of the 2007 Draft, it has defined the range of bodies entitled to handle pre-trial investigations (procedures). It proposes to limit this role to three agencies: the Ministry of Internal Affairs, the Security Service and an 'agency performing supervision over the compliance with tax legislation'. Furthermore, it bans any unauthorised intervention of members of 'operative units' into the criminal process[57].

24. The Draft Code takes into account the recommendations of the Council of Europe experts on the 2007 Draft and contains far more advanced provisions securing the fundamentals of the right to liberty and security. Thus, it incorporates an elaborate set of elements supporting the presumption in favour of liberty, including the need to specify the circumstances suggestive of reasonable suspicion and the relevant prevailing risks that would justify a deprivation of liberty. In addition, it rightly specifies the duty to substantiate why these considerations cannot be addressed by alternative measures. It is important to note that the Draft Code provides for a selection of such measures that comprises personal commitment and warranty, bail and house arrest.[58]

[57] Article 44.
[58] However, see further comments in paras. 183-185.

25. Moreover, it introduces a special set of provisions allowing for a kind of judicially controlled intermediate detention of a suspect or accused lasting up to 36 hours[59] that could be applied for the purposes of bringing him or her before a judge with the view of deciding on non-custodial 'measures of restraint'. The Draft Code extends the reasonable suspicion and other above-mentioned requirements over this kind of detention (i.e., a deprivation of liberty pending determination of whether non-custodial preventive measures might be warranted)[60]. Thereby it seems to be establishing an appropriate means of ensuring the attendance of suspects at relevant hearings without remanding them in custody.

26. The Draft Code is also set to remedy the shortcomings of the current concept of special investigative techniques and other intrusive measures referred to as 'covert investigative (detective) actions' that treats them as disassociated from the criminal procedure. In line with the recommendations of the Council of Europe's experts, it incorporates a more elaborate framework concerning their use. As a result, along with the advanced modes of undercover activities and infiltration, this framework now extends to electronic means of communication. At the same time, it offers an improved legislative framework regulating interferences with private and family life and some other qualified rights protected by the European Convention, which however remains rather unsatisfactory and inconsistent.[61]

27. The Draft Code retains a number of advanced provisions countering ill-treatment in the context of criminal procedure that had been already introduced in previous versions. Thus, it reinforces the safeguards of notification of custody and access to a lawyer and doctor[62] by specifying in Article 207 that detention is to be considered as having commenced from the moment when a person is obliged to stay with the competent official or is confined to premises identified by the him or her. As in the 2007 Draft this requirement is further supported by the obligation to bring a detained person to the official premises as soon as possible and the imposition of liability for its breach[63]. It is also important that the Draft Code spells out the duty of pre-trial judges to react to any allegations and other indications of violence or breaches of legal requirements during the detention of criminal suspects.[64] It thus specifies that they should order medical forensic examinations and ensure that these indications are investigated and that the alleged victims are protected.

Remaining Conceptual Shortcomings

28. Notwithstanding that it strives to adapt to the European standards, stating expressly the essential principles to be respected in criminal proceedings, the Draft Code has failed to address or appropriately tackle several conceptual concerns and considerations that have previously been identified by Council of Europe experts and there thus still appear to be some serious flaws in it.

[59] Article 188 of the Draft Code.
[60] Articles 181 and 186.
[61] See the comments in paras. 34-39.
[62] However, see para. 195 on certain shortcomings in designing particular safeguards.
[63] Article 208.
[64] Article 204 of the Draft Code.

Adversarial procedure

29. This is particularly evident with regard to the implementation of an adversarial procedure. In particular, the drafters have failed to take into account the comments regarding the need for a more consistent application of adversarial principles throughout the entire criminal procedure, including its pre-trial stages. In particular, the Draft Code still provides for the pre-trial disclosure of evidence by defence. Thus, according to paragraph 4 of Article 286, the defence will be obliged to grant the prosecution access to the materials it intends to use as evidence at the trial. Although this rule is furnished with the provision that formally allows for an exclusion of the adverse evidence, it does not represent a sufficient guarantee of the privilege against self-incrimination. At this stage of the procedure (completion of pre-trial investigation) and without seeing all the evidence of prosecution, it is indeed difficult to assess the exact character of all the material held by the defence.

30. The adversarial character of pre-trial procedures and principle of equality of arms could also be adversely affected by the formal rule stipulating that the defence should assemble its evidence by means of actions carried out by the investigation[65]. The Draft Code does not provide any clear procedure for the initiation by the defence in such investigative actions and does not indicate the scope of its involvement in them. The possibility of the defendant to gather and present evidence following such investigative actions thus appears to be more theoretical than real in practice

31. Furthermore, the apparent restriction on assembling evidence by the defence to officially conducted investigative measures - despite the broad statement in sub-paragraph 2 of paragraph 4 of Article 45 of a right to collect and produce evidence in court - leads to a considerable procedural disparity. While it should be up to the defence to decide on modalities of presenting evidence and ensuring that it is admitted by the trial court, this rule actually obliges the defence to disclose its evidence in the course of preliminary investigation. This restriction becomes more inexplicable when weighted against the potential of state-backed investigation and range of procedural tools (including covert investigative actions) that are placed at the prosecution's disposal, the results of which will only be made known to the defence during the final phase of pre-trial procedures.

32. The are also grounds for concern regarding the exclusionary rules of evidence. The Draft Code states that illegally obtained evidence shall not be admissible but then fails to introduce adequate mechanisms to expel those elements of evidence from the proceedings.

33. With regard to the right of defence, one essential point is that the right to legal assistance must be adequately guaranteed. In the Draft Code there are numerous provisions describing the right of the defendant and defence counsel. In practice, however, the implementation of these rights casts serious doubts because the defendant without financial resources will only have right to a legally appointed lawyer and be exempted of from having to pay his or her fees in the cases where a defence lawyer is mandatory. This will be, according to the Draft Code, only in

[65] Paragraphs 12 and 3 of Articles 45 and 92 respectively.

criminal proceedings for grave offences (i.e., leading to more than 10 years' imprisonment). As in most criminal justice systems the vast majority of cases (more than 90%) do not deal with grave offences, this means that in the overwhelming majority of proceedings the right to legal assistance through legal aid will not be adequately safeguarded. This will clearly result in many cases in violations of the right to legal assistance enshrined in Article 6(3)(c) of the European Convention.

Investigative measures

34. In spite of the series of recommendations by Council of Europe experts, the Draft Code fails to set out appropriate limits to the wide powers to effect searches and other investigative activities that allow, without any judicial warrant, interference with the right to respect for home, privacy and other analogous values and it lacks any guarantees that would balance them.

35. In addition to the inconsistent application of the general rule requiring a prior judicial warrant for intrusive investigative actions, there are several other shortcomings in the Draft Code that make the framework in issue a very loose one.

36. Firstly, alongside the debatable wording of 'publicly accessible places', which is used in Chapter 21 in dealing with covert investigative actions, it offers incomplete indications as to the scope of the notion 'home'. While this is something that, according to the European Court's case law, includes *inter alia* an office of a company run by a private individual, as well as a legal person's registered office, branches and other business premises, the definition offered in paragraph 2 of Article 230 of the Draft Code has the wording that refers just to 'any premise an individual permanently or temporarily legally owns' and just specifies some particular locations covered by it.[66] Thus, it limits it to those formally owned by a physical person and introduces an additional prerequisite of legality (lawfulness) of their possession. Since the legality of ownership of premises is of limited relevance, if any, to the legitimate purposes embodied by the criminal procedure, the latter component should be seen as undermining the general rule. By introducing the possibility of exploiting this pretext, the Draft Code opens a Pandora's Box for bypassing judicial control over this kind of interference within the human rights concerned.

37. Secondly, unlike the provision that establishes the condition of urgency for entering premises without a prior warrant when carrying out ordinary investigative actions,[67] this condition is omitted from the relevant clauses of Article 246 that modifies the rule in respect of covert ones. Although in both cases it is circumscribed to respectively 'saving of human life, property and hot pursuit' and 'saving human life and preventing the commission of a grave crime or a crime of special gravity', the omission of a specific stipulation referring to the urgency of

[66] The original Ukrainian text uses the word 'особи', which connotes a physical person and individual.

[67] It should be mentioned that the Draft Code inexplicably excludes the possibility of applying these powers for the purpose of conducting searches. Unlike the relevant paragraphs in Articles 234 and 237 that specify such a possibility it in case of inspections and investigative experiments, there is no corresponding reference to it in Articles 231-233.

the situation will easily lead to the practical negation of judicial control over covert investigative activities.

38. Thirdly, notwithstanding the preceding recommendations and the fact that the European Court has been suggesting that the absence of a prior judicial warrant may be counterbalanced by availability of an *ex post factum* judicial review, the Draft Code very inconsistently provides for this additional safeguard for just some of the investigative actions that interfere with the rights in issue. The role that can be ultimately played by a trial court in this regard will be very remote in time.

39. However, the Draft Code has also retained a set of elaborate provisions on analogous measures that are attributed to the category of those that 'ensure criminal procedures'. Their catalogue includes provisional access to objects and documents, provisional seizure of property, and its attachment[68]. The overlap of these measures with searches and other investigative activities and the resultant multiplicity of nuanced procedural arrangements were understandably questioned by the previously mentioned expert opinions. Certainly these measures complicate the legal framework and might be rarely used. Nonetheless they are subject to either a prior judicial warrant or subsequent judicial review[69]. For these reasons, it seems that there is some rationale in introducing these additional but 'safer' avenues for recovering material evidence and securing property that might be used to cause damage.

Administrative detention

40. The European Court has condemned Ukraine for using administrative detention and the detention of vagrants and other analogous frameworks for depriving actual criminal suspects of their liberty without fair trial guarantees, safeguards against ill-treatment and other relevant entitlements being applicable to them[70]. The CPT, in its turn, has recommended that the authorities put an end to such practices. These powers formally fall outside the scope of the Ukrainian concept of criminal procedure[71] but the scale and immediate effects of these practices require that, in addition to the reform of the relevant laws, this is something also addressed in the Draft Code. The most appropriate specific procedural measure would be the introduction of judicial control over investigative activities with persons deprived of their liberty under frameworks other than those concerned with a criminal case.

Investigation of crimes by officials

41. In Article 214 the Draft Code establishes a distribution of jurisdiction in respect of the investigation of crimes committed by the officers of the Security Service and the Ministry of Internal Affairs, with the former investigating those committed by the latter and *vice versa*. This could be regarded as a solution that complies with the standards concerning the procedural obligations under the right to life and the prohibition of ill-treatment and law-enforcement abuses that involve other human

[68] Chapters 15-17.

[69] The latter is envisaged for the provisional seizure of property that now is conditioned by indications for apprehending its proportionality and should be automatically followed by a judicial decision as to its attachment; Articles 164 and 166.

[70] See the cases cited in n. 9.

[71] Most probably that is why the issue has not been touched upon in the comments of Council of Europe experts on previous drafts of the Criminal Procedure Codes.

rights violations. However, it seems that even after its adoption the Ukrainian legal framework will not be able to fulfil these obligations as the arrangement only takes account of the institutional aspects of much more complex requirements for independence governing the procedures concerned. Since both of the institutions involved represent law-enforcement agencies reporting to the executive hierarchy, deploy uniformed officers and bear other attributes that undermine the appearance of their independence and impartiality, this arrangement is hardly likely to meet the requirement of an objective character, which needs to be demonstrated to both the alleged victim and the public at large.

42. These considerations are of particular importance due to the country-specific scale of impunity for ill-treatment and other law-enforcement abuses that has been identified, *inter alia*, by the number of judgments of the European Court and CPT reports. For these reasons, the most appropriate response to this problem would be the establishment of a fully independent police (law enforcement) complaints (investigative) body.

43. On positive point it should be mentioned that the Draft Code allows for the possibility of suspending investigated officials, including law enforcement officers, in the early stages of the criminal procedure. Thus Articles 151-155 envisage that this measure can be applied to suspects and not just to the accused. However, it would be necessary to lower further the threshold of applicability of this measure – namely, a medium-gravity, grave or gravest crime – in the case of law enforcement officers. Due to their special responsibilities and powers they should be subject to the possibility of suspension regardless of the gravity of crime they are implicated in.

Notification of suspicion

44. The Draft Code has retained the modalities of formal notification of suspicion that fall short of meeting all the aspects of the guarantees in Articles 5(2) and 6(3)(a) of the European Convention. Thus they still fail adequately to define the moment from which criminal charges are considered as being brought against a person and, accordingly, the point from which the person concerned is entitled to basic fair trial guarantees. While the European Convention law uses a broad concept that is defined as any form of measures which carry the implication of an allegation of committing a criminal offence, the Draft Code limits them to the moment of detention, application of restraint measures and availability of sufficient evidence. As a result, on certain occasions this could lead to a postponement of the application of the guarantees under the European Convention which would be unacceptable, especially in view of the powers of the investigating authorities and their scope during the pre-trial stage (including those involving provisional seizure and attachment of property or other coercive measures).

45. Furthermore, Chapter 22 - which provides for an immediate notification of suspicion on detention or application of other measures of restraint - fails to refer to the particular provisions of the Draft Code that specify the form and modalities of such notice. As a result, this lapse might breed an interpretation suggesting that suspects are to be advised of their rights and can benefit from other guarantees only from the moment when they are served a formal written notification of

suspicion. It is worth emphasising that for detainees this notification is supposed to be served within 24 hours of their detention.

46. In addition, the formulation in paragraph 2 of Article 272 of the rights about which suspects are to be advised inexplicably differs from their definitive specification in the more general Article 45. Although not all the rights mentioned in the latter are equally applicable in the specific procedural situation of notification of suspicion, this could be the only opportunity for a suspect to benefit from the obligation for the investigating authorities to inform him or her about them. For this reason, it would be desirable to extend accordingly the scope of the rights which a suspect is to be informed of during this procedural action.

Drafting style

47. The above-mentioned inconsistencies can serve as examples of certain shortcomings of legislative techniques being applied by the drafters. The previous expertises paid considerable attention to structural deficiencies, lack of contextual coherence and other shortcomings of the texts of the respective draft codes. Even on the assumption of the specificity of legal language, notions and regional legislative traditions, these expertises suggested that these defects could undermine the overall regulatory merits of the draft codes and the clarity and other qualities of many of their particular provisions.

48. The drafting defects can be illustrated further by the fact that instead of using references to an umbrella clause the Draft Code outlines the right of notification of custody in five different articles[72]. It does not just refer to or mention it but recapitulates its components in each of them. However it does it very inconsistently. Thus, the crucial element related to 'detainee's choice' is only incorporated in the text of Article 13. On the other hand, unlike other clauses in issue, it skips the component of 'whereabouts' and modality of its execution envisaging that this is done by the detainee in person. The respective provisions of Articles 45 and 206, in their turn, omit the word 'immediately' and thus lack another crucial requirement. Furthermore, the latter article and Article 211 do not mention family members and close relatives.

49. While a replication of provisions could be seen as additional guarantee for ensuring their observance, this legislative technique expands and complicates the text. If it is to be used, it requires a high level of consistency between the repetitive clauses.

50. Moreover, while many unnecessary reiterations have been eliminated, there are still numerous provisions providing for the obvious; such as the definitions of 'judge', 'court' or 'trial'

51. Further illustration of drafting defects can be provided by the shortcomings of chapter 21. The overall structure of the Draft Code and relevant articles suggest that it tends to recapitulate the modalities and specify a need for obtaining a judicial warrant for covert investigative actions that involve an interference with the right to respect for home, correspondence, privacy and other components

[72] Namely, Articles 13, 45, 206, 211 and 272.

covered by Article 8 of the European Convention. Thus, in Article 263 it spells them out with respect to inspection of publicly inaccessible places, home or any other possession of a person and, therefore, differentiates it from inspection of public places. However, rather inconsistently it fails to maintain that distinction and level of particularization in Article 265 which provides for the surveillance of an individual, object or location.

52. Another kind of drafting defect can be exemplified by the cursory provisions of Article 253, which provide for judicial control over transmitting information obtained through covert investigative actions. This provision introduces an important safeguard but it does not indicate the basic principles and general modalities of procedures to be followed. Thus it omits to specify any format, scope, addressees and other parameters for the information to be transmitted and it does not indicate who is supposed or entitled to initiate the procedures concerned, etc.

53. Some of the provisions that introduce limitations to overall rules are formulated in general terms that do not meet the requirement that legal provisions should be precise and foreseeable. For example, paragraph 1 of Article 248 specifies that 'information about persons who conducted covert investigative (detective) actions, or were involved in the conduct thereof, *if needed be*, may be indicated keeping the true personal information thereon secret'[73].

54. The examples mentioned are purely of an illustrative nature. If not remedied, this kind of deficiencies will undoubtedly hinder the effective implementation of the Draft Code in practice and might result in findings of breaches of the European Convention's 'quality of law' requirements.

55. In sum, although the language of the Draft Code is clearer and easier to understand than previous drafts, the text still lacks clarity in many places. This might make its use difficult and cumbersome, therefore increasing the risks of misinterpretations or lack of uniformity in its application.

IV. SPECIFIC PROVISIONS

56. The comments on individual provisions of the Draft Code follow the order of its chapters and focus in particular on those provisions that should be revised or could be better formulated. However, some clarifications considered necessary in order to avoid misinterpretations, contradictions and complexities in the application of the Draft Code are also identified.

[73] Exact quotation of the English translation of the text. Emphasis added.

SECTION I. GENERAL PROVISIONS

Chapter 1. Criminal Procedure Law of Ukraine and Its Scope (arts. 1-7)

57. This chapter of the Draft Code includes definitions of several concepts relevant to criminal procedure, as well as rules determining the scope of the Draft Code's application.

Article 1 (Criminal procedure law of Ukraine)

58. This provision, which defines what is 'criminal procedure law', is unnecessary as well as confusing as there are rules applicable to the criminal procedure that are not envisaged in this Code, nor in the Constitution or the applicable international treaties. For example, the rules regarding the structure of the judiciary or the incompatibilities of judges are applicable also to the criminal proceedings. It would be better either to delete this provision or to clarify what is the aim of it.

Article 2 (Purpose of the criminal procedure code of Ukraine)

59. This provision states that the criminal proceedings shall be conducted in the manner established in the Draft Code. However, the Draft Code should also state at the outset that its the rules shall be applied and interpreted according to the European Convention and the case law of the European Court. Otherwise there might be some contradiction between Article 1 of the Draft Code (which states what is considered to be criminal procedure law) and Article.2 which does not say that criminal proceedings shall be conducted according to the criminal procedure law, but that the code lays down the manner in which such proceedings shall be conducted. In any event, as noted in the previous paragraph, Article 1 of the Draft Code is unnecessary. Although Article.9 refers to 'due consideration' of the 'practices of the European Court' in the application of the principle of rule of law, it ought to be clearly stated that the rules of the Draft Code are to be interpreted according to the case law of the European Court. This provision should thus be modified accordingly.

Article 4 (Definition of the Code's principal terms)

60. This provision is essentially correct but it is too long and repetitive and at the same time does not seem to be necessary. Definitions are aimed at clarifying rather than introducing complexity. Many of the definitions contained in this article are already regulated in other laws (for example, the term public prosecutor) or will be defined later when dealing with the precise institution or proceedings (for example what is an appeal or which is the court of cassation). Others are not necessary, because they are common terms that are known by everyone (for example, court, judge or trial).

61. Furthermore, the definition of pre-trial investigation should be recast. Under sub-paragraph 6 of paragraph 1 there is one definition for this term but in the immediately following sub-paragraph the same term is defined in a different way. In addition, the distinction between inquiry (in sub-paragraph 5) and pre-trial investigation should be eliminated as it does not add anything relevant to the pre-trial stage structure while, at the same time, creating additional complexity. Finally the broad definition of participants in sub-paragraph 26 causes problems

when the Draft Code later regulates the rights and duties of the participants with regard to precise procedural acts and it should thus be reviewed.

Chapter 2. Principles of Criminal Proceedings (arts. 8-30)

Article 8 (General Principles of criminal proceedings)

62. It is doubtful whether a list of 'general principles' is needed, as in later chapters all these principles are developed. In any event, if the list of principles is maintained it has to be pointed out that it is positive that this article includes 'the prohibition of double jeopardy' (in conformity with article 60 of the Constitution) and the 'freedom not to self-incriminate', which were absent from the previous drafts. However, the wording could be improved for the sake of clarity. It is thus suggested that this provision starts with a slightly recast paragraph 2 stating, for example: 'Content and form of criminal proceedings shall be in compliance with following principles'. This would allow paragraph 3 to be deleted since, although it is clear that there might be additional principles not specifically mentioned in this article that should also be followed (for example, 'efficiency' or 'impartiality'), it is inappropriate in a provision enumerating the essential principles that govern the criminal procedure to state that the list is "not exhaustive".

Article 9 (Rule of law)

63. A Draft Code is not the appropriate law to include a definition of the principle of 'rule of law', which is usually expressed in the Constitution. However, it does no harm to repeat it in the Draft Code if this is considered important within the practice of the criminal justice system in Ukraine. In that case, it should be considered to add that rule of law essentially means that everyone is subject to the law.

Article 10 (Legitimacy)

64. The first paragraph of this article states that 'Only criminal procedure law of Ukraine defines the way in which criminal proceedings shall be conducted', which is repetitive as this principle is already stated in Article 5 of the Draft Code. It should, therefore, be deleted.

65. There are no further objections to the content of this provision but, as it contains rules regarding to the hierarchy of the sources of law as well as rules of interpretation, the rule of law and the impartiality and objectivity of the state officers, prosecutors and judges, it turns out to be somewhat confusing. Thus paragraph 4 would be better placed under paragraph 2 of Article 9 (interpretation principles), and the content of paragraph 5 also belongs in Article 9. These are minor issues but addressing them would contribute, through a better structure, to a better understanding of the provisions concerned. The provision should thus be modified accordingly.

Article 11 (Equal rights before law and court)

66. This provision appears to be repetitive as the prohibition of discrimination and the right to equal treatment are already stated in Article 24 of the Constitution and have also been previously mentioned Article.7 of the Draft Code. It would thus seem advisable to recast Articles 7 and 11 of the Draft Code into one provision.

67. As to the precise wording of Article 11, there appears to be some contradiction in that paragraph 2 grants 'additional rights' to certain persons (for example foreigners) and at the same time paragraph 1 prohibits any 'privileges' (for example based on nationality). While the objective of the provision as a whole is understood, but the expression 'additional rights' might create some misunderstanding and some reformulation would be appropriate.

Article 13 (Right to liberty and security of person)

68. Paragraph 1 states that 'an individual can be kept into custody, apprehended or otherwise deprived of their right of free movement upon suspicion …'. However, it needs to be made clear that such a step is an exceptional measure. It would thus be advisable to rewrite this paragraph in a negative way:, namely, that 'No one shall be kept in custody unless…'. It should be also added that there ought to be a requirement for "reasonable" suspicion as it is found in Article 129 of the Draft Code. This should thus be modified accordingly.

69. Paragraph 2 follows the safeguards recognized in Article.29 of the Constitution, in the sense that the detained person shall be brought before the judge within 72 hours, and if this requirement is not fulfilled, the detainee shall be immediately liberated. However, it should be made clear that the detainee has to be brought before the judge as soon as possible and that the time of 72 hour is the absolute maximum and that this period of time should not be the norm. This provision, even if it is not contrary to Article 5(3) of the European Convention, needs to be interpreted according to the case law of the European Court in order to avoid the detention period of 72 hours turning out to be the rule rather than the exception.

