SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE

REPORT ON AN EVALUATION OF THE IMPLEMENTATION OF THE CRIMINAL PROCEDURE CODE OF UKRAINE

April 2015

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1. INTRODUCTION

1. This report is concerned with issues relating to the implementation of the Criminal Procedure Code of Ukraine ('the Code') from since its entry into force on 20 November 2012 until September 2014. In particular, it is concerned with questions raised as to whether the reforms effected by the Code have been appropriately implemented and whether the implementation of its provisions has given rise to problems which need to be addressed, either by the adoption of amendments to it or of organisational changes and other practical measures.

2. The methodology followed is first explained before making a number of general observations about the implementation of the Code and the attitudes of the main stakeholders towards its provisions. There is then a Section by Section analysis which focuses on the particular provisions that have given rise to comment as to either their suitability or the effectiveness of their implementation. The report concludes with an overall assessment of the Code's provisions and the steps taken to implement them.

3. A number of amendments to the Code have already been adopted by the Verkhovna Rada since its entry into force, with certain of them eventually not being implemented. They have not generally been considered in this evaluation, partly because they have not been concerned with the issues that have been raised by stakeholders about and partly because they have been in force for too short a period for any assessment of their effectiveness to be made[1]. However, certain proposals for amending the Code which have been analysed by the Council of Europe or which relate to the issues raised in the course of preparing the report have been taken into account in the analysis below.

4. The report has been prepared by Mikael Lyngbo[2], Jeremy McBride[3] and Eric Svanidze[4] in the framework of the Council of Europe Project "Support to criminal justice reform in Ukraine", financed by the Danish Government ('the Project').

5. The authors wish to express their appreciation to all who gave their time to meet with them while undertaking the evaluation. They are also very grateful to the Project team, who made all the practical arrangements and chased up all the information that was needed in the course of preparing the report.

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[1]Evaluations of the compatibility of some of these amendments with European standards have, however, been undertaken pursuant to the Project.
[2]Legal Expert of the Danish Helsinki Committee for Human Rights; former chief of police, public prosecutor and a ranking official in the Danish security service
[3]Barrister, Monckton Chambers, Gray's Inn, London.
[4]Former Deputy Minister of Justice of Georgia and former member of the European Committee for the Prevention of Torture.

2. METHODOLOGY

6. The evaluation of the implementation of the Code has been based firstly on two series of meetings with stakeholders held in Ukraine in June and July 2014.

7. The first set of meetings were with the Parliamentary Committee on the Legislative Support to the Law Enforcement, judges from the High Specialised Court of Ukraine on Civil and Criminal Cases and the Supreme Court, officials from the Ministry of Internal Affairs and the Ministry of Justice, the Office of the Prosecutor General, the secretariat of the Ukrainian Parliament Commissioner for Human Rights and representatives of civil society and the Ukrainian National Bar Association.

8. The second set of meetings took the form of focus group meetings