70. Furthermore Article 13 and paragraph 2 of Article 209 of the Draft Code should be harmonized as they establish different time periods (72 hours in the former case and 60 hours in the latter).

71. Paragraph 4 should be deleted as it is repetitive of paragraph 2. However, it should be noted that any deprivation of liberty that is against the law and fundamental rights will entail criminal and disciplinary liability.

Article 15 (Confidentiality of communication)

72. Although this provision is in conformity with the text of Article 31 of the Constitution and with Articles 246 and 254 of the Draft Code, the use of pro-active investigative measures is only admissible in very exceptional cases, in order to prevent very serious crimes such as terrorism or other forms of grave organised crime. Therefore it should be made clear in this article, as well as in Article 246, what are the serious or grave crimes in which such measures could exceptionally be admitted. The broad reference in Article 15 to only a 'crime of grave or especially grave severity' entails the risk of unjustified use of pro-active investigative measures, which should be avoided by listing in this provision exactly what are the crimes for which they are authorised.

Article 18 (Presumption of innocence)

73. This article reproduces in a very similar way the content of Article. 62 of the Constitution. There are no objections to this rule but it might be appropriate to

reinforce its content by providing that, until his or her guilt is proved, an individual shall not only be considered innocent but shall also be *treated accordingly*.

Article 19 (Freedom not to self-incriminate)

74. The right of non self-incrimination and to keep silent is an essential safeguard for the defendant in the criminal proceedings, stemming out from the notion of human dignity. This article states that 'no one shall be compelled' to declare or testify about facts that might incriminate him or her or close relatives or family members.

75. Two issues might be pointed out with regard to this provision. First, it should mention not only the right against self-incrimination but also the right of the suspect or defendant to remain silent, as is stated in sub-paragraph 4 of paragraph 3 of Article 45 of the Draft Code when notified of the suspicion. Furthermore, it should be noted that the right to remain silent and not to incriminate oneself requires not only that a person be not compelled to do so but also that he or she is immediately and adequately informed about this right. This is stated in paragraph 2 of Article 21 and in sub-paragraph 4 of paragraph 3 of Article 45 of the Draft Code but the existence of this obligation should be made clear specifically with regard to the right not to self-incriminate oneself and to remain silent.

76. On the other hand, this article deals with two different rights, namely, (a) the right not to incriminate oneself and (b) the right not to testify against one's close relatives. This exception to the general duty to give testimony does not only apply to the defendant but to every witness[74]. However, if this provision aims to clarify the principles applicable to the criminal proceedings and to define the scope of the fundamental rights that govern them, the present drafting might lead to some confusion with regard to the concept of the right of non self-incrimination and the right to be exempted from the obligation to testify. Thus the title of this provision should be modified or the right not to declare against close relatives should be moved to another article.

Article 20 (Double jeopardy)

77. Pursuant to Article 61 of the Constitution, which recognizes the principle of *ne bis in idem*, this provision expresses the prohibition on being charged or punished twice for the same criminal offence. However, it should be made clear in this provision that a pre-trial investigation should be stopped as soon as it is known that the person being investigated has already been tried upon the same charges.

Article 21 (Right to defence)

78. Paragraph 1 of this article contains a definition of the right to defence. This definition is not complete since it does not clearly include the right to present evidence. Certainly the reference only to the right to 'give oral or written explanations' could be misleading in this regard and it is thus suggested that this provision be modified to provide specifically for the right to produce evidence.

79. From the viewpoint of systematic structure, to refer under the right to defence in criminal proceedings to the right to appeal to the European Court does not seem to

[74] See paragraph 4 of Article 65 of the Draft Code.

be at all appropriate. Indeed it might give the wrong idea that there is a further jurisdictional tier to grant the right to defence when the role of the European Court is to determine whether or not a High Contracting Party has failed to secure the right to a fair trial or other rights and freedoms under the European Convention. Insofar as the content of this provision is retained, it should be placed in a discrete provision unrelated to the right to defence.

Article 23 (Adversarial approach)

80. Paragraph 1 requires criminal proceedings to be conducted 'on the basis of adversarial approach envisaging independent assertion by the side of the accusation and the side of legal protection of their legal positions' which underlines, even if this is over-complex in its expression, that the aim of the Draft Code is to move towards a more adversarial model of criminal justice where the defendant is not considered as an object or source of evidence and where both parties enjoy similar rights to present their case before an impartial court. This model implies the possibility of a more active involvement of the defendant in the collecting of evidence and participating in the pre-trial stage and this approach is expressly stated in paragraph 2. However, it should be noted that if the defendant does not have the economic means for arranging his or her own evidence gathering, the adversarial approach will remain theoretical and the principle of equality of arms will also be absent. In order to implement an adversarial model, adequate rules on expenses and free legal aid have to be in place but it is not clear from Articles 118 and 120 of the Draft Code whether or not the expenses for experts on behalf of the defence will be covered by the free legal aid system. If this is not the case, the Draft Code might be purporting to establish an adversarial approach for criminal proceedings, but in practice any judgment is likely to rely almost exclusively on the evidence collected by the prosecution. Neither the European Convention nor the case law of the European Court requires the adoption of a specific model of criminal procedure but compliance with them does necessitate that equality of arms and an effective defence are guaranteed. Thus, given the shift towards a more adversarial procedure, it is essential than rules other than Article 23 secure the existence adequate means to ensure the defence rights of those defendants who cannot afford the expense of collecting evidence[75].

81. Paragraph 6 provides that the 'Pre-trial judge, court shall not act in favour of the prosecution or defence' and then requires the objectivity and impartiality of the pre-trial judge. In fact, it is not against the objectivity or the impartiality that a pre-trial judge decides in favour of one of the parties to the proceedings. In fact, every decision will favour one or other party. It is clear that this provision seeks to express the idea of impartiality but the text is confusing. It would, therefore, be desirable to delete the opening phrase of this paragraph as it is not accurate and does not add anything to the second sentence, from which it is clear that the pre-trial judge is required to act according to the principles of impartiality and objectivity.

[75] See also para. 31.

Article 24 (Direct examination of testimonies, objects and documents)

82. The content and aim of this provision appear to need some clarification. If its aim is to state the rule that only evidence produced in court and subject to cross-examination by the parties has evidentiary value, then the first two paragraphs appear to be unnecessary and confusing.

83. Furthermore, if this provision seeks to establish the rule that only evidence presented directly to the court may be evaluated with regard to the issuing of a judgment, the requirement in the first paragraph that the public prosecutor directly examine the evidence also does not seem to make much sense.

84. Finally, it appears that paragraph 6 is so obvious that it could be deleted: a court is clearly not bound by the allegations of any of the parties since otherwise what would be the sense in having the trial itself?

Article 25 (Right to challenge procedural decisions, actions, or omission)

85. It is very positive that the Draft Code explicitly recognizes the right of the parties and participants to the criminal proceedings to make use of the legal remedies foreseen in it in order to challenge decisions, acts as well as omissions. However, the provision in paragraph 2 of the right to challenge court decisions before a higher court 'irrespective of whether such individual did or did not take part in the court hearing' might entail the risk that a party intentionally fails to appear at a court hearing in order to challenge decisions taken at that hearing and thus cause an undue delay of the proceedings. It would be appropriate, therefore, to provide that a voluntary absence from a hearing should be taken into account in deciding whether to admit a challenge before a higher court to a decision taken at that hearing and this provision should be amended accordingly.

Article 26 (Public character of criminal proceedings)

86. This provision establishes the principle of compulsory prosecution, also called in some legal orders the 'principle of legality'. However, the title of this provision - the public character of criminal proceedings - is not the same as 'compulsory prosecution' and should be changed to avoid confusion.

87. Although there should be some limitation of the discretionary powers of the prosecution in with regard to dropping a case before trial (as seen in Article 280 of the Draft Code), it was rightly pointed out in a previous expertise that strict adherence to the compulsory prosecution might be problematic in cases involving juveniles. The provisions in Chapter 38 dealing with proceedings in respect of juveniles do not mention any exceptions to the application of the principle of mandatory prosecution, notwithstanding that most criminal justice systems consider that some discretionary powers for the prosecution are advisable so as to promote the re-education and rehabilitation of juveniles. The suggestion made in respect of prior drafts that it would be appropriate for this provision to refer to possible and precise exceptions to the principle of compulsory prosecution in case of juveniles is thus endorsed and it should be amended accordingly

Article 28 (Publicity and openness of trial)

88. This provision is broadly in compliance with Article 6(1) of the European Convention but its application also needs to take full account of the relevant case law of the European Court regarding rights under Articles 8 and 10, namely, to respect for private and family life and to freedom of expression.

89. Thus the first paragraph, which follows almost literally Article 11 of the Law on the Judiciary, deals with the access to the decisions and information of the trial to the parties, participants and non-participants who allege a legitimate interest. The access to all the decisions regarding a case as well as to all the data relating to the trial may, however, be restricted in cases where the court has, for example, approved witness protection measures and the possibility of exceptions to the statement 'No one can be restricted in the right to obtain in court information on the date, time, and place of his/her trial and on the decisions taken therein' should therefore be recognised.

90. Furthermore it might be advisable to add, as in Article 6(1) of the European Convention, that the publicity of the trial and other court hearings might also be restricted if publicity would prejudice the "interests of justice".

91. In addition it should be noted that sub-paragraphs 4 and 5 of paragraph 2 are repeated, at least in the English version.

92. Paragraph 6 regulates the conditions under which the media may record or film in the courtroom. This is only allowed 'upon permission of the court and the consent of participants to criminal proceedings'. The role of the media in the administration of justice and the conditions under which the trial can be audio recorded for radio broadcasting or shown on television or, is widely discussed among scholars as well as among practitioners. However, to require the consent of 'all participants' to allow the audio recording or filming of the trial court may unjustifiably restrict the publicity of the trial in cases where there is a high public interest in the case. Certainly, having regard to the broad definition of 'participants' in sub-paragraph 26 of paragraph 1 in Article 4 of the Draft Code, it would not seem appropriate for the consent of translators or the bailiff to be required in order to broadcast hearings. It would be preferable, instead of allowing the broadcasting only 'upon permission of all participants', for the court to be required to determine whether any objections are sufficiently weighty either to preclude any recording or filming or to preclude this with respect to a particular person.

93. The scope of the restriction in paragraph 7, which allows information examined in camera to be omitted when pronouncing publicly the judgement, seems excessive, and against the transparency of the justice administration. It would be more appropriate for it to be stated that, while information justifiably requiring protection shall not be read out publicly, there should be no general bar on referring to information examined in camera. in the public reading of the decision.

Article 30 (Language of the criminal proceedings)

94. This provision guarantees the right of the suspect/defendant to use his own language where he or she does not know the State language sufficiently and to be assisted by interpreter and have certain documents translated. As such this provision does not pose any concerns but, if taken with the rules on expenses, it is not clear whether the right to be assisted is free of charges as required by Article 6(3)(c) of the European Convention. Certainly paragraph 1 of Article 120 of the Draft Code does not make any mention of the expenses of interpreters and paragraph 2 of Article 120 does not cover fully the right to be freely assisted by interpreter since it only states that the expenses of translation of 'testimonies given by the suspect, accused and the victim are covered by the State Budget of Ukraine'). Moreover paragraph 4 of Article 120, while providing for the reimbursement of a translator's travel expenses, per diem and remuneration, does not indicate whether the State will cover those expenses for a defendant who does not speak or understand the State language.

95. In consequence, Article 30, in conjunction with Article 120, might not be in compliance with Article 6(3)(e) of the European Convention and its interpretation by the European Court[76]. There is a need, therefore for clarification as to the effect of these provisions and, if necessary, their modification to ensure that the requirements of Article 6(3)(e) of the European Convention are fulfilled.

Chapter 3. Court, Parties, and Other Participants in Criminal Proceedings (arts. 31-83)

Article 32 (Composition of court)

96. According to the fundamental right of the legal judge pre-established by the law, this article defines what will be the composition of the court in the different criminal proceedings. Article 6(1) of the European Convention establishes the right to be tried 'by an independent and impartial tribunal established by law' and leaves to national provisions the regulation of the issues of jurisdiction and composition of the courts, provided the independence and impartiality of the judiciary is safeguarded. The composition of the courts established in this article generally seems adequate, allowing the case to be decided by a single judge if the penalty is not so serious, providing for the possibility of a court of three judges for serious crimes and giving the accused the possibility of a mixed jury trial for cases which involve a life imprisonment sentence.

97. However, one point that might raise concern relates to the fact that the panel of three judges for cases which involve a penalty of 10 years' imprisonment or more will, according to paragraph 3, only be established 'upon motion of the accused'. In cases of such grave penalties, it would be preferable that the court should always be comprised of three judges and not only upon the request of the accused. This is particularly so as such a request might not be well received or misunderstood as personal distrust towards the single judge. For the interests of justice, in criminal cases which can result in such a severe imprisonment sentence,

[76] See, for example, *Kamasinski v. Austria*, no. 9783/82, 19 December 1989 and *Lagerblom v. Sweden*, no. 26891/95, 14 January 2003.

it should be established as the rule in the Draft Code that the decision in such cases has to be rendered by a panel of three judges in any event.

98. Furthermore paragraph 7 needs to be modified to make it clear that a court reviewing decisions upon newly discovered circumstances shall have a different composition from that which originally determined the case so as to avoid a possible breach of the guarantee of impartiality in Article 6 of the European Convention[77].

Article 34 (Territorial jurisdiction)

99. The criteria for defining the territorial jurisdiction of the criminal courts recognized in this article are the usual ones: forum *delictii commissi* and special provisions for connected crimes and offences where the place of commitment is still unknown.

100. However, the rule contained in the first sentence of paragraph 2 may raise some doubts with regard to the compliance of one of the essential procedural safeguards which is the right of the judge pre-established by the law. This right ensures the objectivity of the criteria for identifying the competent court and thus avoids manipulations or case by case selection of courts. The right that the relevant court be pre-established by the law requires not only that the court already exist before the case arise, but also that the rules on jurisdiction and venue are prior to the case and are drafted according to objective criteria. Paragraph 2, which follows paragraph 6 of Article 48 of the Law on the Judiciary, states that 'Jurisdiction of a case involving the accusation of a judge of commission of a crime shall be determined by the Head of the Supreme Court of Ukraine'. The justification of this special rule on territorial jurisdiction could be to avoid that the judge is tried in the same court where he or she holds office. However, this provision would only be acceptable if the determination of the territorial jurisdiction by the Chief Justice of the Supreme Court was made according to objectively established jurisdictional rules.. Without such a requirement there is the risk for judges to be tried by a court which is not determined by the law but by the choice of a single person, namely the Head of the Supreme Court. In order to guarantee the independence of the judiciary and of each judge in particular, the rules on jurisdiction have to be clear, objective and defined from the outset in the law. This provision should thus be amended accordingly.

Article 35 (Instance jurisdiction)

101. Usually criminal codes of procedure, in respect of the principle of *res iudicata*, only exceptionally allow for the reopening of cases which have been adjudicated by a judgment that has become final. For reasons of justice, the procedural rules may accept the breach of the *res iudicata* in favour of the convicted defendant. However, as long as this is an exceptional remedy, the jurisdiction is usually attributed to higher courts, that initially examine whether there are legal grounds that justify the reopening of the case. The attribution to a single higher court guarantees the application of one of the principles of judicial activity - *res iudicata* effect of the judgments - and allows also the application of unified criteria in the reopening of cases. It should be considered, therefore, whether the

[77] See, e.g., *Oberschlick v. Austria*, no. 11662/85, 23 May 1991.

jurisdiction to review or reopen of criminal proceedings upon newly found circumstances should be attributed to the same court or judge who rendered the decision to be reviewed.

Article 36 (Referral of criminal proceedings from one court to another)

102. Under the title of 'referral' this provision introduces changes to the territorial jurisdiction rules for reasons such as the number of witnesses or the residence of the accused. Although some flexibility in the regulation of the territorial jurisdiction is positive, too much leeway and open rules might cause problems in practice, not only with regard to delays but also to certainty. At the end, according to the rules of the Draft Code, a defendant might be tried at the place where the offence has been committed, where he or she resides; where the majority of witnesses have their residence or where the majority of victims live. This is likely to cause considerable uncertainty and also creates the risk of manipulations contrary to the right to the natural judge. It should be clarified, therefore, that the general rule on territorial jurisdiction (*forum delictii commissi*), shall prevail unless the interest of justice justifies the change to the place where the defendant lives, or the majority of victims or witnesses reside. Otherwise the referral to another court can cause undue delays.

103. Furthermore, the possibility of changing the venue without hearing the defendant is not appropriate and thus the text of paragraph 2 should be revised to provide for him or her to be heard first.

104. Finally, there is a need to clarify whether paragraph 5 is providing for the recommencement of the trial or for its continuation. The new start from the beginning promotes the respect for the immediacy principle but, at the same time, it may cause important delays and additional costs. Thus, it should be made clear that the referral of the proceedings should take into account these consequences and try to limit the referrals only to the cases strictly needed.

Article 37 (Court's Automated Workflow System)

105. The application of an automated workflow system is highly positive not only for the rationalization of work but also for safeguarding the right to an independent and impartial judge. Notwithstanding this positive assessment, there is a need to clarify what is meant by the provision in paragraph 3 that the automated workflow system should take into account the 'specialization of judges when assigning cases'. Certainly it is not clear what kind of specialization is meant here since the Draft Code does not refer to the existence of any specialized criminal courts.

Article 38 (Public Prosecutor)

106. The Draft Code, in conformity with the Law of Ukraine on the Public Prosecution Service, provides for a strong prosecution service with a strict hierarchical structure. Attention should be drawn to the perils that entail the high dependency of the investigators on the public prosecutor. The latter not only supervises the pre-trial investigation but also has direction powers, can give precise instructions to the investigators and can even appoint and dismiss investigators with regard to particular investigations. As a rule the control over the investigator's compliance with their professional duties should lie primarily within the relevant agency and only in certain cases should he or she be appointed or removed from a case by the

public prosecutor. It could be said that the public prosecutor is the most powerful institution of the criminal justice system envisaged by the Draft Code but only the future practice will show if this is the appropriate model of prosecution for Ukraine. Furthermore, the provisions in sub-paragraph 4 of paragraph 1 of Article 38, which provide for an exceptional power of the prosecution to carry out 'certain investigatory (search) or procedural actions individually or full-scale pre-trial investigation', contradict the overall aproach to investigation that was welcomed in paragraph 23 of this opinion and should be reconsidered. However, the following comments do not aim to discuss the model of prosecution but the precise regulation in the Draft Code.

107. Paragraph 2, which states that the prosecutor will supervise the pre-trial investigation over judges and other officials, is unnecessary and confusing. This provision is already embedded in the general duty to supervise the lawfulness of all pre-trial investigations[78]. Mentioning in this provision the supervision of cases with specific defendants may give the wrong impression that his or her involvement in such cases will be different from that in investigations concerned with 'ordinary' citizens.

108. Paragraph 5 recalls the independence of the public prosecutor in performing his or her duties. Being an essential principle of the prosecution service, this statement should be placed at the beginning of Article 38 rather than at the end of a lengthy list of duties.

Article 39 (Participation of public prosecutor in court proceedings)

109. The duties assigned to the public prosecutor under this provision are all already mentioned in Article 38 and so this provision should be deleted.

Article 40 (Replacement of the public prosecutor)

110. Paragraph 2 of this provision repeats what is already stated in paragraph 3 of Article 38 and so, to avoid unnecessary repetition, this provision should also be deleted.

Article 45 (Suspect, accused)

111. This extremely long and detailed article lists the rights and duties of the suspect and defendant. It might not be necessary to list all the rights as well as procedural actions to which the defendant or suspect is entitled as all these rights are already expressed and regulated in the Draft Code. However, what is essential for the compliance with the European human rights standards is that these rights are effectively implemented and thus it should be made clear in paragraph 3 that a suspect or defendant should be informed of his or her rights in a clear and proper way.

112. Moreover, as already mentioned in connection with Article. 23[79], the adversarial approach will not be adequately implemented if the disclosure of materials and evidence gathered during the pre-trial investigation is only made once this is completed. For the adequate participation of a suspect or defendant in the

[78] Paragraph 3 of Article 5 and Article 29 of the Law on the Public Prosecution Service.
[79] See paras. 80-84.

gathering of evidence, he or she should have access to the records whilst the pre-trial investigation is being carried out, unless the disclosure would harm the results and efficiency of the investigation. Of course the record shall be disclosed once the pre-trial investigation has finished and before the case proceeds for trial but a suspect or defendant should also generally be granted access before this occurs and sub-paragraph 14 of paragraph 3 should be amended accordingly.

113. It should also be noted that there appears to be an element of repetition in paragraph 3 in that sub-paragraphs 14 and 19 both deal with the right to disclosure of records.

Article 46 (Acquitted, convicted)

114. It should be considered if it is necessary to define the term 'acquitted' as this does not seem to entail any complexities. On the other hand, the second paragraph of this provision stating 'the acquitted, convicted shall enjoy all rights of the accused as set forth in Article 45 of the present Code' is neither accurate nor necessary. Both the acquitted and the convicted have the rights of the defendants, as their position in the proceedings is that of the defendant, or appellant defendant or defendant seeking review, etc. This provision should thus either be deleted or transferred to paragraph 2 of Article 45.

Article 48 (Defence counsel)

115. This provision might be considered unnecessary. Certainly it underlines the lack of necessity for Article 46 since there is no mention in it of the defence counsel being also the lawyer that provides defence for the convicted or the acquitted on appeal, which is self evident.

Article 49 (General rules for defence counsel's participation in criminal proceedings)

116. While it would be legitimate to provide that, before the court or during the legal assistance to the detainee, only one lawyer (or a limited number of them) will be allowed to intervene, the number of lawyers that a suspect or defendant wants to work on his or her defence is a question that is outside the scope of the Draft Code and should not be limited by any legal rule in the way that paragraph seeks to do. This is something that is a matter for the private decision of the particular individual and the agreement or otherwise of the professionals to work in a team. Paragraph 1 should thus be deleted.

Article 50 (Defence counsel's rights)

117. The content of this provision, providing for the right of the defendant to be assisted by counsel and meet him or her privately before and after the first interview, is in full compliance with the European Convention and the case law of the European Court on the right to be assisted by a lawyer. Furthermore it also recognizes the confidentiality of the documents relating to the client-attorney relationship.

118. However, from a legal point of view it is not correct to speak of the 'rights of the defence counsel' as these are rights of the defendant that the defence counsel shall exercise on his or her behalf (the same conceptual mistake is to be found in paragraph 4 of Article 62 when dealing with the 'rights of the victim's

representative') and this provision should be amended to reflect that position. In the same sense, it should be considered whether it is correct to establish a requirement in paragraph 4 for public institutions 'to obey' the defence counsel's legitimate demands. It might be an issue of the translation, but in European countries a public officer is never obliged 'to obey' a private demand and it is taken here to mean that public institutions shall 'attend' or 'show diligence in attending' to the requests of the attorney in so far as they are 'legitimate'. This provision should, in order to implement the adversarial approach stated in Article 23 of the Draft Code, be accompanied by adequate training for public institutions as to how they should collaborate with defence counsel as regards investigation and evidence gathering for the purpose of a criminal procedure. Otherwise it will be difficult to give effect to the objective set out in paragraph 4 of Article 50.

119. Furthermore, there is a need to harmonise Articles 45 and 50. Sub-paragraph 3 of paragraph 3 of Article 45 provides for the suspect's right to have counsel present during interviews and other procedural actions but Article 50 only mentions the right to private consultation before and after the interview. It should thus be clarified what is the role of the defence counsel during the interview and harmonize these two provisions.

Article 51 (Duties of defence counsel)

120. The first two paragraphs of this provision describe the essential duties of the defence counsel in defending the interests of the defendant. However, it might be appropriate to mention specifically the duty of the defence counsel to watch over the compliance of the legal provisions and the respect of the fundamental rights of his or her client during the proceedings, together with the obligation to report on possible violations thereof.

Article 52 (Committing a defence counsel)

121. The terms of paragraph 1 are adequate in order to guarantee the right of the suspect or accused to contact and hire a defence lawyer, either directly or through relatives. As such, it is in full compliance with the European Convention. However, in order to ensure that there are no undue influences over the choice of a lawyer, it might be useful to add that the investigator, public prosecutor and court shall refrain from giving advice to the defendant as to whom he or she could contact, or recommend any professionals to assist him or her.

122. As regards paragraph 3, it is important to emphasise that no public authority (investigator or prosecutor and not even the judge) should be able to appoint a defence lawyer for the defendant: urgency is not a ground to curtail the fundamental right of the defendant to appoint a lawyer of his or her own choice. Furthermore, in case the defendant shall have a duty lawyer, he or she should be appointed immediately by the bar or another independent body and not by the investigator or prosecutor involved in the criminal proceedings. This provision should thus be amended accordingly.

Article 54 (Confirmation of defence counsel's authority)

123. The rule in most continental legal systems in Europe is that upon appearance the defence counsel identifies him or herself as registered attorney. It is also usual that he or she holds an identity card of the relevant bar association proving their

condition of practicing lawyer. In any event excessive formalities should not interfere with the right to legal assistance of the defendant and it would be appropriate for those in this provision to be simplified. Furthermore a written agreement should not be necessary for the provision of assistance where a suspect has just been detained and gives his or her oral assent to the lawyer acting for him or her.

124. In any event, the issues regulated in this provision and Article 55 (agreement between counsel and client-defendant) are ones that more properly belong to the relevant law on the advocacy and the bar. This provision should thus be modified accordingly.

Article 56 (Mandatory participation of a defence counsel)

125. This provision sets out the cases in which assistance by a lawyer is mandatory. As a general rule defence counsel is mandatory for proceedings of 'crime of especially grave severity', i.e., one for which a penalty of more than 10 years' imprisonment is prescribed. For less serious offences, paragraph 1 of Article 58 provides that a defendant can waive the right to be assisted by lawyer.

126. However, particular concerns relating to the right to defence and to equality of arms arise when this provision is linked with the rules on legal aid: free legal aid will only be provided for criminal proceedings where defence counsel is mandatory. This means that, in the vast majority of criminal proceedings, no free legal aid will be granted. Those defendants who lack enough economic resources will thus have to face criminal proceedings without being assisted by a lawyer. The adversarial model is not feasible without a defence lawyer and the absence of legal assistance will thus amount to a breach of the principle of equality of arms[80].

127. Furthermore, the participation of defence counsel is only assured – according to Article 272 of the Draft Code - from the time of notification of suspicion, which might not be at the very beginning of an investigation and thus the defence rights of the suspect —if he or she is not apprehended – could well be infringed.

128. The appointment of defence counsel is – according to sub-paragraphs 1 and 2 of paragraph 2 - also mandatory in cases where the suspect or defendant is an underage 'upon establishing that the person concerned is an underage'. There is a need to modify these provisions so that defence counsel shall be appointed immediately if there are any indications that the suspect or defendant is or might be underage and not just once this has been definitely established. The determination of the age of a person might be very complicated and need different medical expert opinions. During that procedure, until the age of the suspect is determined, the person should be granted the right to be assisted by counsel.

Article 57 (Committing a defence counsel to participate in a particular procedural action)

129. From the viewpoint of the fundamental right to be assisted by lawyer, as has already been noted[81], the appointment of a lawyer should not be done by

[80] See also para. 33.
[81] See paras. 121-122.

investigator, prosecutor or court, even if there appears to be an urgent need. In very urgent cases (and not only to avoid inconveniences), the rule should be to adjourn the relevant procedural act if counsel appointed by the defendant does not appear and issue that lawyer with a warning as to his or her possible liability for any non-appearance that cannot be justified. If the act really cannot be postponed to another day, it is usually the defence lawyer in charge of the case who sends a lawyer of his or her team or another trustworthy lawyer who will substitute for him or her. If this should not be possible, the bar association (the lawyer's self-governing body according to the Draft Code) or an independent body should promptly be requested to provide for a duty lawyer immediately for that special act which cannot be rescheduled. The appointment of lawyer should under no circumstances be done by the investigators or prosecutors and their only function should be to send the request to the bar association. Furthermore any decision regarding the urgent nature of the act should only be decided upon by a judicial authority. The terms of this provision should thus be amended accordingly.

Article 59 (Victim)

130. Paragraph 5 states that an application to be considered as a victim in the proceedings shall be refused in a reasoned ruling of the investigator or the public prosecutor if it is lodged by a person who has not suffered any damage. This ruling is subject to review by the pre-trial judge. However, it should be made clear that the acceptance of a person as victim should only be denied upon manifest data or clear evidence that such person is not a victim. The object of the criminal proceedings is precisely to establish if such damage occurred or not and the victim might be unduly excluded from the proceedings because it is not self-evident from the beginning that he or she has suffered the damage. This is especially difficult to assess at the beginning of the proceedings in cases of material damage to a legal person. This provision should thus be amended accordingly.

Article 60 (Rights of the victim)

131. The style of the Draft Code listing each and every right of each of the parties or participants does not contribute to its clarity. As it has been noted previously[82], this complexity makes the use of this legal instrument difficult.

132. The provision in sub-paragraph 4 of paragraph 1 is unclear. If it relates to the right for damages, this is a right will derive from the judicial decision granting them but it is not a right of the victim to recover or be given property or documents seized from the suspect or accused. If it deals with the right to secure property that actually belongs to the victim, the precautionary measures will be those granted by the judge and they usually do not imply the 'right of the victim to obtain property'. The scope of this provision should thus be clarified.

Article 65 (Witness)

133. Paragraph 2 of this provision lists the persons who 'may not be interrogated as witnesses' about the various matters specified, while paragraph 3 explains that the persons listed under sub-paragraphs 1 to 5 of paragraph 2 'may be released from the duty to keep professional secrets by the person who entrusted them such information'. However, when starting the interrogation of a witness it is not

[82] See paras. 49-50 and 111.

always clear if the questions affect the professional secrecy or not. It will be important, therefore, for every person, before being interrogated, to be informed about their rights and duties, as well as the exemptions of the duty to testify. This provision should be amended to give such a requirement.

134. Furthermore, there are some other confidential relationships that should be also protected, such as the right of journalists not to disclose the sources of their information. This is a right protected in the constitutions of several European countries and should be considered here as a right to refuse to testify in order to protect Articles 8 and 10 of the European Convention. As refusal to testify will, except when there is the right to refusal, entail liability under Article 67, the list of persons exempted should be revised and completed so as to cover all persons to whom professional secrecy obligations apply.

135. Paragraph 4 provides for the right of a witness to waive giving testimonies concerning him or herself and his or her close relatives and family members. The same provision is perhaps unnecessarily repeated in sub-paragraph 3 of paragraph 1 of Article 66. It should be noted that the right to refuse to testify is connected with the right not to self-incriminate or prejudice close family members but it does not mean that a witness cannot be required to answer questions concerning him or herself in general (e.g., do you live in such address? do you visit frequently the suspect?).

Article 66 (Rights and duties of a witness)

136. Sub-paragraph 2 of paragraph 1 recognizes the right of the witness to "benefit from legal assistance" when being interrogated. Usually witnesses are not granted the right to be assisted by lawyer but, if the witness so desires, it shall be permitted. However, it should be made clear in this provision that a witness shall be informed of this right in order to avoid the risk that a suspect is summoned and interrogated as a witness, without being previously warned about his or her rights.

Article 69 (Expert)

137. The Draft Code opts for a model of party-appointed and not court-appointed experts, although Article 326 also enables the judge to appoint an expert. However, in order to ensure equality of arms, legal aid provisions should cover the fees of the expert appointed by the defendant who has insufficient financial resources for this purpose. In practice an expert will only accept an assignment if he or she is adequately remunerated and the expenses are covered from the outset. It is not clear from the Draft Code and the Law on legal aid whether the remuneration of the expert will fall within the scope of the right to legal aid. This matter needs to be clarified and provision for such remuneration should be introduced if it does not already exist.

138. Sub-paragraph 4 of paragraph 4 imposes an obligation on an expert not to disclose to the court any information obtained, without the authorization of the party who employed him or her. It is unclear what is this provision's aim. Is it to protect the adversarial nature of the proceedings by denying the trial judge access to the expert opinion before the trial but, if so, the expert opinion should not be given to the trial court in any case, not even with the party's permission. Yet, if the expert opinion was made upon assignment of the prosecution, the defendant should -

taking into account that there is the obligation of full disclosure of the records after the pre-trial investigation has been completed - have access to all materials and also to the expert opinion and might be free to disclose it to the pre-trial court or present it to the trial court as evidence. The aim of this provision should thus be clarified.

139. It should also be noted that the scope of the prohibition on the disclosure by an expert a specialist, a witness or a translator - in sub-paragraph 4 of paragraph 4 of Article 69, sub-paragraph 3 of paragraph 5 of Article 71, sub-paragraph 3 of paragraph 2 of Article 66 and sub-paragraph 4 of paragraph 3 of Article 68 respectively - on information that came to their knowledge during the fulfilment of their duties in the proceedings should be clarified since, if it is overbroad, it could entail a restriction of their rights under Article 10 of the European Convention.

Article 76 (Inadmissibility for the judge to re-participate in criminal proceedings)

140. There are no objections with regard to the content of this provision but it should be considered whether it could be drafted in a clearer way, avoiding unnecessary and cumbersome repetitions.

Article 78 (Grounds for challenging a defence counsel, representative)

141. There is a need to clarify what is the reason in sub-paragraph 3 of paragraph 2 for preventing a defence counsel from participating in the proceedings when he or she is a close relative of the defendant. It is not immediately obvious why a defendant should not be able to hire his or her close relative as a lawyer.

Article 80 (Proposal for challenge)

142. Paragraph 3 of this provision states that recusals may be presented during the pre-trial stage and during the trial but it should be made clear that a recusal at the former stage shall be formulated as soon as the ground for it becomes known, as is provided in paragraph 4 as regards the admission of the challenge once the trial has started.

Article 81 (Procedure for deciding on a challenge)

143. According to paragraph 1 of Article 81, it appears that the decision on the recusal of the pre-trial judge will be taken by the same challenged pre-trial judge. This is not adequate for safeguarding the right to an impartial judge. The challenge should thus be handed over first to the challenged judge and, if he or she refuses to admit it, the final decision should be taken by another judge.

Article 82 (Implications of challenging a judge, pre-trial judge)

144. It might be advisable to draw attention to the possible consequences of an unjustified self-disqualification. Experience has shown that there might be abuses invoking self-disqualification causes in order to avoid deciding on particular cases which are very complex, time demanding or deal with sensitive issues. Thus, the self-disqualification should always be grounded and reviewed by another judge or court.

Chapter 4. Evidence and Proving (arts. 84-101)

Article 84 (Evidence)

145. It may be a matter of translation but the reference to circumstances which are 'important' for the criminal proceedings would be more appropriately a reference to circumstances that are 'relevant'.

Article 87 (Inadmissibility of evidence obtained through serious violations of human rights and fundamental freedoms)

146. Following Article 62 of the Constitution, which states that 'An accusation shall not be based on illegally obtained evidence or on assumptions', this provision what evidence shall be considered inadmissible Paragraph 2 enumerates which acts are 'in particular' to be considered 'essential violations of human rights' for the purpose of determining inadmissible any evidence obtained thereby. This provision seems to advance in the right direction towards the prevention of abuses in the collecting of evidence, introducing the exclusionary rule of evidence. It should be noted, however, that the definition of acts which are considered 'essential violations of human rights' is not exhaustive given the use of 'in particular'. However, the illustrative nature of the list ought to be made even clearer and the list ought also to have added to it statements obtained without previously informing the suspect or accused of his/her right to remain silent. Other grounds that should render the evidence inadmissible would be evidence produced without respecting the right to cross-examination.

147. While the defining of what evidence is inadmissible is generally dealt with in a positive manner, there does not seem to be an adequate procedure for preventing such evidence from being presented to the trial court. Under the general provisions on evidence at trial in Article 342, the decision on inadmissibility of evidence is not mentioned. Furthermore, when dealing with the proper basis for a judgment in paragraph 3 of Article 367, it is not recalled that a judgment cannot be grounded on inadmissible evidence. Only in Article 93 – which deals with the evaluation of evidence – is there a brief reference to evaluating evidence 'from the point of view of admissibility'. As a result there is the likelihood that the exclusionary rules of evidence remain simply as a statement without real application in practice since it is not evident what steps are to be followed to exclude such evidence from the trial. It also does not appear that this is not a matter to be dealt with in the preparatory proceedings before trial under Article 309 and ff. Resolving this issue is especially important in the case of trial by jury, because the members of the jury should in no case be confronted with the illegally obtained evidence and this is not something dealt with in Article 382. There is a need, therefore, to clarify exactly how inadmissible evidence is to be prevented from being presented to the trial court..

Article 91 (Burden of proof)

148. Article 62 of the Constitution rightly provides that 'All doubts in regard to the proof of guilt of a person shall be interpreted in his favour' but paragraph 3 of the present provision does not really add anything relevant in this regard and actually appears to be confusing in its formulation. It would, therefore, be appropriate for this provision to be recast in a clearer way.

Article 93 (Evaluation of evidence)

149. This provision, which starts by addressing the moral considerations of the investigating, prosecuting and judicial authorities in evaluating evidence and later mentions conscience in this regard, might give the wrong impression that the conscience of individuals in these various authorities should prevail above the legal evidentiary rule which is clearly unjustified; evidence should be evaluated according to the legal provisions, making a rational and logic assessment of all the facts upon a complete and impartial examination of the evidentiary elements that are admissible. There is a need, therefore, for the formulation of this provision to be recast to make this abundantly clear.

150. The statement in paragraph 2 that 'No one evidence shall have probative value' is taken to mean that a single piece of evidence shall have not full probative effect to ground the guilt. However, as was previously pointed out[83], this seems to go back to the legal rules on assessment of evidence or 'system of legal proof' extended in medieval proceedings (*testis unus, testis nullus*), and which has been eliminated from modern criminal procedure codes, once rationalism permeated the criminal proceedings. This exception to the principle of free assessment of evidence does not have a clear justification: the probative effect of the evidence depends on its reliability and consistency. It is true that under certain circumstances, one single testimony, without any other evidentiary support, might not be considered as enough evidence to destroy the presumption of evidence but this is something the court should be able to assess, without having a legal rule imposing such an evaluation. Certainly it is conceivable that there might be case where one single piece of evidence is enough to ground the guilty judgment because it fully convinces the court on the existence of the facts. This provision should, therefore, be deleted.

Article 94 (Testimonies)

151. While stating as a general rule that only testimonies given in court may be evaluated as evidence, paragraph 4 provides for an exception for testimonies 'obtained during special judicial procedures at the stages of pre-trial proceedings'. There is a need to clarify what is meant by 'special procedures'. As the possibility of securing evidence and cross-examining the witnesses before the trial stage is foreseen by Article 222 in urgent cases, it would be appropriate for paragraph 4 to refer to this provision but it should also be indicated whether or not this provision has any other procedure in mind.

152. Paragraphs 6 and 7 appear to be contradictory as the former seems to prohibit the figure of expert witness but the latter admits such testimony provided the parties are granted the right to cross-examination according to the rules of expert evidence questioning. These paragraphs should be harmonised.

Article 95 (Ascertaining reliability of a witness's testimonies)

153. The provision enshrined in paragraph 4 should be harmonized with paragraph 4 of Article 222: while the former allows the interrogation of a witness with regard to

[83] See para. 149.

previous statements to show contradictions or inconsistencies, the latter does not seem to allow that kind of interrogation.

Article 96 (Hearsay testimonies)

154. The exclusion of hearsay testimonies in this provision is subject to so many exceptions that at the end it amounts to its admission with the risk of allowing the use of statements made by the police officers who interviewed the suspect despite paragraph 4 of Article 94. Even if hearsay testimonies are not incompatible with the European Convention[84], such evidence poses questions as to its reliability and should only be admitted under exceptional circumstances. This provision should thus be amended accordingly.

Article 99 (Disposing issues related to objects and documents)

155. Paragraph 5 provides for the preservation of all objects and documents which have been produced to court until the criminal proceedings end with a judicial judgment. Consideration should be given to the possibility of destroying special objects - such as drugs, dangerous elements or objects whose conservation is too costly - once their evidentiary value is secured. Certainly storing high quantities of confiscated drugs until the proceedings are definitely ended - which may take several years - entails severe risks and additional chances for corruption.

Article 101 (Contents of expert's findings)

156. With regard to the expert evidence, it should be clarified who appoints the expert. According to sub-paragraph 4 of paragraph 4 of Article 69 the party employs the expert but it is clear from the Law of Ukraine on the Court Expert Examination that experts can be appointed both by the parties and by the court. This should be made clear in the Draft Code, as well as the interaction between any court-appointed expert and a party-appointed expert.

157. However, as it is provided that the expert shall be warned before the expert examination about his or her duties and the consequences of a misleading expert opinion, there is a need for clarification as to how the appointment of an expert is actually done. Even if it is done on behalf a party, it needs to be clear whether or not the assignment is done by the court.

Chapter 5. Recording Criminal Proceedings. Procedural Decisions (arts. 102-109)

Article 103 (Record)

158. It might not be necessary to list each of the data, acts and objects that shall be included in the record as this leads to a lengthy and over-formalistic provision. It might suffice to state that the record shall encompass all acts, objects and decisions relevant for the criminal proceedings.

159. Moreover, taking into account the broad definition of 'participants' contained in sub-paragraph 26 of paragraph 1 of Article 4, it appears to be excessive that the record has to be signed by all of them. Why should the person who reports a crime or the bailiff be called to sign the record?

[84] See *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005.

160. Despite the length of this article, it is not clear if the record shall be handed over to the pre-trial judge/court or not. Article 108 states that the 'register of pre-trial proceedings records' shall be sent to the court together with the indictment but is this register the same as the whole record of pre-trial proceedings or not. It might be a misunderstanding caused by the translation but it should be clarified what is the aim of elaborating the record, and particularly whether the trial court will have access to it before the trial takes place. In this connection, it is noted that paragraph 4 of Article 287 prohibits the court from being provided with 'other documents' before the trial but it still does not clarify whether or not the register of materials and the record shall be handed over to the trial court.

Article 106 (Use of technical means for recording criminal proceedings)

161. It is appropriate to provide for the criminal proceedings to be audio- or video-recorded as this might ensure the fairness of the proceedings and avoid inaccuracies in a written summary record. The implementation of this provision requires that the investigation premises and the courtrooms are accordingly equipped. This provision should, however, clarify what would be the consequences of non-compliance of the requirement of video- or audio-recording in those cases where this is compulsory. Will the act be rendered void? Shall the trial be conducted even in case it is not possible to use the technical means of recording? As such issues may lead to important practical problems and delays, it should be explicitly stated what happens if in a certain court there are is no such technical equipment or it is out of order.

Article 109 (Procedural decisions)

162. In order to avoid useless repetitions, paragraph 3 should be deleted as its content is already embedded in paragraph 1.

163. Furthermore paragraph 7 - states that the decisions of investigator and public prosecutor shall be binding in accordance with the law - might lead to misinterpretations given any measures restrictive of fundamental rights or according coercive measures require to be authorized by reasoned judicial warrant. There is a need, therefore, to recast the terms of this provision.

Chapter 7. Procedural Time Limits (arts. 112-115)

Article 112 (Concept of procedural time limits)

164. It would be advisable to clarify that any time limits fixed by the court should be such as to allow sufficient time to prepare an adequate defence, with the end of avoiding possible violations of Article 6(3)(b) of the European Convention.

Chapter 8. Procedural Expenses (arts. 116-124)

Articles 116-120

165. These articles establish the rule on expenses and who will bear the costs of travel expenses, fees and other expenses related to witnesses, experts and translators.

166. As to the expenses of translators, reference is made to the observations made when dealing with Article 30[85].

167. The problem of involving experts for the case where the defendant lacks financial resources has also been highlighted when dealing with expert evidence and the adversarial approach defined in Article 23[86].

168. It should be noted that the Draft Code regulates in a very complex way the distribution of expenses and the exceptions to paying them. Articles 116-120 should thus be reviewed to avoid inconsistencies. For example, paragraph 2 of Article 118 and paragraph 4 of Article 119 provide that the fees and travel expenses of the victim's representative shall be borne by the victim but paragraph 2 of Article 120 states that the expenses related to the participation of the victim shall be borne by the State. It would thus be desirable to reformulate these provisions.

Chapter 9. Repair (Compensation) of Damage in Criminal Proceedings (arts. 125-127)

169. It is positive that damage caused to the victim by a criminal offence will be covered by the State in cases of the defendant's insolvency. However these provisions should define the procedure for claiming such damages and whether or not they are to be fixed in the same criminal proceedings instead of generally referring to the 'procedure prescribed by the law'. Thus, although sub-paragraph 7 of paragraph 1 of Article 362 provides, when dealing with the content of the judgment, that the court shall decide 'whether damage caused to the victim … shall be repaired and, if so, in which amount and according to which procedure', this leaves it unclear what are the rules applicable to the issues of damage, how the amount is to be determined and which procedure is to be applied. This provision should be amended so as to clarify these matters.

SECTION II. MEASURES TO ENSURE CRIMINAL PROCEEDINGS

Chapter 11. Summons by Investigator, Public Prosecutor, Court Summons and Compelled Appearance (arts. 128-140)

Article 135. Valid reasons for non-compliance with court summons; Article 136. Consequences of non-appearance on summons

170. In case of the non-appearance for interrogation of the suspect, witness, victim or other participant in criminal proceedings, Article 136 provides for the imposition of pecuniary sanctions. However, such sanctions should only be imposed when the absence is not justified or not communicated. In this sense, the list of valid reasons for non-compliance with a summons in Article 135 is not complete, as there might be other justifiable reasons than those given in it that could impede the summoned person's appearance in court. For example, an expert may have been summoned for another court session at the same date and hour. It is suggested,

[85] See paras. 94 and 95.
[86] See para. 80.

therefore, that a general excuse such as 'any other justified reasons' be added to Article 135 which the court must consider before imposing pecuniary sanctions. Certainly, it should be made clear that the list of valid reasons for non-appearance is not to be considered exhaustive.

Articles 137-140. Compelled appearance, Motion on enforcement of compelled appearance, Consideration of the motion on court summons and Enforcement of compelled appearance

171. These provisions provide for a 'compelled appearance' of a suspect, accused or witness who fails to comply with summons. The measure is described as a 'compulsory forwarding' of relevant individuals to a specified location. Since this action is regulated separately from measures involving deprivation of liberty, the Draft Code seems to suggest that a 'compelled appearance' does not involve any elements of detention.

172. However, the set of the provisions in issue would benefit from a clear (stated) differentiation from deprivation of liberty and greater elaboration of the powers that are given to the officials entitled to perform this measure. It could explain, for example, that it involves escorting the person concerned immediately to the specified (official) location, clarify whether its enforcement allows for the use of physical force and, if so, to what extent, etc.

Chapter 13. Temporary Restriction of the Enjoyment of a Special Right (arts.145-150)

Articles 146-147. Implications of temporary seizure of documents confirming special right and Motion for temporary restriction of a special right

173. These provisions vest detaining persons and officials with the power to temporarily seize documents 'confirming special right' from a detainee suspected of a criminal offence lack any indication of a link between the offence and any of the special rights listed, i.e., a driving license, a hunting permit or an authorization to conduct entrepreneurial activity. Furthermore, the language of these articles appears to make resort to this measure automatic and implies that criteria for apprehension of necessity and, therefore, the proportionality of any such measure are relevant only to a subsequent court decision and have no application to the initial seizure of respective documents. This would clearly be incompatible with the right to peaceful enjoyment of one's possessions under Article 1 of Protocol No. 1. There is a need, therefore, to amend these provisions to ensure that there is both a link between the offence suspected and the seizure and that the initial seizure is actually subject to the requirement of proportionality.

174. Moreover, it would be advisable to envisage that on certain occasions (e.g. drunk driving), this is a measure that could be applied as an alternative to the detention of a suspect.

Chapter 14. Suspension from Office (arts. 151-155)

Article 151. General Provisions Related to Suspension from Office

175. Paragraph 3 outlines the special rules of suspension from office of judges and persons appointed by the President. Being of a cursory character, it leaves out the important nuances related to the special bonds maintained between both categories of officials and the state, specificity of guarantees that apply to judges, as well as some other relevant standards. As such it seems to be only a referential clause but, since it makes no mention of relevant laws, it might be mistakenly viewed as an exhaustive provision regulating the matter. There is a need, therefore, to clarify what other legislation is relevant to the suspension from office and, if there is none, there is clearly a need to elaborate the content of this provision.

Chapter 15. Provisional Access to Objects and Documents (arts. 156-163)

176. The detailed clauses on provisional access to objects laid down in Chapter 15 lack an important component with respect to timing. Considerations of proportionality of this measure require that they stipulate that any judicial warrant providing for it should specify corresponding time-limits for the validity of such access and they should be amended accordingly[87].

Chapter 18. Measures of Restraint, Apprehension of a Person (arts. 173-211)

Article 174. Purpose and grounds for enforcement of measures of restraint

177. There are legal ways for influencing a victim, witness, another suspect, accused, expert or specialist, namely, by means of motions, putting questions and using other procedural avenues. For these reasons, subparagraph 3 of paragraph 1 should specify that it is the risk of 'illegal influence' and not any 'influence' that constitutes a ground for applying for the relevant measures.

178. It is not only a pre-trial judge who should be bound by the fundamentals of the right to liberty and security, including the need to identify reasonable suspicion and the risks outweighing the presumption in favour of liberty. It is important that they equally bind investigators and prosecutors and this obligation for them should thus be explicitly mentioned in paragraph 2.

Articles 176 and 177. Personal commitment and Personal warranty

179. Although it is envisaged by Article 199 that the persons concerned by a personal commitment and personal warranty are entitled to request their modification and invoke subsequent judicial control over their legality, it would be advisable that the present provisions stipulate their time-frame and also require their proportionality.

Article 180. Keeping in custody

180. The wording of paragraph 4 suggests that a judge is 'obliged' to detain a person wanted by foreign countries and subject to extradition. This would be incompatible with the right to liberty and security under Article 5 of the European Convention. This provision should thus be modified so as to leave room for taking

[87] The overall indication suggested in Article 99 (as soon as possible) is too vague. Moreover, the Draft Code does not specify that even this requirement applies to the measure in issue.

into account all the possible circumstances and applying judicial discretion accordingly.

Article 183. Time limits for Consideration of the Motion to Enforce a Measure of Restraint

181. All the prerequisites necessary for meeting the standards established under Article 5(3) of the European Convention are to be fulfilled within the time-limits denoted by the word 'promptly'. For these reasons, paragraph 2 that allows extending it for the purposes of better preparation of defence beyond 72 hours up to five days would be in violation of this provision.

182. Furthermore, it should be mentioned in this regard that the Recommendation of the CoE Committee of Ministers 'On the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse' suggests that the interval between the initial deprivation of liberty and suspect's appearance before a judicial authority should preferably be no more than forty-eight hours. In many cases a much shorter interval may be sufficient. Moreover, it requires that a judicial authority responsible for remanding someone in custody or authorising its continuation, as well applying alternative measures, shall hear and determine the matter without delay[88].

Article 191. Enforcing a measure of restraint

183. Paragraph 5 introduces a set of restrictions and duties that are classified as substitutes to "measures of restraint". However, these obligations involve also considerable restrictions and interference with rights of suspects and accused. The list of such measures includes duties to appear before court or any other public authority; remain within 'certain territorial jurisdiction'; inform the public prosecutor or court of a change of place of residence and/or employment; abstain from communicating with a specified individual or communicate with such person on conditions indicated by a pre-trial judge or court; refrain from visiting specified locations; undergo a medical treatment from narcotic or alcohol addiction; surrender of a passport; and carry electronic means of control.

184. These measures should be subject to certain time-limits and be covered by the entitlements to request their modification and invoke subsequent judicial control over their legality as is envisaged by Article 199 with respect to other measures.

185. Furthermore, some, if not all, of the above-mentioned substitutes could serve as self-sufficient 'measures of restraint'. It would thus be appropriate to include them explicitly in the framework outlined in Articles 173-175 and other relevant provisions of the Draft Code. This would expand the range of alternatives to detention and reduce the need in many instances of other strict measures of restraint.

Article 206. Lawful apprehension by a competent official

186. Due to the importance attached to the right of access to a doctor by the CPT and the evolving case law of the European Court (which has endorsed the various

[88] Rec(2006)13, paras. 14 and 16.

facets of this right under the duty of effective investigation of ill-treatment), it would be appropriate for this right to be explicitly mentioned in paragraph 3.

187. The novel concept of 'moment of apprehension' in Article 207[89] requires its adequate interpretation and implementation. Thus, it would be advisable to specify in paragraph 4 that a detention report should refer to the 'date and *exact* time (hour *and minutes*) *of the moment* of apprehension' and include a reference to Article 207.

188. Moreover, this paragraph, as well as all other provisions of the Draft Code that specify the conditions and timing of an access to a lawyer and relevant rights of the defence, should be adjusted so as to comply with the CPT requirement that such access is granted as from the outset of deprivation of liberty (moment of apprehension) and not just prior to the first interrogation.

Article 208. Bringing to a pre-trial investigation agency

189. The Draft Code rightly establishes a strict scheme of escorting (delivery) of a detained person to an investigating authority. Its rationale suggests that it should extend and include a component providing for registration of the exact time of his or her transfer under its responsibility or admission to the police station or other relevant premises. This aspect currently is and could be further regulated by some bylaws and instructions. However, in line with the above-mentioned considerations, paragraph 2 should be modified so as to envisage a registration of exact time of detainees' arrival or admission in addition to the duty of informing relevant officials.

Article 209. Period of apprehension without pre-trial judge's, court's ruling

190. The comments above concerning a reference to 'the moment of apprehension' and Article 207[90] are fully applicable to Article 209 that specifies the time-limits of custody without warrant.

Article 210. Person responsible for keeping those apprehended

191. The provisions in sub-paragraph 8 of paragraph 3 that set up the obligation of an 'official responsible for keeping detainees' to record any injuries and provide medical assistance to them do not comply with all the crucial components of the safeguard of access to a doctor. First of all, this obligation is to be combined with the detainee's right of access to a doctor 'of own choosing'. Secondly, the provisions should put emphasis on the timing of such access and specify that it is to be granted without delay. This provision should thus be modified accordingly.

192. It should be noted that sub-paragraphs 6 and 7 of paragraph 3 are missing in both the Ukrainian and English texts.

Article 211. Notification of other persons of the apprehension

193. In addition to the highlighted definitional inconsistencies related to the right of notification of custody[91], the Draft Code has overlooked an important component

[89] See comments in para. 27.
[90] See para. 187.
[91] See paras. 44-46.

of this specific safeguard. It is accepted that in view of the need of protecting the legitimate interests of investigation such a notification can be exceptionally delayed for a certain period (a number of hours). However, the CPT standards require that such exceptions should be clearly defined and subject to strict limitations and accompanied with further appropriate guarantees. In particular, any delay is to be recorded in writing with the reasons therefore and approved by an official unconnected with the case, preferably a judge or prosecutor. Accordingly, Article 211 as the most comprehensive provision dealing with the safeguard in issue should be amended so as to remedy this omission.

SECTION III. PRE-TRIAL PROCEEDINGS

Chapter 20. Investigative (Detective) Actions (arts. 220-241)

Article 222. Interrogation of a witness, victim in the course of pre-trial investigation in court session

194. The Draft Code introduces an exceptional format of judicial interrogation of witnesses (victims) in the course of preliminary investigation. This exists in many jurisdictions and serves the justifiable purposes of protecting witnesses or securing judicial interrogation in circumstances where there should be no delay. However, the present provision has furnished it with some unacceptable imperatives. In particular, it introduces a ban of questioning the same person during subsequent court proceedings unless this is necessary for clarifying some novel circumstances. Moreover, it specifies that in certain situations this format can be applied without the defence being present. In spite of that, it does not envisage any exemptions from this ban even in circumstances when relevant grounds cease to exist or the defence could not attend the interrogation due to certain excusable reasons. As a result, these imperatives reverse the concept of immediacy of a trial and relevant aspects of its fairness and they should thus be deleted.

195. Furthermore, there is a need to clarify whether previous statements by a witness can be used or read out to assess his or her reliability and credibility at any subsequent interrogation of the witness concerned.

Articles 233, 234 and 237. Execution of the ruling to authorise search of a home or any other possession of a person, Inspection and Investigative experiment

196. The rules on execution of searches, inspections and investigative experiments in these provisions provide for an unfettered discretion for investigators as to securing the presence of the suspect, defence counsel or some other participants of the criminal procedures during these investigative actions. They disregard character of such investigative activities, their relation to home, premises or other possessions of the persons concerned. They also overlook instances when they are carried out upon motions of the defence.

197. The general rule should be that those implicated and not just the suspects, as well as their defence lawyers should be present and can consult each other prior to making statements or signing the records. At the same time, the overall condition could be furnished with provisions referring to the need to act without delay and other exceptions.

198. These provisions should thus be amended to take account of all these considerations.

Chapter 21. Covert Investigative (Detective) Actions (arts. 242-271)

Article 245. Time in which the pre-trial judge's ruling to allow conducting a covert investigative (detective) action is valid

199. Paragraph 5 contradicts the principle of proportionality since it allows the carrying out of covert investigative actions when they cease to be necessary. It should be amended so that a public prosecutor should (and not may) 'take decision to discontinue conducting of a covert investigative (detective) action if such action is no longer needed.'

Article 251. Measures to protect information, which is not used in criminal proceedings

200. This provision allows for the destruction of information, objects and documents obtained as a result of covert investigative actions and deemed to be unnecessary for subsequent pre-trial investigation. However, there is link to be made to the obligation in Article 249 to notify individuals about such actions that concern them. Thus Article 251 should include some provision securing the rights of these individuals in view of and before any decision as to destruction is taken and executed. Moreover, it would be appropriate to provide for the destruction of an information carrier (tapes, CD-ROMs etc.) as well as of the information itself. This provision should be amended accordingly.

Article 256. Audio, video monitoring of an individual

201. This provision – which deals with audio and video monitoring of individuals - has incorporated an additional justification for an exception to the need for a prior judicial warrant for the carrying out such intrusive investigative actions[92]. It refers in this respect to the written consent of at least one of the persons (participants) involved in the monitored activity. However, it is not sufficient to absolve an investigation from obtaining a warrant in relation to another person, unless it is an action that really cannot be delayed and, in the specific circumstances of the case, the involvement of a particular person could not be envisaged beforehand because there is no information about other persons being concerned by the action. Thus, this exception should not apply to the monitoring of two or more persons identified by an investigation as supposed to be acting together without specifying all of them in the warrant

Article 267. Control of the commission of a crime

202. The provisions dealing with the set of covert investigative actions embraced by the title 'Control over commission of crime' are devoid of any stipulation specifying a need for good reasons to suspect the person(s) concerned in relevant criminal activities. Accordingly, in addition to a general reference to the prohibition of incitement (instigation of the offence), Article 267 should

[92] See paras. 34-39.

incorporate such an element that would counter 'fishing' and other faulty methods of suppressing criminal activities.

203. Although the European Court acknowledges the complexity and time-consuming nature of relevant international procedures, a suspension of investigation under the pretext of recourse to international legal assistance, as is suggested in sub-paragraph 1 of paragraph 3, undermines the concept of pro-active control over timeliness of pre-trial procedures. For these reasons, it would be more appropriate to address the need for additional periods of investigation when it involves international legal assistance by providing for a specific ground for extending the maximum periods of preliminary investigations and this provision should be amended accordingly.

Chapter 24. Completion of pre-trial investigation. Extension of time limits for pre-trial investigation (arts. 279-293)

Article 279.General provisions related to the completion of pre-trial investigation

204. The word combination 'as early as possible' (the original text uses 'найкоротший строк' which corresponds to 'the shortest possible time') in paragraph 1 and some other related clauses seemingly introduces a higher standard than that denoted by the European Convention's right to trial within a reasonable time.

205. However, regardless of its real content, the standard remains of declarative character. This is because, firstly, the Draft Code does not explicitly provide for an appropriate judicial remedy for ensuring it (as it is required by the case law of the European Court)[93]. A second reason is that in Article 279 this right is attributed to an accused only. Hence, it contradicts Article 291 which envisages that an extension of the term of investigation can be objected to by a suspect and defence counsel. Thirdly, the Draft Code does not offer any actual procedure for the 'dismissal of such [belated] charges through closure of the proceedings', as indicated in paragraph 1.

206. In practice, the domestic 'shortest possible' or European Convention's 'reasonable time' standards are likely to be disregarded, with a high probability of the latter being breached by sticking to formal terms (deadlines) regardless of the complexity of the case. Appropriate additions to this provision should be made.

Article 286. Disclosing materials to the other party

207. Paragraph 9 introduces a tight requirement for familiarisation with case materials. It obliges the defence to compete it 'as soon as possible' and thus contradicts the obligation under Article 6(3)(b) of the European Convention to provide an accused with 'adequate time' for the preparation of his or her defence. This provision should thus be brought into line with the European Convention standard.

[93] Paragraph 3 of 291 specifies that the defence is entitled to submit its objections to the prosecutor supposed to take a decision on extension of the term of pre-trial investigation.

SECTION IV. TRIAL PROCEEDINGS IN COURT OF FIRST INSTANCE

Chapter 27. Preparatory Proceedings

Article 311 (Completing of preparatory proceedings and assigning trial)

208. After the preparatory court session is completed, paragraph 2 provides that the trial shall be assigned for trial ten days. There is a need to clarify whether this is the fixing of the trial date or the actual holding of the trial. The latter would almost certainly be incompatible with Article 6(3)(b) of the European Convention as there would be an insufficient amount of time, especially in complex cases, to examine the materials under paragraph 2 of Article 312 and adequately prepare the defence.

Chapter 28. Trial (arts. 313-362)

Article 314 (Invariability of the court composition)

209. It generally seems appropriate to provide that, in the case the trial judge or one of the judges of the trial court cannot fulfil his or her duties once the trial has started, the trial shall re-start unless the failing judge is substituted by the reserve judge who followed the sessions. However, there is a need to clarify what shall happen with the evidence that has already been produced; shall it be repeated in any case or shall, under certain circumstances, the change of one of the judges not render all the evidence received void. Taking into account that all the trial sessions have to be video-recorded it seems to be against the right to a fair process within a reasonable time, to require the re-start of the proceedings in all cases where one of the judges has to be substituted. Furthermore, if the parties do not object to the validity of the acts already carried out, it does not seem essential to re-start the trial. In complex cases the need to re-start the trial should be balanced with the possible loss of important evidence. As the immediacy principle (direct examination of evidence by judges who render the judgment) can be accomplished by reproducing the video-recording, the absolute requirement to re-start the trial from the beginning should be reconsidered.

Article 316 (Judge presiding in court session)

210. With regard to the power of the presiding judge to remove from the trial 'everything which has no importance for criminal proceedings', it should be made clear that the parties shall have the right to object any decision taken under this power and to challenge it also by way of appeal. This is of particular importance with regard to evidence, which might be declared as irrelevant or time-consuming by the court without sufficient justification. The absence of a remedy in such situations would be contrary to Article 6 of the European Convention.

Article 319 (Implications of the public prosecutor's and defence counsel's non-appearance)

211. In the event of the non-appearance of the public prosecutor or defence counsel when this is mandatory, paragraph 1 provides for the adjournment of the trial and for the court to 'take measures to ensure their appearance in the next court

session'. Certainly no coercive measures should be adopted by the court against a prosecutor or a lawyer based on their non-appearance and only notification with warning of possible liability would be admissible. It should in fact be the Law on the Advocacy that establishes the professional or disciplinary sanctions for negligent compliance with the duties of lawyers. There is a need, therefore, to clarify what kind of 'measures' are meant here.

Article 321 (Implications of the witness's, specialist's, interpreter's and expert's non-appearance)

212. In case of the non-appearance in court of witness, experts, specialists or interpreters, this provision refers to the imposition of the pecuniary sanctions regulated in Articles 135 and 136 on summons and compelled appearance. However, such sanctions should only be imposed when the absence is not justified or not communicated. As has already been noted[94], the list of valid reasons for non-compliance with summons of Article 135 is not complete, as there might be other reasons that could impede the summoned person's appearance in court. For example, an interpreter may have been summoned for another court session at the same date and hour. The suggestion previously made, that a general excuse such as 'any other justified reasons' be added to Article 135 which the court must consider before imposing pecuniary sanctions, is thus also needed where Article 321 is being applied.

Article 324 (Measures to be taken in respect of violators of the order in the court)

213. In exceptional cases, where the defendant has to be taken out of court for serious misconduct during court session and has not appointed a defence lawyer, this provision requires the court to appoint defence counsel and give the latter time to prepare his or her defence. However, it needs to be made clear that the court should actually request the bar association (or an independent body governing advocacy) to appoint this lawyer. In other provisions the Draft Code refers to the procedure of appointing lawyer in cases of legal aid and it is not clear why this has not been done here. Furthermore, it should also be stated that the trial should be halted while the appointed defence lawyer who is taking over the case prepares the defence.

214. In addition, as the appointment of a lawyer may cause delays, consideration should be given - for reasons of efficiency – to the possibility of using the means provided for in Article 329 (proceedings through video conference), particularly where the criminal offence is not grave.

Article 325 (Imposing, revoking, or changing a preventive measure in court)

215. The reference in paragraph 2 to Article 18 should be to 'Chapter 18' of the Code but this may just be an error in the English text.

Article 326 (Conducting expert examination upon court ruling)

216. It should be noted that the appointment of an expert by the court during trial - on its own motion or upon that of the parties - might require the suspension and adjournment of the trial. In order to avoid undue delays, the necessity to appoint expert at this stage of the proceeding should be balanced with the need to avoid

[94] See para. 170.

such delays. In any case, wherever possible, the trial should proceed and witnesses summoned should be examined while the newly-appointed expert accomplishes the required expertise so that the motion for a court-appointed expert does not automatically cause an interruption to the trial.

Article 329 (Conducting of procedural actions during court proceedings through video conference)

217. Any procedural actions conducted through video conference should, except in cases where special protection measures are in place pursuant to paragraph 9, comply with the requirement in Article 322 that court sessions are open and public. There is a need for confirmation that this is the effect of these two provisions.

Article 331 (Changing a charge in court)

218. The possibility of changing the charges by the accusing parties, envisaged by this provision should only be exceptionally admitted they will entail a higher penalty for the defendant and, in any event, this should be subject to approval by the court unless the change of charges involves just a change of the legal qualification of the facts without increasing the penalty. Certainly the fact that new factual circumstances appear during trial is not enough reason to change the scope of the proceedings as this might affect the whole defence strategy of the defendant. Moreover, if such a change is admitted, the three days' adjournment envisaged in paragraph 4 might not be enough to prepare the defence, not to say, to collect new evidence on those new factual circumstances. This provision should thus be amended to require the court's approval for a change, subject to the exception noted, and to allow for a longer adjournment.

Article 332 (Bringing an additional charge)

219. In case of admitting additional charges, paragraph 2 provides for the adjournment of the trial but 'not more than for fourteen days'. This maximum period might not, however, be sufficient, considering that during those days the preparatory court session has to take place and the defence will also have to prepare for the additional charges. It would be more appropriate to establish that the time period of 14 days might be extended upon motion of the defence and that, in order to avoid undue delays, some of the 14 day period can be waived by the defendant if he or she does not consider so much time is needed to prepare the defence regarding the additional charge.

Article 344 (Examination of the accused)

220. The provision in paragraph 3 does not seem to be appropriate as a defendant should not be required to abandon the court room while another accused is being interrogated. The idea of removing one defendant while another testifies, and then allowing the one who was removed to re-enter the court room and put questions to the accused who testified in his or her absence does not seem to be fully consistent with either the right to cross-examination or the need to protect certain witnesses. Any relevant security issues should be addressed through the adoption of protection measures, which are not explicitly provided for in this article This provision should thus be amended accordingly.

Article 345 (Examination of witness)

221. Paragraph 9 allows for the possibility of testimony being given through the use of technical devices – such as video-conferencing – in order to prevent the identification of particular witness. However, for this provision to be in line with the case law of the European Court[95] and Council of Europe Recommendation (2005)9 of 20 April 2005 on the protection of witnesses and collaborators of justice[96], it should be amended to underline the exceptional character of the use of anonymous witness as well as provide to the defence for the possibility of challenging the need to maintain the anonymity of particular witness.

222. Paragraph 10 repeats in relation to witnesses exactly what was already provided for under paragraph 2 of Article 344 in relation to the accused and it would be desirable to avoid such repetition through having a general provision on giving testimony. The same applies to paragraph 11 of Article 345, which is a repetition of Article 344.

Article 347 (Specific features of examining a minor or underage witness, victim)

223. The measures foreseen under this provision to protect the rights of a minor or underage person testifying as witness or victim do not seem to be sufficient. Depending on his or her age and the type of offence involved in the proceedings, additional safeguards for his or her psychological stability may need to be adopted. Particularly in cases of child abuse, the child should not be brought to the courtroom but be interrogated through the assistant of a psychologist or pedagogue in another room, more appropriate to his or her age and without the public nor the defendant being present. The use of video-conferencing should also be considered as a means of protecting the child from additional suffering and trauma, recalling an aggression or facing the defendant. These are more appropriate approaches than removing the defendant - as paragraph 4 envisages – and this provision should be amended accordingly.

Article 351 (Examination of documents)

224. The meaning of paragraph 1 - which provides for the possibility of the defence to request the disclosure of 'records of investigative (detective) actions' to the trial court is unclear as, in conformity with Articles 286 and 312, the defendant and his or her counsel should be granted full access to the records and material of the criminal proceedings once the pre-trial investigation has been completed. If these provisions have been complied with, there should not be a need for any additional request to disclose 'detective records' at the trial stage. Article 351 should thus be reviewed for possible inconsistencies with regard to Articles 286 and 312 or it should be made clear what are the 'detective documents' that might be kept

[95] See, e.g., *Kostovski v. The Netherlands*, no. 11454/85, 20 November 1989, *Windisch v. Austria*, no. 12489/86, 27 September 1990 and *Ludi v. Switzerland*, no. 12433/86, 15 June 1992.

[96] Paragraph 19 of which provides that: 'Where available, and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal justice and the rights of the parties. The parties should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge'.

undisclosed to the defence party and what is the purported justification for this non-disclosure.

Article 354 (Field inspection)

225. For efficiency reasons a field inspection at the trial stage should only take place exceptionally as it is a procedural act which is complex to organize, may entail much time and costs and, in any event, will cause the interruption of the court sessions. Additionally it should be mentioned that a field inspection is not generally appropriate in proceedings involving a jury. It would be preferable in such cases for any field inspection to have taken place during the pre-trial stage, subject to mandatory video-recording so that such an inspection would not then be required during the trial in the vast majority of cases.

Article 355 (Court actions in case the accused is found incompetent in court session)

226. There is a reference in paragraph 1 to 'Article 39' which should in fact be to 'Chapter 39' of the Draft Code but this may just be a problem concerning the English text.

Article 361 (Resumption of trial)

227. The possibility envisaged in this provision of resuming the trial, once it has been concluded and the court has retired for deliberations on the judgment, should be deleted. It is strange for such a possibility to exist in an adversarial procedure and it could distort the essence of the trial. Any issues that are unclear should be resolved before the ending of the court session but any found subsequently to should be determined by the court according to the rules on the burden of proof.

Article 362 (Issues to be disposed by court when passing a judgment)

228. What has previously been said regarding the issue of damages is equally applicable to this provision[97].

229. Furthermore, the effect of the trial court's decision as regards compensation for any damage caused to the defendant in the course of criminal proceedings is unclear. According to paragraph 6 it is possible for a defendant, having got a decision on this issue, still to have resort to a (presumably civil) court, which seems inconsistent with the principle of *res iudicata* as it allows the same issue to be decided twice by different courts. There is thus a need to clarify the scope of this provision.

Chapter 29. Court Decisions (arts. 363-374)

230. Consideration should be given as to whether this is the appropriate place in the Draft Code to include provisions regarding the type of court decisions, their formal requirements and their content. Being general rules regarding procedural acts, it would be more appropriate from the viewpoint of systematic order to deal with these issues in Section I under the 'General Provisions'. Moreover, the

[97] See para. 169.

regulation on the content of the judgment seems excessively lengthy and detailed. However, this is a matter of legislative style and does not have any bearing on compliance with the European Convention.

Article 369 (Adoption of court decision and separate opinion of a judge)

231. According to paragraph 3 provision (similarly to Article 339 in the existing Criminal Procedure Code), judges may add to the judgment their own separate opinion in writing. Such an opinion shall not be pronounced and will only be disclosed in the review proceedings or if there is a proceeding against the judges for knowingly rendering an illegal judgment. However, such undisclosed dissenting opinions do not promote the transparency of justice and the need for such a provision should be reconsidered.

232. This comment is equally applicable to paragraph 4 of Article 385, which allows jurors to submit a dissenting opinion.

Article 371 (Releasing the accused from custody)

233. It is not clear from paragraph 2 when the court shall release a defendant on whom a sentence of imprisonment has been imposed and this provision should be amended to specify when this can occur.

Article 372 (Measures of caring for underage, disabled and preserving property of the accused)

234. It is appropriate to provide for the taking of measures with regard to persons that need care, as well as with regard to any property of a convicted defendant which will remain unattended. However, in the case of such property, it is only appropriate for such measures to be adopted at the defendant's request and paragraph 2 should be amended accordingly.

Chapter 30. Special procedure of criminal proceedings in the court of first instance (arts. 375-385)

§ 1. Simplified Procedure for Criminal Misdemeanours

235. Articles 375 and 376 raise concerns with regard to respect for the right to defence. It should be noted that in cases of simplified procedures for misdemeanours, the decision will be taken upon the guilty plea of the defendant and without his or her appearance before the deciding judge. Every legal system has to adopt measures to deal with overloaded criminal justice systems and thus introduce shortcuts in the proceedings or fast track, abbreviated or simplified proceedings. The simplified proceedings regulated here very much resemble German court order proceedings. However, the need to handle mass criminality regarding minor infringements efficiently does not allow for the disregard of procedural safeguards which might be essential even in cases dealing with misdemeanours. The simplified procedure certainly might entail risks of possible abuse at the pre-trial stage. The trial in absentia for these misdemeanours would only be acceptable if the defendant has been assisted by lawyer when pleading guilty and waiving his or her right to be present at trial. Otherwise this provision entails serious risks for the

right to access to court and right to a fair trial. This provision should thus be reviewed and amended accordingly.

§2. Proceedings in Trial by Jury

236. There is very limited scope for the use of jury trials, namely, only upon motion of the defendant in cases where the criminal offence entails a life imprisonment. The model chosen is the mixed jury trial, where two jurors will sit in panel together with the professional judge, who will direct the deliberations and put the questions to be decided to the jurors. This model is perfectly compatible with the European Convention but further consideration should be given to whether this is a suitable model of jury system for Ukraine.

237. Jury trial has played a significant role in framing the modern criminal justice systems, especially in helping to protect the independence of the judicial power and giving relevance to the event of the trial. Thus it undoubtedly contributed to enhance the procedural safeguards of the accused by establishing an adversarial trial as a model. At the same time, it has reinforced the principles of orality, immediacy and equality of arms in the development of the trial. The presence of the jury has strongly influenced the form of the trial, the presentation of the facts, the exclusionary rules of evidence and respect for the rights of defence.

238. In those systems where democracy is still not very strong and needs to be supported, the use of jury trial may be considered as a very useful institution to avoid or diminish risks for the judiciary and its independence. Equally, for a system that is making a transition from an 'inquisitorial' procedure to an 'adversarial' one, the establishment of the jury will force the transformation towards an oral, concentrated trial before an impartial judge where the role of the parties is essential in presenting the evidence and ultimately in the result of the trial. Thus the limited scope of the jury trial should be reconsidered as, according to Article 378 of the Draft Code, only will take place upon the motion of the defendant and for crimes punishable with life imprisonment

Article 380 (Rights and Duties of Jurors)

239. When listing the rights and duties of the jurors this article does not mention the possibility for the jurors to take notes during the trial and the presentation of evidence with a view to using them later during their deliberations. This is something that should be included in this list.

240. Sub-paragraphs 4 and 6 of paragraph 2 prohibit the juror from communicating issues regarding the criminal proceedings. As such they are partly overlapping but the prohibitions in them also seem to be too broad. While it is appropriate to prohibit the disclosure of deliberations or to comment on the proceedings while they are taking place, an absolute ban on them talking to anyone about any aspect of the proceedings without the court's permission once those proceedings have ended is likely to infringe their rights under Article 10 of the European Convention. There is a need to refine the scope of this prohibition to matters which ought justifiably to be kept secret.

Article 382 (Administering Oath to the Jury)

241. The comments previously made in respect of Article 87 on the admissibility of evidence and the exclusion of illegally obtained evidence[98] are also relevant to this provision

SECTION V. CRIMINAL PROCEEDINGS RELATED TO REVIEWING COURT'S DECISIONS

Chapter 31. Criminal Proceedings in the Court of Appellate Instance (arts. 386-416)

Article 386. Court decisions which may be challenged in appellate procedure

242. The substance of this provision is not in itself problematic but its formulation could be the source of confusion. This is because paragraph 2 begins by repeating sub-paragraph 3 of paragraph 1 but then introduces the concept of a 'court decision ending proceedings'. and this is followed by a sentence specifying the possibility of making objections against 'such rulings' in an appellate complaint 'against a judgment or other court decision ending proceedings in a court of first instance'. There are two uncertainties regarding paragraph 2. Firstly, it is not clear whether or not it is the rulings made in the course of such decisions rather than the decisions themselves that are not generally appealable as there is a reference in paragraph 2 to appellate complaint against a court decision ending proceedings in a court of first instance. However, that statement gives rise to the second uncertainty as paragraph 1 does not mention the possibility of an appeal against court decisions ending proceedings. It would be clearer if paragraph 1 referred to that possibility and the repetition in paragraph 2 were not retained. Given that the presumed aim is stop appeals against most rulings being made in the course of a trial but to allow objections to them to be raised as part of an appeal against a judgment or court decision, it would be clearer to state that objections to rulings not subject to the possibility of a specific appeal can be made in an appeal against a judgment or court decision.

243. It would also be more straightforward if the substance of paragraph 3 were added to the list of matters appealable in paragraph 1.

244. Furthermore, this article gives the impression that judgments, unlike rulings, are appealable without any limitation but that is not in fact the case as paragraph 1 of Article 388 makes clear. It would be clearer if Article 386 was specifically made subject to paragraph 1 of Article 388.

Article 388. Specific features of appellate challenge of certain court decisions

245. In view of the potentially grave risks that a reconciliation or plea agreements can have for the enjoyment of the right to a fair trial under Article 6 of the European Convention if they have been approved in circumstances where the requirements in paragraphs 4 to 6 of Article 467 have not been fulfilled, the possibility of an appeal by the accused, his or her defence counsel or legal representative on the ground that those requirements were not met should be introduced to the limited grounds of appeal against a judgment based on such agreements in paragraphs 3 and 4. Although these paragraphs provide for an appeal on the ground that there

[98] See paras. 146 and 147.

was a failure to advise him or her on the implications of concluding an agreement, this does not meet the concern that the judge approving the agreement reaches an unjustified conclusion that the requirements in paragraphs 4 to 6 of Article 467 have been fulfilled.

Article 394. Implications of filing an appellate complaint

246. Paragraphs 1 and 2 of this provision are slightly contradictory in that the former refers to the filing of an appellate complaint deterring the execution of the judgment or ruling concerned except in specified cases but the latter states in absolute terms that execution shall not be deterred by the filing of an appellate complaint. It would be better if the reference to execution in paragraph 1 were deleted.

247. In addition it would be clearer if paragraph 1 referred specifically to the particular provisions in the Draft Code where appeal did not deter the taking of legal effect of a judgment or ruling as the position in this regard is already rather obscure given that Article 386 states that court decisions which have not yet taken legal effect may be appealed and thus is presumably subject both to Article 394 and other unidentified provisions that provide that an appeal does not deprive a decision of legal effect.

Article 399. Appeals trial

248. The particular comments already made with respect to the provisions governing the conduct of a trial are first instance are equally applicable to the conduct of an appeal as paragraph 1 specifies that those provisions are also to govern appeals[99].

249. The provision in paragraph 4 that an appeal can proceed where any of the parties fail to appeal makes no allowance in its formulation for an absence for good reason. Proceeding with a hearing where such a reason has been notified to the court would result in a denial of the equality of arms, which is applicable to appeals as much as trials at first instance[100]. There is a need, therefore, either for clarification that such an exception to proceeding in the absence of a party exists or this provision ought to be modified to include one.

Article 403. Grounds for setting aside or changing decisions of appeals court

250. There is a need to clarify the effect of the bar in paragraph 3 on setting aside a judgment 'on grounds of one-sidedness or incompleteness of pre-trial investigation or trial'. Such one-sidedness or incompleteness could entail a failure to look for evidence that is exculpatory of an accused and, as such could involve a breach of obligations under Article 92 of the Draft Code. It may be that such a breach would be regarded as coming within the possibility under sub-paragraph 2 of paragraph 1 of setting aside a decision for 'significant non-compliance with the requirements of criminal-procedural law' but this is not instanced in the specific instances of significant violations listed in Article 405 and, if the failure to look for evidence does not come within the concept of significant violations, the restriction in paragraph 3 should be deleted.

[99] See paras. 209-241.
[100] See, e.g., *Corcuff v. France*, no. 16290/04, 4 October 2007.

251. There is a need to clarify what is the point of paragraph 4 as it is not clear in what circumstances a 'substantial violation of defendant's rights' could yield any argument for setting aside an acquittal. On the contrary such a violation would necessarily mean that a trial was fundamentally unfair and thus a violation of Article 6 of the European Convention[101].

Article 409. Special features of the new trial by the court of first instance

252. The particular comments already made with respect to the provisions governing the conduct of a trial are first instance are equally applicable to paragraph 1 as it specifies that those provisions are also to govern the conduct of proceedings after a judgment has been set aside[102].

253. It would be appropriate for this provision to specify that the court of first instance considering a case in which a previous first instance judgment has been set aside should have a different composition from the one that gave that judgment. There is no provision to that effect in Article 32 of the Draft Code and it is desirable that the composition be changed so as to ensure that there is no basis for reasonable doubts about impartiality and thus a breach of Article 6 of the European Convention[103].

Article 411. Court decisions of the court of appellate instance

254. The particular comments already made with respect to Articles 363-374 are equally applicable to paragraph 2 as this provision - albeit referring to Articles 362-374 - specifies that they are also to govern the court decisions of the court of appellate instance[104].

Chapter 32. Criminal Proceedings in Court of Cassation (arts. 417-436)

Article 417. Court decisions which may be challenged in cassation procedure

255. Although use of the cassation procedure may be generally inappropriate with respect to judgments based on agreement, the importance of ensuring that the conditions governing the approval of such agreements in Article 467 point to the need for the court of cassation to be able to consider challenges based on the wrong interpretation or application of those conditions by a court of appellate instance. Paragraph 3 should thus be modified to permit such a challenge.

Article 427. Cassation trial

256. The provision in paragraph 4 that a cassation trial can proceed where any of the parties fail to appeal makes no allowance in its formulation for an absence for good reason. Proceeding with a hearing where such a reason has been notified to the court would result in a denial of the equality of arms, which is applicable to cassation proceedings as much as to trials at first instance and appeals[105]. There is a need, therefore, either for clarification that such an exception to proceeding in the absence of a party exists or this provision ought to be modified to include one.

[101] See, e.g., *Mirilashvili v. Russia*, no. 6293/04, 11 December 2008, at paras. 164-166.
[102] See paras. 209-241.
[103] See, e.g., *Oberschlick v. Austria*, no. 11662/85, 23 May 1991.
[104] See paras. 230-234.
[105] See, e.g., *Wynen v. Belgium*, no. 32576/96, 5 November 2002.

Article 429. Powers of the court of cassation after a cassation complaint has been considered

257. It would be appropriate for this provision to specify that the court of first or appellate instance considering a case in which a previous first instance or appellate judgment has been set aside should have a different composition from the one that gave that judgment. There is no provision to that effect in Article 32 of the Draft Code and it is desirable that the composition be changed so as to ensure that there is no basis for reasonable doubts about impartiality and thus a breach of Article 6 of the European Convention[106].

Article 431. Grounds for reversing or changing decisions by court of cassation instance

258. In view of the comment already made with respect to Article 403[107], the cassation grounds should include one-sidedness or incompleteness of a pre-trial investigation or trial where this entailed a failure to look for evidence that is exculpatory of an accused, if this is not covered by the 'significant non-compliance with the requirements of criminal-procedural law' ground in sub-paragraph 1 of paragraph 1.

Chapter 33. Proceedings in the Supreme Court of Ukraine (arts. 437-451)

Article 438. Grounds for Revision of Judgments by the Supreme Court of Ukraine

259. The possibility of revising judgments pursuant to a finding by an international judicial agency of a violation of international commitments is undoubtedly welcome. However, the term 'international judicial agency' is not defined in the Draft Code and it would be appropriate to make it clear that this term includes the European Court.

Article 440. Term of Application for Revision of Judgments

260. It is not evident why, as paragraphs 1 and 2 provide, there should be different time limits for lodging applications according to whether they are under sub-paragraph 1 or sub-paragraph 2 of paragraph 1 of Article 438. Furthermore the relatively short deadline of one month provided with regard to applications based on decision of an international judicial agency seems unduly short and could be difficult to fulfil, particularly as that ruling will almost certainly not be in Ukrainian. Moreover it seems inappropriate to put the burden of making the application on the person in whose favour the decision was made since, for example, the duty to execute judgments of the European Court is on the Respondent state. It would be more appropriate if paragraph 2 provided that the Agent of Ukraine before the European Court or other international judicial agency was under an obligation to refer the relevant decision to the Supreme Court of Ukraine and give the person in whose favour the decision was made the possibility of so referring it if the Agent did not do so within the prescribed deadline.

[106] See, e.g., *Oberschlick v. Austria*, no. 11662/85, 23 May 1991.
[107] See para. 251.

Article 443-444. Procedure of Lodging the Application for Revision of Judgments, Verification of Compliance of the Application with the Requirements of the Present Code, Conducted by the Superior Specialized Court of Ukraine Dealing with Examination of Civil and Criminal Cases and Admission of a Case for Processing by the Superior Specialized Court of Ukraine Dealing with Examination of Civil and Criminal Cases

261. The role given by these provisions to the Superior Specialized Court of Ukraine dealing with examination of civil and criminal cases to determine the admission of the application for revision of a judgment for processing by the Supreme Court of Ukraine where an international judicial agency has established a violation by Ukraine of its international commitments seems to amount to an unnecessary impediment to the prompt execution of the judgments of the European Court since the finding of a violation in respect of a judgment already makes it clear that there is an issue to be addressed by the Supreme Court of Ukraine. Certainly there seems to be no need for a determination as to admissibility by a panel of five judges and a more simplified process of transmission to the Supreme Court of Ukraine should be devised.

262. Article 442 requires that a copy of the decision of the international judicial agency should be attached to an application for revision by the Supreme Court of Ukraine. However, in the case of the European Court such a decision will be in English or French and this provision does not address the issue of the responsibility for making a translation into Ukrainian of the decision of an international judicial agency given that the practice, if not the requirement, under the Law of Ukraine On the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights is not to consider judgments of the European Court that have not been officially translated. Providing the Supreme Court of Ukraine with a translation is clearly the responsibility of the Ukrainian authorities. This ought not only to be reiterated in this provision but a relatively short deadline for providing the translation should be set so that the proceedings are not unduly delayed. This is especially important in view of the fact that it has taken up to two years for some judgments against Ukraine to be rendered into an official translation.

Article 448. Ruling of the Supreme Court of Ukraine to Satisfy the Application

263. It would be appropriate for this provision to specify that the court which passed the challenged judgment and to which a case is sent after a successful application for revision should have a different composition from the one that gave the judgment concerned. There is no provision to that effect in Article 32 of the Draft Code and it is desirable that the composition be changed so as to ensure that there is no basis for reasonable doubts about impartiality and thus a breach of Article 6 of the European Convention[108].

[108] See, e.g., *Oberschlick v. Austria*, no. 11662/85, 23 May 1991.

Chapter 34. Criminal Proceedings upon Discovery of New Circumstances (arts. 452-460)

Article 454. Time limit for lodging a request to review court decision upon discovery of new circumstances

264. The deadline in paragraph 1 of one month in which to request review upon discovery of new circumstances is unduly short and could amount to an unjustified denial of access to court contrary to Article 6 of the European Convention since the applicant may not be in the country at the time of the circumstance being discovered or may need to obtain legal advice as to the implications of what will be regarded as new circumstances and it may also be insufficient to gather all the material required under Article 455 for making a request. It would be more appropriate to provide for a three-month deadline or to allow the existing deadline to be waived where cause for non-compliance with it is demonstrated by the person making the request.

SECTION VI. SPECIAL CIRCUMSTANCES FOR CRIMINAL PROCEEDINGS

Chapter 35. Criminal Proceedings Based on Agreements (arts. 461-469)

Article 467. General Procedure for Trial Based on an Agreement

265. The conditions to be met before approving a reconciliation or plea agreement are generally appropriate. In particular the duty in paragraph 6 for the court to be sure that an agreement has been voluntarily concluded is of the utmost importance. However, in order that such voluntariness is properly determined and taking into account that any involvement of defence lawyers for this category of cases is likely to remain theoretical, the court should verify the genuineness of any waiver by summoning the accused to confirm it in writing. Furthermore it would be appropriate to require the court specifically to enquire whether there has been any pressure on a suspect or accused to abandon complaints against law enforcement officials in return for not being prosecuted - as seems to have occurred where plea agreements have been introduced elsewhere[109] - and thus to inspect the relevant records of any places where the suspect or accused has been held prior to concluding the agreement in question.

Chapter 37. Criminal Proceedings with Regard to a Specific Category of Individuals (arts. 473-476)

Article 475. Special procedure for apprehension and imposition of a measure of restraint

266. The provision in paragraph 1 for the automatic release of professional judges and people's deputies, regardless of the crime involved, undoubtedly takes account of the special constitutional position of such persons. Nonetheless it also amounts to a recognition that the criminal process can be pursued effectively without the need

[109] See J. Murdoch, *Country Report on Georgia, Combating Ill-treatment and Impunity and Effective Investigation of Ill-treatment*, (Council of Europe, 2011), paras. 55-62.

to remand a suspect in custody pending trial. As such it underlines the need for a more restrictive formulation, as well as application, of provisions permitting other, less exalted persons who are suspect or accused of offences to be remanded in custody[110].

Chapter 38. Criminal Proceedings in Respect of Underage Persons (arts. 477-496)

§ 1. General rules of criminal proceedings in respect of underage persons

267. The provisions in this part of the chapter do not really reflect the need for a child-friendly environment and process where criminal proceedings are instituted against persons under eighteen years of age. In particular, there are no provisions regarding the need for the room in which any trial may be held to take account of the character and capacity of those being tried and there is no requirement that all law enforcement, legal and judicial personnel involved in such proceedings should have the appropriate training before being allowed to take part in them[111]. There is also insufficient recognition of the need for underage persons to be kept informed and to be heard in the course of the proceedings, with the latter only being specifically mentioned in paragraph 3 of Article 487 (as regards committing such persons to the supervision of their parents) and the former referred to in paragraph 2 of Article 489 (in the case of a temporary removal of underage persons from the courtroom) and paragraph 2 of Article 491 (as regards the imposition of compulsory measures of educational nature instead of the imposition of a criminal sanction). There is thus an unquestionable need to recast the provisions to ensure that a clear framework for ensuring child friendly justice is genuinely established in this part of the chapter.

268. The particular comments already made with respect to Article 174 are equally applicable to paragraph 5 of Article 486 as this specifies that that provision is also to govern the court decisions of the court of appellate instance[112].

§ 2. Application of compulsory measures of educational nature on underage persons who have not attained the age of criminal discretion

269. The shortcomings noted in the first part of this chapter are undoubtedly exacerbated in the second part. This part provides for the use of criminal proceedings against persons who have attained the age of eleven but not the age after which criminal proceedings may ensue in order to apply compulsory measures of an educational nature where a socially dangerous act containing elements of a crime has allegedly been committed. However, none of the provisions in this part give any indication of appropriate account being taken of the young age of the children concerned. As a result there is again a real need to recast these provisions to ensure that they genuinely establish a clear framework

[110] See paras. 177-185.
[111] See *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008 and *Panovits v. Cyprus*, no. 4268/04, 11 December 2008 (as regards interrogation) and *T v. United Kingdom* [GC], no. 24724/94, 16 December 1999 (as regards the trial), as well as the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).
[112] See para. 177.

for ensuring child friendly justice in the exercise of the powers conferred by this part of the chapter.

270. The particular comments already made with respect to Article 174 are equally applicable to sub-paragraph 2 of paragraph 5 of Article 493 as this specifies that that provision is also to govern the court decisions of the court of appellate instance[113].

Chapter 39. Criminal Proceedings with Participation of Insane Persons and Persons whose Mental Disorder Occurred after Criminal Offence Has Been Committed (arts. 497-510)

Article 498. Procedure for pre-trial investigation of publicly dangerous actions committed by insane persons and of criminal offences committed by persons with limited criminal capacity

271. Neither this provision nor any other in this chapter give any indication as to how it is established at the pre-trial stage that a person is insane or fell ill with mental disease. There is provision for psychiatric examination in Article 503 once proceedings against such a person have begun and for a psychiatric ruling in Article 509 where the person falling ill did so only temporarily but there does not seem to be any provision for actually initiating a finding at the pre-trial stage that a person is to be regarded as being insane at the time of allegedly committing an offence or has subsequently fallen ill with a mental disease with the result that the provisions in this chapter become applicable. Such a finding should be subject to judicial control. Undoubtedly judicial control is available under Article 502 where measures of restraint are imposed but there ought to be a clearer basis for deciding that a suspect is not to be processed not as someone who is sane but as someone who is insane or has fallen ill with a mental disease. There is a need, therefore, for clarification as to this issue and possibly some elaboration of the provisions in this chapter to deal with it.

Article 503. Psychiatric examination

272. Psychiatric examinations to determine a person's mental state are, in principle, a justified measure where someone is considered to be insane or to have fallen ill with a mental disease. However, such examinations must be carried out in a manner that is not inhuman or degrading and respects the right to private life under Articles 3 and 8 of the European Convention[114] and it would be desirable that this obligation be specifically reiterated in any authorisation given for them. This does not require any amendment to the Draft Code but it is a matter that needs particular attention when providing the training for the implementation of its provisions.

[113] *Ibid.*
[114] See, e.g., *Worwa v. Poland*, no. 26624/95, 27 November 2003.

Chapter 40. Criminal Proceedings Containing State Secret (arts. 511-512)

Article 511. Protecting State secrets during criminal proceedings

273. There is a need to clarify what is the effect of the requirement in paragraph 1 that pre-trial investigations and trials in cases containing State secrets be conducted in accordance with the rules governing secrecy orders. Although the need to maintain legitimate State secrets is understood, restrictions on publicity should not be excessive. It is particularly important that any such restrictions do not impede the preparation of the defence or the right to a public hearing. While restrictions on disclosure of the content of certain facts or testimony and of the identity of some witnesses might be justified, it does not follow that the existence of the investigation or trial should remain secret or that that the conduct of the trial in its entirety should be *in camera*. The effect of the rules governing secrecy orders should thus be explained, together with an indication as to how their operation ensures that the rights to a public hearing and to defend oneself under Article 6 of the European Convention are not prejudiced in this regard.

274. Furthermore the blanket bar in paragraph 4 on a suspect's defence counsel or legal representative making notes when examining materials containing State secrets is likely to impede both the preparation of his or her defence and the ability to provide effective representation during the course of the trial itself since it may well be impossible for the defence counsel or legal representative to remember all the points that may be important for this purpose in the material that has been examined. Although there may be understandable concern about the onward transmission of matters involving State secrets, it ought to be possible to devise a system that allows notes to be taken while not permitting these to leave the jurisdiction of the court and still respecting the confidentiality of the preparation for a suspect's defence. Some reconsideration of the formulation of the scope of the restriction in paragraph 4 is thus required.

Chapter 41. Criminal Proceedings in the Territory of Diplomatic Missions, Consular Posts, Ships of Ukraine (arts. 513-517)

Article 514. Procedural actions during criminal proceedings in the territory of diplomatic missions, consular posts, ships of Ukraine

275. There is a need to clarify what safeguards exist against possible impropriety or negligence in the conduct of procedural actions by either the head of diplomatic mission or consular post or the captain of a Ukrainian ship in respect of offences allegedly committed in or on it as this could prove highly prejudicial to the defence of anyone accused of committing the offence concerned.

Article 516. Time limit of lawful detention of an individual

276. This article should include provision for ensuring that any persons detained in a diplomatic mission or consular post have access to independent legal advice during their detention as this may be essential both for challenging its legality and ensuring that the defence rights of those detained are respected[115].

[115] See, e.g., *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005.

SECTION VIII. EXECUTION OF COURT DECISIONS (ARTS. 526-534)

Article 530. Deferral of execution of sentence

277. This may be just a translation problem but sub-paragraph 1 of paragraph 1 ought to include illness as well as disease as a ground for deferral of execution of sentence as the former is as capable as the latter of preventing someone from serving their sentence where doing so would result in them being subjected to inhuman and degrading treatment contrary to Article 3 of the European Convention[116]. Furthermore this article ought to make provision for deferring the serving of a sentence in the case of a disabled person so long as the places of detention are not suitable to meet their particular needs[117].

Article 531. Issues to be decided by court during execution of sentence

278. The issues in this provision are entirely appropriate ones for a court to determine, especially those involving a decision as to whether or not a person's detention should be continued or resumed since these are subject to the right under Article 5(4) of the European Convention to challenge the legality of one's detention before a court[118]. The right under Article 5(4) includes the right to legal assistance and to take part in the proceedings in which the issue of the detention of the person concerned is being determined. However, there is no mention of any aspect of the procedure before the court under Article 531 and there is a need to clarify the rules which govern this procedure and, in particular, the extent to which they are in conformity with the requirements of the European Convention.

SECTION IX. INTERNATIONAL COOPERATION IN CRIMINAL PROCEEDINGS

Chapter 42. General Principles of International Cooperation (arts. 535-544)

279. It would be appropriate to include in the provisions in this chapter a specific duty to act promptly in handling or making requests for international legal assistance or extradition so as to ensure that requests made to or by the Ukrainian authorities are being dealt with promptly and thereby avoid unduly long detention for those who may be the object of all such requests[119].

Chapter 43. International Legal Assistance in the Conduct of Procedural Actions (arts. 545-566)

Article 560. Examination based on a request for international legal assistance

280. The first sentence of paragraph 1 seems to duplicate in part the content of paragraph 1 of Article 559 and the need for its retention should thus be reviewed.

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[116] See, e.g., *Mouisel v. France*, no.67263/01, 14 November 2002.
[117] See *Price v. United Kingdom*, no. 33394/96, 11 July 2001.
[118] See, e.g., *Weeks v. United Kingdom*, no. 9787/82, 2 March 1987 and *Winterwerp v. Netherlands*, no. 6301/73, 24 October 1979.
[119] See, e.g., *Quinn v. France*, no. 18580/91, 22 March 1995.

281. It would be appropriate for a person summoned to be informed that he or she is entitled to the assistance of a lawyer before or during the examination so that he or she is in a position to know whether or not he or she should decline to testify for one of the reasons permitted by paragraph 2.

282. There is a need for clarification as to who determines whether or not a refusal to testify is admissible and whether or not there is any appeal against a determination that a particular refusal is not admissible.

283. There is also a need for provisions comparable to those in paragraphs 2 and 5 of Article 561 in cases where an examination is not conducted through video or telephone conference so as to ensure appropriate procedural protection for persons being examined.

Article 562. Search, arrest and confiscation of assets

284. Paragraph 2 provides for a court to take a decision with regard to the assets concerned but there is no indication as to whether the person who possessed them is entitled to contest the submissions of the requesting state and, in particular, whether he or she is entitled to make submissions that the request for international legal assistance should be refused for any of the grounds set out in Article 551. There is thus a need for clarification as to what procedural protection exists for the person in possession of the assets, money and valuables that may be the object of an exercise of the powers conferred under this provision.

Chapter 44. Surrender of Persons Who Have Committed Criminal Offence (Extradition) (arts. 567-587)

Article 577. Grounds for refusal to extradite

285. The existence of reasonable grounds for believing that the person requested to be extradited will be tried in a manner giving rise to a flagrant denial of justice should be introduced as an additional ground for refusal to extradite so as to comply with the requirements of Article 6 of the European Convention regarding the effect of removal to another country[120].

Article 579. Imposition of the measure of restraint in the form of keeping in custody, to ensure extradition

286. The particular comments already made with respect to Chapter 18 are equally applicable to paragraph 3 as this specifies that its provisions are also to govern custody decisions in extradition cases[121].

Article 586. Transit

287. The provision in paragraph 2 for the giving of authorisation for the transit through Ukraine of persons being extradited to a third country should be made subject to a duty to ensure that the person being extradited is not taking place in breach of paragraphs 8 or 9 of paragraph 3 of Article 577, or the additional ground for

[120] See, e.g., *Drozd and Janousek v. France and Spain*, no. 12747/87, 26 June 1992 and *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99, 4 February 2005.
[121] See paras. 177-193.

refusal of extradition discussed in the preceding paragraph, in order to ensure that Ukraine is not complicit in the requirements of the European Convention governing extradition.

Chapter 45. Takeover of Criminal Proceedings (arts. 588-594)

Article 590. Keeping a person in custody before the receipt of the request to take over criminal proceedings

288. The particular comment already made with respect to Article 579 is equally applicable to paragraph 2 as this specifies that its provisions are also to govern custody decisions where there is a request to take over criminal proceedings[122].

Chapter 46. Recognition and Execution of Sentences of Foreign Courts and of Transfer of Sentenced Persons (arts. 595-607)

Article 604. Arranging execution of sentence in respect of a transferred sentenced person

289. This provision should be modified to include the release of a transferred sentenced person where it is established that the sentence was imposed in proceedings that amounted to a flagrant denial of justice so that the detention of the person concerned is not maintained in breach of Article 5 of the European Convention[123].

SECTION X. FINAL PROVISIONS AND SECTION XI. TRANSITIONAL PROVISIONS

290. The six months' period ostensibly prescribed in paragraph 1 for the entry into force of the generality of the Draft Code's provisions does not allow sufficient time for the appropriate training and administrative changes that will be required in order to ensure the proper application of all the changes being introduced. Such training needs to include familiarisation with the international commitments including the European Convention and the case law of the European Court to which the Draft Code is seeking to give effect. Six months may not be sufficient for this purpose given the scale of the changes involved and the considerable pressure of work to which investigators, judges, lawyers and prosecutors are subject. However, the proposed six months' interval between promulgation and entry into force does not actually even guarantee that period for the training needed since sub-paragraph 3 of paragraph 19 in Section XI allows the Cabinet of Ministers a delay of up to three months before the duty to prepare and ensure the execution of re-training programmes arises. As a result the opportunity for effective training for all relevant personnel in the justice sector before the Draft Code enters into force is patently inadequate. The Draft Code should thus be modified to delete this three months' delay before the training obligation arises.

291. The short interval between promulgation and entry into force of the generality of the Draft Code's provisions is in marked contrast to the five year delay proposed

[122] See para. 286.
[123] See *Drozd and Janousek v. France and Spain*, no. 12747/87, 26 June 1992.

in paragraph 1 with respect to the pre-trial investigation of crimes established by Articles 402-421 and 423-435 of the Criminal Code and to sub-paragraph 2 of paragraph 2 of Article 214 seems to be unduly long and should not be retained.

292. Although it makes sense in general - as is envisaged in virtually all the provisions in Section XI - for proceedings already commenced before the Draft Code enters into force to be continued under the procedure valid before then, it would be appropriate for the persons concerned to be able to rely on any substantive improvement, such as regards preventive measures, that have been effected by the Draft Code. This should be so even if the entities dealing with the matter may not be the ones envisaged by the Draft Code and a provision to that effect should be added to those in this section.

293. It seems unduly optimistic to provide for only three months for regulatory and legal acts to be brought into compliance with the Draft Code, as is envisaged by sub-paragraphs 1 and 2 of paragraph 19 of Section XI, and this should be extended to the full six months between its promulgation and entry into force.

V. ANNEX: TABLE OF AMENDMENTS TO LEGISLATIVE ACTS OF UKRAINE

294. It is not intended here to state which other provisions should be amended in order to establish a criminal justice system that is in accordance with the standards of the Council of Europe. However, it is important to note that, even if the text of the Draft Code makes decisive progress towards establishing a criminal procedure in accordance with the European Convention and modern criminal justice systems, this effort might not be successful if the content of other laws are not brought into line with the changes being made by the Draft Code. For instance, the criminal procedure law may be fully respectful of all the necessary procedural safeguards but these could be circumvented by the continued existence of administrative offences that can lead to detention.

295. The analysis of the annex that follows comprises first some general comments and then ones directed to particular provisions in it.

General Comments

296. Although the main provisions with regard to criminal proceedings are encompassed in the Draft Code, there are numerous other legal provisions that are directly connected to the criminal procedure. The entry into force of a new Criminal Procedure Code inevitably affects many other laws, ranging from the Civil Code to the Law of the Public Prosecution Office or the Law on State Secrets, to mention only some examples. Drafting a Criminal Procedure Code necessarily requires reviewing all those legal provisions that could be affected by the new rules of criminal procedure, as well as checking if those other laws are in line with those rules. The annex contains amendments to 71 laws, whose provisions have been partially updated, deleted or reformed.

297. The process of adjusting the entire national legislation to the text of the Draft Code is not an easy task. The extent of the annex - some 92 pages - and the number of laws affected shows the dimension of the work involved and also gives an idea of the efforts made by the drafters to update the terms and conditions of the relevant laws as well as to detect possible inconsistencies with the rules in the Draft Code.

298. Notwithstanding the drafters' endeavour to furnish the Draft Code with an annex including a full list of connected legal amendments, the task of analysing the proposed amendments has not been devoid of difficulties. The document is divided in two columns; the left column contains the present regulation while the right column conveys the proposed amendments. This structure should in principle facilitate the comparison of the norms and allow finding at a glance the paragraph, sentence or word reformed. However, the proposed amendments are not always clearly highlighted and immediately comprehensible. Sometimes complete paragraphs appear in bold letters, even in cases where only a single word has been changed. On other occasions, lengthy provisions are copied fully in the annex, which makes difficult to recognize the concrete paragraph that has been changed, when the single mention of it would have been enough to see the amendment and understand its significance. In yet other parts of the text, the provision that is supposed to have been amended remains however exactly the same (for example, in Articles 4 and 19 of The Law of Ukraine on Ensuring Security of Persons who participate in Criminal Legal Proceedings, Article 166 of the Criminal Executive Code of Ukraine, Articles 38, 185-5, 247 of the Code of Ukraine on Administrative Offences or in the Law on State Protection of Courts and Law-Enforcement Bodies, the text on the right column is the same as the text on the left column). Moreover, there are some articles where the translation has made it extremely difficult to understand the meaning of the law; see, for example, Article 88 of the Law of Ukraine on Execution Proceedings. All these aspects have increased the difficulty in identifying the relevant changes and the scope of the proposed amendments.

299. With regard to the extent of the amendments in the annex, they are mostly minor adjustments of the wording, leaving the content unaltered. Some of the terms that have been replaced show that, even if they can be considered as adequate, they are not relevant from a substantive point of view: thus 'inquiry body' has been replaced by 'pre-trial inquiry body', 'criminal case' by 'criminal proceeding', 'crime' by 'criminal offence', 'citizens under investigation' by 'citizens in criminal proceedings', 'criminal-procedural legislation' by 'criminal procedural legislation' and 'taking under arrest' by 'keeping under arrest'. These amendments are generally correct and consistent with the provisions in the Draft Code.

300. However, not all the amendments are limited to language or term adjustments. A few amendments deal with new institutions or provisions introduced by the Draft Code as, for example, 'the notification of the suspicion of the authorities carrying out pre-trial investigative acts or operative and search activities'. Still, more than 80% of the amendments listed in the annex have no substantive relevance, as the content of the provision remains unaltered.

301. Nonetheless some evident shortcomings in certain laws do need to be pointed out in the comments on individual provisions, even if this might seem to go beyond the scope of this opinion. For example, the powers of the militia seem to be excessive. Furthermore the existence of three laws on execution proceedings (the Law on State Criminal Executive Service, the Criminal Executive Code and the Law on Execution Proceedings) does not facilitate the comprehension of the legal framework and thus makes it more difficult to control its possible infringements. Moreover the immunities provided for judges in criminal proceedings may cause the adverse effect of negatively influencing the independence of judges. In addition the powers of the public prosecutor to enter premises are contrary to the principle of prior judicial authorization for such measures. Finally, according the Law on the State Security Service, the agents of this service are vested with powers to carry out criminal investigations (art. 24) and to enter into houses during the investigation of offences within their competence (art. 25.7). The existence of these powers constitutes a significant exception to the application of the general rules in the Draft Code and consideration should be given to whether such extraordinary competences can be justified and comply with reasonable procedural safeguards.

302. The draft adjustments discussed below to the Law on Operative and Search Activity, Law on the Militia, Law on the Prosecutor's Office, Law on the Security Service and several other legal acts that are connected with the criminal procedure or relevant bodies and institutions mainly represent either general or targeted references to the Draft Code or relevant modifications of the clauses that recapitulate its provisions. However, these laws require more substantial revision since the proposed amendments do not concern a number of conceptual issues that have not been embraced by the limited (pointed) modality of their adjustment. As a result the powers of the prosecution and investigative bodies to apply corresponding intrusive measures outside the framework of criminal procedure are retained. For example, the draft amendments have not concerned sub-paragraph 1 of Article 20 of the Law on the Prosecutor's Office that provides for their power of prosecutors to enter 'without hindrance …premises of bodies of state power, self-government bodies, citizen's public associations, enterprises, institutions and organizations irrespective of the form of ownership', have access to their documentation and some other related prerogatives. The Law on the Security Service, as well as the Law on the Militia and certain other laws contain many provisions of the same character.

Comments on individual provisions

The Law of Ukraine on the Judiciary and the Status of Judges
Article 21

303. A new paragraph – paragraph 5 - is added to this provision providing the manner in which the investigating judge shall be appointed within the local general courts. This legislative amendment is absolutely necessary to implement the scheme of the Draft Code, in which the investigating judge shall exercise control over the investigative acts and measures and grant the protection of fundamental rights.

304. Paragraph 5 states that the investigating judge shall be elected from the judges of local general court at a meeting of judges of the court upon a proposal from the head of the court. As the head of the court or chief judge has the duty to foster the effectiveness of court staff, it might be accepted that he or she proposes the judge to be elected for the position of investigating judge. However, this system entails the risks that the appointment always fall upon the same judges or the contrary, some judges will never occupy the position of investigating judge. In sum, the decision of the chief judge may render the election system a mere formality.

305. Furthermore, the appointment for investigating judge will be for a maximum term of maximum two years. For efficiency reasons, the appointment should be longer, to allow the relevant judge to acquire the necessary experience and skills to develop the functions of an investigating judge. In addition it should be clarified if the same judge can be re-appointed as investigating judge.

306. Moreover Article 21 should also state that the investigating judge shall be released from the duties as a first instance judge, in order to comply with the impartiality requirements.

Article 24

307. The amendment of this article – which enumerates the functions and duties of the chief judge of a local court - is consistent with Article 21 above. However, this amendment is not strictly necessary. When listing the functions and duties of the chief judge of local courts Article 24 already states that the chief judge shall "exercise other powers specified by the law'[124], a general provision which is sufficient to encompass the new duty to make the proposal of investigating judges.

Articles 29 and 115

308. The previous comment is equally applicable to the amendment of these provisions which respectively concern the head of the court of appeals and the listing of the functions of the meeting of judges.

Article 48

309. The amendment of this article is merely formal, as the content does not change: the prior reference to the 'opening of a criminal case' is replaced by the 'notification concerning suspicion of committing a crime'. In both cases the final say with regard to the criminal investigation of a judge is by the General Public

[124] Sub-paragraph 9 of paragraph 1 of Article 24.

Prosecutor. If the formal amendment of this article does not merit any further comments and the amendment as such is consistent with the rules on pre-trial investigation of the new Draft Code, the content raises concerns with regard to the independence of justice and should be reconsidered as a whole.

310. The Constitution grants immunity to the judges. In particular Article. 126 states that 'A judge shall not be detained or arrested without the consent of the Verkhovna Rada of Ukraine, until a verdict of guilty is rendered by a court'. It is unusual to find such a broad immunity for judges in European constitutions and the Venice Commission has criticised this constitutional provision[125]. Without entering into the issue of the appropriateness of, and need for, this wide judicial immunity, the fact that the arrest or detention of a judge requires the prior consent of parliament may also raise concerns as to the independence of the judges. As was stated by the Venice Commission, 'Immunity should not be lifted by Parliament but by the High Council of Justice. Article 126 should be changed in this sense and provide only for functional immunity for acts preformed in the office excluding corruption. Pending such an amendment, at least the law should guarantee that the lifting of immunity only takes place on the basis of a judicial recommendation' [126].

311. However, the prosecution of judges can only be initiated by the General Public Prosecutor. This measure has two aspects. From one perspective, it can be seen as helping to avoid the risk that a single, lower prosecutor decides to press charges against judges without sufficient elements of probable cause. From another perspective, it is problematic in that the General Public Prosecutor is appointed by the executive. Thus, something that from the outside may be seen as a set of measures to protect the judicial independence could, under closer inspection, entail some risk of political dependence that surely does not benefit judicial independence. Some reconsideration of this arrangement is thus desirable.

Article 58

312. There is a need to clarify why the rules concerning the approval of the list of jurors and the approval of the list of people's assessors are different. If the functions of jurors and people's assessors are in general the same and the requirements that they have to fulfil are exactly equal[127], it is unclear why the rules for setting up the list of jurors should differ from those applicable to the list of people assessors.

Article 61

313. The amendments of this article are mainly to add the word 'jurors' in different paragraphs to extend the application of this provision, initially foreseen only for people's assessors, also to jurors. However, in the new paragraph 3 the reference to jurors is omitted and, if this is not a typing or translation mistake, it should be corrected.

[125] See the Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine, made by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights ad Legal Affairs of the Council of Europe adopted in March 2010, on the basis of comments by S. Gass, J. Hamilton, M. Pellonpää and H. Suchocka, point 27.
[126] *Ibid*, at point 27.
[127] Article 59 of the Law on the Judiciary.

Article 62

314. The amendment due to the Draft Code is limited to extending the application of this provision also to jurors. The only amendment is to introduce the word 'juror' beside that of the term 'people's assessor'. However, if all the safeguards provided for judges are applicable to jurors and people's assessors such as those on immunity then the comments previously made with respect to article 48 would be applicable also to this provision.

Article 66

315. It should first be underlined that the changes introduced to this article – which concerns the procedure for appointing a person to the position of a judge for the first time - are not related to the Draft Code or a consequence of changes introduced by it.

316. This article currently states that the announcement to recruit judges shall be made in *the Holos Ukrayiny* and *Uryadovyy Kuryer* newspapers. According to the amendments that shall accompany the new Criminal Procedure Code, the announcement concerning the competition to recruit judges shall be made in printed media outlets determined by the Highest Qualification Commission of Judges of Ukraine. In most European countries such competitions are announced in the Official Journal, as well as in the web pages of the judiciary and the public administration, so everyone interested knows where to look for it. Additionally it can be published in other newspapers.

317. It should be made clear that the announcement made in 'printed media outlets' shall have enough publicity as to ensure that every possible candidate interested in taking part in the competition to become a judge will have adequate notice of it.

318. This comment is also applicable to the change made to Article 77.

Transitional provision

319. The wording of the amendment introduced here appears to be confusing. It might be a problem of the translation, but it is unclear which petitions shall be filed with the Supreme Court. Furthermore the reference made in this paragraph to paragraph 4 of Article 400 of the Criminal Procedure Code needs to be updated.

The Law of Ukraine on Operative and Search Activity

320. The provisions in this law on covert and other investigative actions are made subject to the Draft Code, thus keeping the latter mixed up with opaque regulations on intelligence-related activities. For maintaining clear distinction between these two frameworks it would be advisable to delete from this law the provisions on investigative activities that are already regulated in the Draft Code in order to make a clear distinction between criminal investigation and other intelligence actions. The Law on Operative and Search Activity should simply incorporate a general clause suggesting that all these actions are regulated by the Draft Code.

Article 4

321. It is very positive to recall the fundamental principles that shall guide operative and search activities. This provision mentions also the 'interaction with bodies of state authority, local government and population' as one of the principles. This would seem to mean that any operative and search activity shall be coordinated and carried out with the cooperation of such bodies, and respecting the rights of the citizenship. It might be a problem of the translation but the meaning of 'interaction' appears confusing and, in any event, it is not a principle to be put at the same level as the rule of law and the protection of human rights.

Articles 6 and 7

322. The amendments introduced under these articles reflect the positive change of the tasks of the operative and search units within the criminal justice system, stating expressly that their role shall remain the area of prevention, detection and stopping of crimes, but not with the aim of prosecution. This is expressly said under paragraph 7 of Article 7, which states the general rule that upon *indicia* of committing of an offence, the investigation and all gathered materials shall pass over to the pre-trial investigation authorities. However, it is not clear whether those materials passed to the criminal investigators and public prosecutor shall have evidentiary value. It should be made clear under which conditions those materials could be admissible as evidence and with regard to which type of offences. Otherwise the principle of proportionality could be infringed.

Article 8

323. The amendment to paragraph 2 of this provision – which concerns the rights of units conducting operative and search activity - is an explicit reference to Article 267 of the Draft Code for the control of 'controlled and operative purchase'. The amendment is correct but, as has already been pointed out[128], Article 267 needs to incorporate more safeguards to prevent fishing and other faulty methods of suppressing criminal activities.

324. The amendments to paragraphs 6-19 of this provision merit a positive assessment as they further clarify that the functions of investigating committed crimes is a task to be carried out within the criminal investigation and that the activities of the operative units shall be in accordance with the rules of the Draft Code and, where needed, only be carried out upon judicial warrant of the investigating judge.

Article 9

325. The amendments introduced to paragraphs1, 2 and 4 are appropriate but the new wording of paragraph 6II appears to be confusing, perhaps because of the translation. Certainly it is not clear if the extension of the time to carry out operative and search activities up to 12 months for cases of treason needs in any event the consent of the public prosecutor. Nor is clear who is the competent prosecutor for authorising any such extension of time in a given case.

[128] See paras. 197-198.

Article 14

326. A new paragraph has been added to this article - which concerns supervision over the observance of laws in the conduct of operative and search activity - to state that this supervision in the case of investigations relating to judges, prosecutors and other high public officer of the administration or members of the executive shall be done by the General Public Prosecutor. Concerns previously expressed as to the concentration of such powers in the hands of the General Public Prosecutor[129] are also applicable here. Pursuant to Article 122 of the Constitution, the General Public Prosecutor shall be appointed and removed by the President of Ukraine, subject to the consent of Parliament. Therefore the control by the General Public Prosecutor on the operative and search activities might be considered as an additional guarantee or, on the contrary, as a risk of influence of the executive upon the operative and search activities. Even if it exceeds the scope of this article, it should be noted that, in order to avoid political influence on the prosecution service, the term of office of the General Public Prosecutor should not be coincident with that of the President and the causes for removal should be clearly established by the law. An excessively subservient prosecution office to the executive power leaves space for abuses and threatens the principles of democracy.

The Law of Ukraine On the Public Prosecutor's Office (the Procuracy)

327. The amendments of this law are mainly little adjustments consistent with the new provisions of the Draft Code, as for example, deleting the reference to the investigators of the procuracy. The amendments to paragraph 6 of Article 15 and Article 36 requiring that the instructions of the General Public Prosecutor to the bodies conducting pre-trial investigation shall be 'written' is in line with the Council of Europe Recommendations Rec(2000) 19, particularly recommendation 13, regarding the promotion of transparency of the prosecution service.

328. Other amendments concern adjustments to the reforms introduced in the structure of the criminal investigation by the Draft Code and some minor language adjustments, as for example: 'criminal violation of the law' instead of 'crime', 'citizens in criminal proceedings' instead of 'citizens under investigation' and 'prosecutor' instead of 'investigator of the procuracy'[130].

Article 20

329. The amendment undertaken in this provision is only the substitution of 'criminal case' by 'pre-trial investigation' and so its content remains unchanged. It should be noted that the powers of the prosecutor to enter certain premises, as accorded in paragraph 1, appear to be excessive and contrary to the protection of the rights under Article 8 of the European Convention.

Article 40

330. The right of the public prosecutor to withdraw a case from court has been excluded in the amended article 40, thus the title of this article – 'Amendment of appellation or cassation protest, or withdrawal of a case from court' - should be

[129] See para. 309.
[130] Articles 46, 47, 48, 49, 50 and 55.

amended accordingly. Furthermore, this article provides for the possibility of a superior public prosecutor to amend, complete or withdraw the appeal or cassation filed by an inferior prosecutor. The hierarchical structure of the prosecution office aims to guarantee the uniformity and consistency of the public prosecution all over the territory. However, it should be made clear that corrections and amendments from a superior prosecutor to an inferior prosecutor should always be according to the law. Although it is essential that the superior can correct errors or abuses by an and thus prevent the prosecution office from abusing or departing from their function which is the protection of the law and the interests of the society, it is equally important that the system provides for an effective procedure for a prosecutor to resist illegal instructions from his or her superior.

Final provision

331. The figure of the investigator of the procuracy shall disappear according to the new structure of the pre-trial investigation set up by the Draft Code. However, this final provision provides a time period of five years until these investigators disappear which, as has already been noted[131], appears to be excessively long.

The Law of Ukraine on the Militia

332. The main amendment to this provision is to include a reference to the rules provided by the Draft Code, which can only be assessed positively. However, the Draft Code does not specify the functions of the militia and whose instructions they shall follow when acting within the framework of criminal procedure. The Draft Code mentions expressly the militia only in Articles 490, 494, and 495, namely, 'the militia departments for underage delinquents'. The involvement of the militia in the criminal proceedings should certainly be kept to a minimum.

Article 11

333. This provision - which allows the militia to hold under arrest a person for the term established by the court but no longer than 10 days – needs further clarification. In particular it should be made clear, even where there is a judicial warrant authorizing an arrest, what are the reasons that are regarded as justifying the keeping of a detainee under the control of the militia for such a long time.

334. On the other hand, it is highly positive that the possibility of holding 'persons suspected of vagrancy' for up to 30 days has been deleted, together with the possibility of carrying out photography, filming, shooting and sound recording and/or dactyloscopy on such persons.

335. It might be a problem of the translation but the use of the word 'inquisitor' in this and other articles does not seem appropriate. It needs to be clarified whether or not it refers the investigating judge.

The Law of Ukraine on the Security Service of Ukraine

336. The changes introduced in this law as a consequence of the Draft Code are only of minimum relevance, mostly substituting the expression 'crime' for 'criminal offence' or 'inquiry' for 'pre-trial investigation', or including a reference to the rules of the Draft Code. For example, the long Article 25, listing the rights of the

[131] See para. 291.

Security Service is reproduced in two pages in the annex to the Draft Code but just two words have been changed which do not imply any modification of the content.

337. It is beyond the scope of this opinion to make any assessment of this law as a whole as regards its compliance with the European human rights standards. However, it should be noted that the rules on criminal procedure and criminal prosecution of the Draft Code should generally apply to all types of criminal offences and to all possible persons, taking into account immunities or necessary specialties. There is a need to clarify which are the investigations of criminal offences that fall within the competence of the Security Service of Ukraine, if these investigations are also entered into the general register of criminal investigations, who supervises and controls the pre-trial investigation in criminal matters carried out by State Security Service officers and if such special proceedings are justified.

338. The removal of the last sentence of Article 25 which - in cases of terrorism - vested the Security Service bodies with the same powers of an inquiry organ can be viewed in principle as a positive advance.

The Law of Ukraine on Counter-Intelligence Activity

339. The only change which has been detected in the annex is the substitution of the reference to 'court decision' with 'inquisitor', a term which, as already noted[132], needs to be clarified as a reference to investigating judge.

The Law of Ukraine on the Procedure for Compensation of Damages Caused to Citizens by Illegal Actions of Bodies of Inquest and Pre-Trial Investigation

340. This law remains generally unchanged, save for the adjustment to the wording of the Draft Code. There are no alterations with regard to the content, except the elimination of the compensation of damages for refusal to initiate a criminal case or closing under certain circumstances.

The Law of Ukraine on Pre-Trial Detention

341. As with other laws, most changes undertaken to the law on pre-trial detention are merely superficial without amending the content. It merits positive assessment the amendment of paragraph 5 of Article 26 replaces the public prosecutor's 'right to issue warrants of arrest by a reference to exercise of the 'powers' provided for in the Law on the Public Prosecution.

342. In an amendment to Article 13 reference is made to defence rights 'according to Article 44 of the Code of Criminal Procedure of Ukraine' when the reference should be to Article 45.

343. Article 20 makes a reference to the release of persons being kept under arrest and includes a reference to Article 156 of the Criminal Procedure Code when this reference should be to Article 155.

[132] See para. 335.

The Criminal Code of Ukraine

344. In the case of Articles 48, 65 and 91, as well as paragraph 4 of Article 235, paragraph 5 of Article 235 and Articles 369, 374, 383, 385, 386, 387 and 426, the text on the left side is exactly the same as on the right side.

345. Two articles have been added: Articles 381-1 and 389-1. The first deals with the fines to be imposed to the pre-trial investigator for not fulfilling the lawful written instruction of the prosecutor, which appears to be adequate. The second - Article 389-1 - is entitled 'Intentional fail of fulfilment of peace treaty or of plea of guilt' and it does not seem appropriate to regulate in the same provision infractions which lack any kind of connection.

The Notary Law of Ukraine

346. The amendments to this law are, as most of the amendments included in this annex, of minor importance, mainly changing an expression ('investigation bodies conducting operative and detective actions' instead of 'bodies of investigation'). However, there is a need to clarify what is meant by the new text for paragraph 2d – unconnected to the Draft Code – which provides for 'ceasing of criminal proceeding against a notary on no exonerating grounds' as this does not seem to be a cause for revocation of the license to act as notary.

The Civil Code of Ukraine

347. It is not possible to assess the impact of the deletion of paragraph 2 of Article 265 because of the confusing language used in the English translation.

348. The text on the left side for Article 306 is exactly the same as that on the right side.

349. The amendment to paragraph 1 of Article 1176 does not seem to be in line with the amendment to Article 1167, which will compensate moral damages in case of 'illegal use of preventive measures' and not only in cases of 'illegal use of such preventive measures as arrest or recognizance not to leave'. The same amendment should be made to paragraph 1 of Article 1176.

The Law of Ukraine on Psychiatric Aid

350. The text on the left side for Article 19 is exactly the same as that on the right side.

The Law of Ukraine on the order of Departure from Ukraine and Entry into Ukraine for Citizens of Ukraine

351. The amendment to this law is, as most of the amendments included in this annex, irrelevant. Thus the expression 'crime' is replaced by 'criminal offence' and the holding of the passport can be accorded from the moment of the 'notification of the suspicion' instead of from the moment 'a criminal case is instituted'. However, it should be made clear that this measure based on a criminal proceeding against a person (or suspicion against him or her), should be adopted upon judicial decision or at least, upon a reasoned decision of the public prosecutor, reviewable by the investigating judge.

The Law of Ukraine on Counteraction Measures against Illegal Circulation of Drugs, Psychotropic Substances and Precursors and Abuse Thereof

352. The amendment of Article 6 of this law is limited to the change of the term 'inquiry and preliminary investigation' by the 'operative and detective activity and pre-trial investigation', which is a correct adaptation to the pre-trial bodies in the Draft Code. As to the content, there are no amendments. However it should be pointed out that this provision entails serious risks in the orderly functioning of the different units working in the fight against drug trafficking. Some kind of 'reward' for the most efficient units may be positive - for example, in improving their working conditions or the assignment of technical equipment - but assigning 50% of the assets confiscated directly to the unit who performed that investigation is a rule that should be reconsidered. While this provision may be justified for efficiency reasons and to incentivise law-enforcement so as to be more engaged in the fight against drug trafficking, it can also lead to other forms of corruption.

VI. SUMMARY OF RECOMMENDATIONS

Provisions in need of editorial improvement

353. Relocation or reformulation to improve clarity, avoid misinterpretation and remove inconsistencies with other provisions is needed in respect of the following provisions:

Chapter 1. Criminal Procedure Law of Ukraine and Its Scope
- Article 4 (paras. 60-61);

Chapter 2. Principles of Criminal Proceedings
- Article 8 (para. 62);
- paragraphs 4 and 5 of Article 10 (para. 65);
- Article 11 (paras. 66 and 67);
- paragraph 1 of Article 13 (para. 68);

Chapter 3. Court, Parties, and Other Participants in Criminal Proceedings
- Article 45 (para. 48);
- paragraph 5 of Article 21 (para. 79);
- the title to Article 26 (para. 86);
- paragraph 5 of Article 38 (para. 108);
- sub-paragraph 3 of paragraph 3 of Article 45 and Article 50 (para. 119);
- Article 60 (para. 131);
- Article 76 (para. 140);

Chapter 4. Evidence and Proving
- Article 84 (para. 144);
- Article 91 (para. 148);
- Article 93 (para. 149);
- paragraphs 6 and 7 of Article 93 (para. 152);
- paragraph 4 of Article 95 together with paragraph 4 of Article 222 (para. 153);

Chapter 5. Recording Criminal Proceedings. Procedural Decisions
- Article 103 (paras. 158-159);
- paragraph 7 of Article 109 (para. 163);

Chapter 6. Procedural Expenses
- Articles 116-120 (para. 168);

Chapter 18. Measures of Restraint, Apprehension on a Person
- Article 206 (para. 48);

Chapter 21. Covert Investigative (Detective) Actions
- Article 265 (para. 51);

Chapter 28. Trial
- paragraph 2 of Article 344 and paragraph 10 of Article 345 (para. 222);

Chapter 31. Criminal Proceedings in the Court of Appellate Instance
- Article 386 (paras. 242-244);
- paragraph 1 of Article 394 (para. 247);

Chapter 43. International Legal assistance in the Conduct of Procedural Actions
- the first sentence of paragraph 1 of Article 560 (para. 280);

Annex: Table of Amendments to Legislative Acts of Ukraine
- the wording in the Transitional Provisions relating to the Law of Ukraine on the Judiciary and the Status of Judges (para. 319); and
- Article 4 of the Law of Ukraine on Operative and Search Activity (para. 321).

Provisions in need of substantive modification

354. The following modifications are required to bring the relevant provisions into line with European standards:

Chapter 1.Criminal Procedure Law of Ukraine and Its Scope
- the inclusion of a duty to interpret the Code according to the case law of the European Court in Article 2 (para. 59);

Chapter 2. Principles of Criminal Proceedings
- the addition in Article 9 of the statement that the rule of law essentially means that everyone is subject to the law (para. 63);
- the addition of a reasonable suspicion requirement to paragraph 1 of Article 13 (para. 68);
- the harmonisation of the periods of detention authorised in Articles 13 and paragraph 2 of Article 209 (para. 70);
- the reinforcement of the presumption of innocence in Article 18 (para. 73);

- the specification of the right of the suspect or defendant to remain silent in Article 19 and revise the title or relocate the provision on declarations concerning relatives (paras. 75 and 76);
- the specification in Article 20 that a pre-trial investigation should be stopped as soon as it is known that the person being investigated has already been tried upon the same charges (para. 77);
- the specific provision in Article 21 for the right to produce evidence (para. 78);
- the adoption of rules securing the existence of adequate means to ensure the defence rights of those defendants who cannot afford the expense of collecting evidence (para. 80);
- the provision in Article 25 that a voluntary absence from a hearing should be taken into account in deciding whether to admit a challenge before a higher court to a decision taken at that hearing (para. 85);
- the addition of exceptions in Article 26 to the principle of compulsory prosecution in case of juveniles (para. 87);
- the introduction of restrictions in Article 28 on trial publicity obtaining court information to secure rights under Articles 6 and 8 of the European Convention (paras. 89 and 90);
- the revision of the basis for determining objections to broadcasting court hearings in paragraph 6 of Article 28 (para. 92);
- the removal of the general bar in paragraph 7 of Article 28 on referring to information examined in camera in the public reading of decisions (para. 93);

Chapter 3. Court, Parties, and Other Participants in Criminal Proceedings

- the addition of a requirement in paragraph 3 of Article 32 that the decision in cases involving grave penalties has to be rendered by a panel of three judges in any event (para. 97);
- the addition of a requirement in paragraph 7 of Article 32 that a court reviewing decisions upon newly discovered circumstances shall have a different composition from that which originally determined the case (para. 98);
- the ensuring that the rules on jurisdiction in paragraph 2 of Article 34 are clear, objective and defined (para. 100);
- the provision in Article 36 that the general rule on territorial jurisdiction should prevail unless the interest of justice justifies the change to the place where the defendant lives, or the majority of victims or witnesses reside and provision should be made in paragraph 2 for the defendant to be heard before any decision on changing the venue (paras. 102 and 103);
- the addition to paragraph 3 of Article 45 of a requirement that a suspect or defendant be informed of his or her rights in a clear and proper way (para. 111);
- the provision in sub-paragraph 14 of paragraph 3 of Article 45 for a suspect or defendant to access to the records whilst the pre-trial investigation is being carried out, unless the disclosure would harm the results and efficiency of the investigation (para. 112);
- a change in the reference to the rights of defence counsel in Article 50 to the rights of the defendant (para. 118)

- the inclusion in Article 51 the duty of the defence counsel to watch over the compliance of the legal provisions and the respect of the fundamental rights of his or her client during the proceedings, together with the obligation to report on possible violations thereof (para. 120);
- the provision in Article 52 that the investigator, public prosecutor and court shall refrain from giving advice to the defendant as to whom he or she could contact, or recommend any professionals to assist him or her (para. 121);
- a prohibition in paragraph 3 of Article 52 and paragraph 1 of Article 55 on any public authority being able to appoint a defence lawyer for the defendant, even in case of urgency (paras. 122 and 129);
- the simplification of the formalities in Article 54 and leaving the issue of professional regulation in this provision and Article 55 to the law on the advocacy and the bar (paras. 123 and 124);
- the provision in sub-paragraphs 1 and 2 of paragraph 2 of Article 56 that defence counsel shall be appointed immediately if there are any indications that the suspect or defendant is or might be underage (para. 128);
- the provision in Article 59 that the acceptance of a person as victim should only be denied upon manifest data or clear evidence that such person is not a victim (para. 130);
- the provision in Article 65 for every person, before being interrogated, to be informed about their rights and duties, as well as the exemptions of the duty to testify (para. 133);
- an amendment to the list of persons in Article 65 who are exempted from disclosing information so as to cover all persons to whom professional secrecy obligations apply (para. 134);
- the provision in sub-paragraph 2 of paragraph 2 of Article 66 that a witness shall be informed of this right to benefit from legal assistance (para. 136);
- the provision in paragraph 3 that a recusal at the pre-trial stage shall be formulated as soon as the ground for it becomes known (para. 142);
- the provision in paragraph 1 of Article 81 for recusal decisions to be taken by a judge other than the one being challenged (para. 143);

Chapter 4. Evidence and Proving

- the expansion of the list in Article 87 of acts considered essential violations of human rights (paras. 146 and 241);
- the admission of hearsay evidence in Article 96 to be allowed only in exceptional circumstances (para. 154);

Chapter 7. Procedural Time Limits

- a requirement that any time limits fixed by the court under Article 112 are such as to allow sufficient time to prepare an adequate defence (para. 164);

Chapter 11. Summons by Investigator, Public Prosecutor, Court Summons and Compelled Appearance

- the addition of a general excuse such as ‘any other justified reasons’ to Article 135 (para. 170);

- the making of a clearer differentiation in Articles 137-140 of compelled appearance from deprivation of liberty and providing greater elaboration of the powers that are given to the officials entitled to perform this measure (para. 172);

Chapter 13. Temporary Restriction on the Enjoyment of a Special Right

- a requirement in Articles 146-147 that there be both a link between the offence suspected and the seizure of documents, as well as that the initial seizure satisfy the principle of proportionality (para. 173);
- the provision for the seizure of documents under Articles 146-147 as an alternative to detention (para. 174);

Chapter 15. Provisional Access to Objects and Documents

- the introduction of a requirement to impose time-limits on the grant of provisional access to objects and documents under Articles 156-163 (para. 176);

Chapter 18. Measures of Restraint, Apprehension of a Person

- the specification in subparagraph 3 of paragraph 1 of Article 174 that it is the risk of 'illegal influence' and not any 'influence' that constitutes a ground for applying for the relevant measures (para. 177);
- the provision in paragraph 2 of Article 174 that prosecutors and investigators are bound by the fundamentals of the right to liberty and security (para. 178);
- the stipulation in Articles 176 and 177 the time-frame of a personal commitment or warranty and also require their proportionality (para. 179);
- the requirement in paragraph 4 of Article 180 the taking into account of all the possible circumstances and the application of judicial discretion (para. 180);
- the provision that the measures authorised by Article 191 should be subject to certain time-limits and be covered by the entitlements to request their modification and invoke subsequent judicial control over their legality as is envisaged by Article 199 with respect to other measures of restraint (para. 184);
- the inclusion of the measures authorised by Article 191 explicitly in the framework outlined in Articles 173-175 (para. 185);
- an explicit mention in paragraph 3 of Article 206 the right of access to a doctor (para. 186);
- the specification in paragraph 4 of Article 206 that a detention report should refer to the 'date and *exact* time (hour *and minutes*) *of the moment* of apprehension' and include a reference to Article 207 and that the conditions and timing of an access to a lawyer and relevant rights of the defence, should be granted as from the outset of deprivation of liberty (moment of apprehension) (paras. 187, 188 and 190);
- the provision in paragraph 2 of Article 208 for the registration of the exact time of detainees' arrival or admission in addition to the duty of informing relevant officials (para. 189);

- the combination of the obligation in sub-paragraph 8 of paragraph 3 of Article 210 with the detainee's right of access to a doctor 'of own choosing' and specifying that it is to be granted without delay (para. 191);
- a clearer definition in Article 211 of the exceptions to notification of apprehension and extend the guarantees provided (para. 193);

Chapter 20. Interrogation of a witness, victim in the course of pre-trial investigation in court session

- the removal of the ban in Article 222 on questioning the same person during subsequent court proceedings where questioned in the course of the pre-trial investigation (para. 194);
- the provision that those implicated and not just the suspects, as well as their defence lawyers should be present at the execution of searches, inspections and investigative experiments pursuant to Articles 233, 234 and 237 and limit the unfettered discretion conferred by these provisions (paras. 196-198);

Chapter 21. Covert Investigative (Detective) Action

- the removal of the possibility under paragraph 5 of Article 245 of carrying out covert investigative actions when no longer needed (para. 199);
- the use of greater precision in the limitations in Article 248 (para. 53);
- the securing of the rights of individuals affected by any destruction of information, objects and documents seized by covert investigative measures (para. 200);
- the specification in Article 253 of the modalities of judicial control over covert investigative actions (para. 52);
- the provision that the exception regarding judicial warrants in Article 256 should not apply to the monitoring of two or more persons identified by an investigation as supposed to be acting together without specifying all of them in the warrant (para. 201);
- the incorporation in Article 267 of such an element that would counter 'fishing' and other faulty methods of suppressing criminal activities (para. 201);
- the provision in sub-paragraph 1 of paragraph 3 of Article 267 for a specific ground for extending the maximum periods of preliminary investigations (para. 202);

Chapter 24. Completion of pre-trial investigation. Extension of time limits for pre-trial investigation

- the provision in Article 279 a means to ensure the deadline set in Article 279 is observed (paras. 204-206);
- the provision for the adequate time as the standard in paragraph 9 of Article 286 for familiarisation with case material (para. 207);

Chapter 28. Trial

- a restriction on the re-starting of trials under Article 314 where a change of evidence does not render all the evidence taken as void (para. 209);
- the stipulation that the parties shall have the right to object any decision taken under Article 316 (para. 210);

- the addition of a general excuse such as ‘any other justified reasons’ to Article 321 (para. 212);
- the provision for the appointment of defence counsel where a defendant is removed under Article 324 for serious misconduct (para. 213);
- a change in the reference in paragraph 2 of Article 325 from 'Article 18' to ‘Chapter 18’ (para. 215);
- the provision that any procedural actions conducted through video conference should, except in cases where special protection measures are in place pursuant to paragraph 9 of Article 329, comply with the requirement in Article 322 that court sessions are open and public (para. 217);
- a requirement for the court’s approval for a change to the charges under Article 331 and provide for a longer adjournment than 3 days (para. 218);
- the provision for the possibility of extending time allowed for an adjournment under Article 332 (para. 219);
- the removal of the possibility under Article 344 of excluding one defendant while another testifies (para. 220);
- the provision for the use of anonymous witnesses under paragraph 9 of Article 345 to be exceptional and for the possibility of challenging such anonymity (para. 221);
- the provision of appropriate arrangements in Article 347 for the testifying of minors and underage witnesses (para. 223);
- the provision in Article 354 that a field inspection is not generally appropriate in proceedings involving a jury (para. 225);
- a change in the reference in paragraph 1 of Article 355 from ‘Article 39’ to ‘Chapter 39’ (para. 226);

Chapter 29. Court Decisions

- the provision in paragraph 2 of Article 371 when the court shall release a defendant on whom a sentence of imprisonment has been imposed (para. 233);
- the provision for the measures under paragraph 2 of Article 372 in respect of a convicted defendant's property to be adopted only at his or her request (para. 234);

Chapter 30. Special procedure of criminal proceedings in the court of first instance

- the provision that trial in absentia under Articles 375 and 376 should be possible only if the defendant had been assisted by lawyer when pleading guilty and waiving his or her right to be present at trial (para. 235);
- the introduction of the possibility for the jurors to take notes during the trial and the presentation of evidence should be included in Article 380 (para. 239);
- the refining of the scope of the prohibition in sub-paragraphs 4 and 6 of paragraph 2 of Article 380 on jurors communicating issues regarding criminal proceedings (para. 240);

Chapter 31. Criminal Proceedings Related to Reviewing Court's Decisions

- the provision in Article 386 of the possibility of an appeal by the accused, his or her defence counsel or legal representative on the ground that the requirements in paragraphs 4 to 6 of Article 467 have not been fulfilled (para. 245);
- the specification in Article 409 that the court of first instance considering a case in which a previous first instance judgment has been set aside should have a different composition from the one that gave that judgment (para. 252);

Chapter 32. Criminal Proceedings in Court of Cassation

- the introduction in paragraph 3 of Article 417 of the possibility for a challenge to the wrong interpretation or application of conditions governing judgments based on agreement (para. 255);
- the specification in article 429 that the court of first or appellate instance considering a case in which a previous first instance or appellate judgment has been set aside should have a different composition from the one that gave that judgment (para. 257);
- the inclusion in Article 431 of one-sidedness or incompleteness of a pre-trial investigation or trial as a cassation ground where this entailed a failure to look for evidence that is exculpatory of an accused if this is not covered by the 'significant non-compliance with the requirements of criminal-procedural law' ground in sub-paragraph 1 of paragraph 1 (para. 258);

Chapter 33. Proceedings in the Supreme Court of Ukraine

- the stipulation in Article 438 that the term 'international judicial agency' includes the European Court (para. 259);
- the extension of the time-limit in paragraph 2 of Article 440 and the introduction of a requirement for the Agent of Ukraine before the European Court to refer the case to the Supreme Court (para. 260);
- the simplification of the transmission procedure in Articles 443-444 (para. 261);
- the stipulation that the duty of providing a translation of the European Court's judgment is the responsibility of the Ukrainian authorities (para. 262);
- the specification in Article 448 that the court which passed the challenged judgment and to which a case is sent after a successful application for revision should have a different composition from the one that gave the judgment concerned (para. 263);

Chapter 34. Criminal Proceedings upon Discovery of New Circumstances

- the provision in Article 454 for either a three-month deadline or for the possibility of waiving the existing deadline where cause for non-compliance with it is demonstrated by the person making the request (para. 264);

Chapter 35. Criminal Proceedings Based on Agreements

- the introduction of a requirement in Article 467 for the court to verify the genuineness of any waiver by summoning the accused to confirm it in writing and to enquire whether there has been any pressure on a suspect or

accused to abandon complaints against law enforcement officials in return for not being prosecuted (para. 265);

Chapter 38. Criminal Proceedings in Respect of Underage Persons

- the recast of the provisions in Articles 477-496 to ensure that a clear framework for ensuring child friendly justice is genuinely established (paras. 267-270);

Chapter 40. Criminal Proceedings Containing State Secret

- a narrowing of the scope of the restriction in paragraph 4 of Article 511 (para. 274);

Chapter 41. Criminal Proceedings in the Territory of Diplomatic Missions, Consular Posts, Ships of Ukraine

- the making of provision for ensuring that any persons detained in a diplomatic mission or consular post under Article 516 have access to independent legal advice during their detention (para. 276);

Section VIII. Execution of Court Decisions

- the inclusion in sub-paragraph 1 of paragraph 1 of Article 530 of illness as well as disease as a ground for deferral of execution of sentence (para. 277);

Chapter 42. General Principles of International Cooperation

- the inclusion in Chapter 42 of a specific duty to act promptly in handling or making requests for international legal assistance or extradition (para. 279);

Chapter 43. International Legal assistance in the Conduct of Procedural Actions

- the provision for a person summoned under Article 560 to be informed that he or she is entitled to the assistance of a lawyer before or during the examination (para. 281);
- the introduction in Article 560 of provisions comparable to those in paragraphs 2 and 5 of Article 561 in cases where an examination is not conducted through video or telephone conference (para. 283);

Chapter 44. Surrender of Persons Who Have Committed Criminal Offences (Extradition)

- the inclusion of reasonable grounds for believing that the person requested to be extradited will be tried in a manner giving rise to a flagrant denial of justice as an additional ground for refusal to extradite under Article 577 (para. 285);
- a requirement that the giving of authorisation for the transit through Ukraine of persons being extradited to a third country under paragraph 2 of Article 586 should be subject to a duty to ensure that the person being extradited is not taking place in breach of paragraphs 8 or 9 of paragraph 3 of Article 577, or the additional ground for refusal of extradition discussed in the preceding paragraph (para. 287);

Chapter 46. Recognition and Execution of Sentences of Foreign Courts and of Transfer of Sentenced Persons

- the provision in Article 604 for the release of a transferred sentenced person where it is established that the sentence was imposed in proceedings that amounted to a flagrant denial of justice (para. 289);

Section XI. Transitional Provisions

- the provision in Section XI of the possibility persons involved in proceedings already commenced before the Draft Code enters into force to be able to rely on any substantive improvement, such as regards preventive measures, that have been effected notwithstanding that those proceedings are to be continued under the procedure valid before then (para. 292);

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- the appointment of an investigating judge under Article 21 of the Law of Ukraine on the Judiciary and the Status of Judges should be longer than two years and such a judge shall be released from the duties as a first instance judge (paras. 305 and 306);
- the provision in the new paragraph 3 of Article 61 of the Law of Ukraine on the Judiciary and the Status of Judges of a reference to jurors (para. 313);
- the simple incorporation in the Law of Ukraine on Operative and Search Activity of a general clause suggesting that all the investigative actions are regulated by the Draft Code (para. 320);
- the specification of the reasons for keeping a detainee under the control of the militia pursuant to Article 11 of the Law of Ukraine on the Militia (para.333);
- the reference in Article 20 of the Law of Ukraine on Pre-Trial Detention to Article 156 of the Criminal Procedure Code should be to Article 155 (para. 343); and
- the requirement that the holding of a passport under the Law of Ukraine on the order of Departure from Ukraine and Entry into Ukraine for Citizens of Ukraine from the moment of the 'notification of the suspicion' should be adopted upon judicial decision or, at least, upon a reasoned decision of the public prosecutor, reviewable by the investigating judge (para. 351).

Provisions in need of clarification and possible modification

355. The following points need clarification on issues as to the compliance of the relevant provisions with European standards and possible modification for this purpose:

Chapter 2. Principles of Criminal Proceedings

- whether or not the 72 hour period of detention in Article 13 is to be automatically applied in all cases (para. 69);
- what is the meaning of the first two paragraphs of Article 24 (paras. 82 and 83);
- what is the effect of Article 30, in conjunction with Article 120, regarding interpretation expenses (paras. 94, 95 and 166);

Chapter 3. Courts, Parties and Other Participants in Criminal Proceedings

- whether or not paragraph 5 of Article 36 is providing for the recommencement of the trial or for its continuation (para. 104)
- what is meant by the 'specialization of judges' in paragraph 3 of Article 37 (para. 105);
- what is the meaning of the duty to obey in paragraph 4 of Article 62 (para. 118);
- what is the scope of sub-paragraph 4 of paragraph 1 of Article 60 (para. 132);
- whether or not legal aid covers the fees of experts (para. 137);
- what is the aim of the obligation in sub-paragraph 4 of paragraph 4 of Article 69 for on an expert not to disclose to the court any information obtained, without the authorization of the party who employed him or her (para. 138);
- what is the scope of the prohibition on the disclosure by an expert a specialist, a witness or a translator - in sub-paragraph 4 of paragraph 4 of Article 69, sub-paragraph 3 of paragraph 5 of Article 71, sub-paragraph 3 of paragraph 2 of Article 66 and sub-paragraph 4 of paragraph 3 of Article 68 respectively - on information that came to their knowledge during the fulfilment of their duties in the proceedings (para. 139);
- what is the reason in sub-paragraph 3 of paragraph 2 of Article 78 for preventing a defence counsel from participating in the proceedings when he or she is a close relative of the defendant (para. 141);

Chapter 4. Evidence and Proving

- how inadmissible evidence is to be prevented from being presented to the trial court (para. 147);
- what is the meaning of special procedures in paragraph 4 of Article 93 (para. 151);
- how the appointment of an expert is to be done (paras. 156-157);

Chapter 5. Recording Criminal Proceedings. Procedural Decisions

- what is the aim of elaborating the record and whether the trial court has access to it before the trial (para. 160);

Chapter 9. Repair (Compensation) of Damage in Criminal Proceedings

- what rules are applicable under Chapter 9 and Article 362 to the issues of damage, how the amount is to be determined and which procedure is to be applied (paras. 169 and 228);

Chapter 14. Suspension from Office

- what other legislation is relevant to the suspension from office under article 151 and, if there is none, there is clearly a need to elaborate the content of this provision (para. 175);

Chapter 18. Measures of Restraint, Apprehension of a Person

- what is the content of the missing text of sub-paragraphs 6 and 7 of paragraph 3 of Article 210 (para. 192);

Chapter 20. Investigative (Detective) Actions

- whether or not Article 222 allows previous statements by a witness to be used or read out to assess his or her reliability and credibility at any subsequent interrogation of the witness concerned (para. 195);

Chapter 21. Covert Investigative (Detective) Actions

- which are the serious or grave crimes in which the measures envisaged by Articles 246 and 254 could exceptionally be admitted (para. 72)

Chapter 27. Preparatory Proceedings

- whether or not the ten-day period prescribed in paragraph 2 of Article 311 concerns the fixing of the trial date or the actual holding of the trial (para. 208);

Chapter 28. Trial

- what kind of measures are envisaged in Article 319 (para. 211);
- whether or not Article 351 is consistent with Articles 286 and 312 and what are the 'detective documents' that might be kept undisclosed to the defence party and what is the purported justification for this non-disclosure (para. 224);
- what is the effect of the trial court's decision under Article 362 as regards compensation for any damage caused to the defendant in the course of criminal proceedings (para. 229);

Chapter 31. Criminal Proceedings in the Court of Appellate Instance

- whether or not an exception to proceeding in the absence of a party exists under paragraph 4 of Article 399, with the need to include one if it does not (para. 249);
- what is the effect of the bar in paragraph 3 of Article 403 on setting aside a judgment on grounds of one-sidedness or incompleteness of pre-trial investigation or trial (para. 250);
- what is the point of paragraph 4 of Article 403 (para. 251);
- whether or not an exception to proceeding in the absence of a party under paragraph 4 of Article 427 exists, with the inclusion of one if it does not (para. 256);

Chapter 39. Criminal Proceedings with Participation of Insane Persons and Persons whose Mental Disorder Occurred after Criminal Offence Has Been Committed

- how it is to be established at the pre-trial stage that a person is insane or fell ill with mental disease (para. 271);

Chapter 40. Criminal Proceedings Containing State Secret

- what is the effect of the requirement in paragraph 1 of Article 511 that pre-trial investigations and trials in cases containing State secrets be conducted in accordance with the rules governing secrecy orders (para. 273);

Chapter 41. Criminal Proceedings in the Territory of Diplomatic Missions, Consular Posts, Ships of Ukraine

- what safeguards exist against possible impropriety or negligence in the conduct of procedural actions under Article 514 by either the head of diplomatic mission or consular post or the captain of a Ukrainian ship in respect of offences allegedly committed in or on it (para. 275);

Section VIII. Execution of Court Decisions

- which rules which govern the procedure before the court under Article 531 and, in particular, the extent to which they are in conformity with the requirements of the European Convention (para. 278);

Chapter 43. International Legal Assistance in the Conduct of Procedural Actions

- who determines whether or not a refusal to testify under Article 560 is admissible and whether or not there is any appeal against a determination that a particular refusal is not admissible (para. 282);
- what procedural protection exists for the person in possession of the assets, money and valuables that may be the object of an exercise of the powers under Article 562 (para. 284);

Section X. Final Provisions

- what is the reason for the delay proposed with respect to the entry into force of provisions concerning the re-trial investigation of crimes established by Articles 402-421 and 423-435 of the Criminal Code and to sub-paragraph 2 of paragraph 2 of Article 214 (para. 291);

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- whether a judge can be re-appointed as investigating judge under Article 21 of the Law of Ukraine on the Judiciary and the Status of Judges (para. 305);
- why the rules in Article 58 of the Law of Ukraine on the Judiciary and the Status of Judges concerning the approval of the list of jurors and the approval of the list of people's assessors are different (para. 312);
- under conditions can investigative materials gathered under the Law of Ukraine on Operative and Search Activity be admissible as evidence and with regard to which type of offences (para. 322);

- whether the extension of the time to carry out operative and search activities up to 12 months for cases of treason under Article 9 of the Law of Ukraine on Operative and Search Activity needs in any event the consent of the public prosecutor and who is the competent prosecutor for authorising any such extension of time in a given case (para. 325);
- whether the word 'inquisitor' in the Law of Ukraine on the Militia and the Law of Ukraine on Counter-Intelligence Activity means investigating judge (paras. 335 and 339)
- which are the investigations of criminal offences that fall within the competence of the Security Service of Ukraine under the Law of Ukraine on the Security Service of Ukraine (para. 337); and
- what is meant by the new text for paragraph 2d of the Notary Law of Ukraine which provides for 'ceasing of criminal proceeding against a notary on no exonerating grounds' (para. 346).

Provisions to be deleted

356. The following provisions should be deleted:

Chapter 1. Criminal Procedure Law of Ukraine and Its Scope
- the definition of criminal procedure law in Article 1 (para. 58);

Chapter 2. Principles of Criminal Proceedings
- paragraph 1 of Article 10 (para. 64);
- paragraph 4 of Article 13 (para. 71);
- the opening phrase of paragraph 6 of Article 23 (para. 81);
- paragraph 6 of Article 24 (para. 84);
- sub-paragraph 4 or 5 of paragraph 2 of Article 28 (para. 91);

Chapter 3. Court, Parties, and Other Participants in Criminal Proceedings
- paragraph 2 of Article 38 (para. 107);
- Article 39 (para. 109);
- paragraph 2 of Article 40 (para. 110);
- sub-paragraph 14 or 19 of paragraph 3 of Article 45 (para. 113);
- paragraph 2 of Article 46 (para. 114);
- Article 48 (para. 115);
- paragraph 1 of Article 49 (para. 116);
- sub-paragraph 3 of paragraph 1 of Article 66 (para. 135);

Chapter 4. Evidence and Proving
- paragraph 2 of Article 93 (para. 150);

Chapter 5. Recording Criminal Proceedings. Procedural Decisions
- paragraph 3 of Article 109 (para. 162);

Chapter 18. Measures of Restraint, Apprehension of a Person
- the possibility in paragraph 2 of Article 183 of extending a measure of restraint beyond 72 hours up to five days (para. 181);

Chapter 28. Trial

- the possibility under Article 361 of resuming the trial, once it has been concluded and the court has retired for deliberations on the judgment (para. 227);

Chapter 31. Criminal Proceedings in the Court of Appellate Instance

- the reference to execution in paragraph 1 of Article 394 (para. 246);

Section X. Final Provisions

- the five year delay proposed in paragraph 1 with respect to the pre-trial investigation of crimes established by Articles 402-421 and 423-435 of the Criminal Code and to sub-paragraph 2 of paragraph 2 of Article 214 (para. 291);

Section XI. Transitional Provisions

- the provision in Section X for a three months' delay before the training obligation takes effect should be deleted (para. 290);and

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- the reference to withdrawal of a case from court in the title of Article 40 of the Law of Ukraine On the Public Prosecutor's Office (the Procuracy) (para. 330).

Provisions in need of reconsideration

357. There is also a need to reconsider the appropriateness of the following provisions:

Chapter 3. Courts, Parties, and Other Participants in Criminal Proceedings

- the attribution in Article 35 of jurisdiction to review or reopen of criminal proceedings upon newly found circumstances to the same court or judge who rendered the decision to be reviewed (para. 101);
- the provisions in sub-paragraph 4 of paragraph 1 of Article 38 providing for certain investigatory (search) or procedural actions individually or full-scale pre-trial investigation (para. 106);

Chapter 4. Evidence and Proving

- the need to retain certain objects under paragraph 5 of Article 99 (para. 155);

Chapter 29. Court Decisions

- the provision for undisclosed dissenting opinions pursuant to paragraph 3 of Article 369 and paragraph 4 of Article 385 (paras. 231 and 232);

Chapter 30. Special procedure of criminal proceedings in the court of first instance

- the limited scope of the jury trial under Article 378 (para. 238); and

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- the role of the General Public Prosecutor in the prosecution of judges under Article 48 of the Law of Ukraine on the Judiciary and the Status of Judges (paras. 309-311).

VII. CONCLUSION

358. The Draft Code clearly reflects substantial efforts to improve on previous drafts both as regards its organisation and expression and as regards compliance with European standards, especially the European Convention and the case law of the European Court.

359. Nonetheless there remain some significant problems which still need to be addressed.

360. In the first place there are still many provisions in the Draft Code for which clearer, simpler and more precise drafting is required.

361. Secondly, many of the points of detail noted in the conclusions that follow need to be appreciated as being not simply problematic in themselves but as reflecting a failure to ensure that the requirements of the European Convention, as elaborated in the case law of the European Court, permeates the approach followed by the Draft Code in its entirety. Some failings noted reinforce others but it is also inevitable that many of them will undermine the effectiveness of provisions that would otherwise usefully contribute to establishing a criminal justice system that will in practice be both fair and ensure that deprivation of liberty is kept to a minimum.

362. Thirdly, the Draft Code has failed to establish a system of criminal procedure fully based on the adversarial principle. In particular the rules on evidence gathering and expert evidence in connection, taken with the provision for free legal aid, do not guarantee the effective implication of the defence in the evidence gathering. Furthermore, the fact that the materials and evidence collected during the pre-trial stage by the public investigators will only be disclosed upon completion of the pre-trial investigation also undermines the idea of an adversarial procedure. Moreover an adversarial model - no matter what formal provisions are made - will not be feasible without the support of a defence lawyer and the absence of greater provision for legal assistance for defendants with no or only limited economic resources will inevitably lead to a breach of the principle of equality of arms. It is clear that in the vast majority of criminal proceedings, no free legal aid will be granted.

363. Fourthly, the role of the public prosecutor within the criminal procedure is very strong, especially during the pre-trial stage but also in the formulation of appeals, cassation and other remedies. The public prosecutor thus has complete control over the pre-trial investigation - although the investigative measures restrictive of fundamental rights now as a rule require prior judicial authorization - and also has a key role in any decision to drop or settle a case. Although a strong prosecution service is theoretically not negative, it can entail severe risks of political interference in the criminal justice system, especially in countries with an

authoritarian tradition. As presently constructed the Draft Code has insufficient check and balances to assure the rule of law.

364. Fifthly, although the role of the trial has undoubtedly been strengthened by establishing the general rule that only evidence lawfully obtained and produced before the trial court shall be admissible, the procedural arrangements to implement the exclusionary rule of evidence are not adequate.

365. Finally the provisions of the Draft Code leave in place the possibility of avoiding the regime that it establishes through the use of administrative offences and administrative detention, as well as the arrangements established by measures such as the Law on Operative and Search Activity, the Law on the Security Service and the Law on the Militia.

366. The Draft Code thus has retained certain shortcomings that require further adjustments and amendments that could be grouped into those that *must*, those that *should* and those that *could* be introduced:

- the first category includes the deficiencies and recommendations that are denoted in paragraphs 29-54, 68-70, 72, 75, 78-83, 87, 97-98, 100, 102, 103, 111, 112, 116, 119, 121, 122, 126-129, 137, 143, 146, 147, 176, 178-180, 182-191, 193, 194, 196-198, 204-207, 220, 221, 223, 241, 245, 255-257, 265, 267, 270, 290, 291, 293 and 320 of the opinion;
- the second one involves paragraphs.59-61, 66, 67, 76, 77, 79, 85, 92-95, 104, 106, 107, 108, 118, 120, 123, 124, 130, 133-136, 138, 139, 150, 152-154, 156, 160, 163, 164, 166-175, 177, 181, 195, 199-203, 210, 211-214, 217-219, 224, 227-229, 233-235, 239, 242, 249, 250, 252-254, 258-264, 271-279, 281-289, 292, 304-306, 310, 321-323, 326, 333, 337 and 349 of the opinion; and
- the third group comprises paragraphs 58, 62-64, 71, 73, 84, 86, 88-91, 101, 105, 109, 110, 113-115, 131, 132, 141, 142, 144, 145, 148, 149,152, 155, 156, 158, 159, 161, 162, 192, 208, 209, 215, 216, 222, 225, 226, 230-232, 238, 240, 243, 244, 246-248, 241, 280, 308, 309, 311-314, 317-319, 325, 330, 331, 335, 342, 343, 345 and 346 of the opinion.

367. However, it also needs to be borne in mind that it is not only the text of a law that has to be compatible with European standards and, in particular, with the requirements of the European Convention. As important as the text of the national law is the way the law is applied in everyday praxis. For this purpose every national judge, public prosecutor and defence counsel should have the opportunity of fully understanding the changes that will be effected by the Draft Code when its adoption. This requires an appropriate interval for training and awareness raising. It is important, therefore, that for a measure of this volume much longer should be allowed for this purpose than is currently envisaged. Thereafter continuing legal education both on the operation of the Code, relevant national case law and the developing case law of the European Court will be needed to ensure that what will then be the Code of Criminal Procedure is implemented in accordance with its own requirements and those of the European Convention. Certain points relevant to this have also been noted in the opinion.

368. There should also be an information programme directed to members of the general public so that the nature of all the changes to be undertaken is fully understood by them. Without this understanding there is unlikely to be confidence in the criminal justice system as a whole and the legitimacy of individual aspects of it will be more readily called into question.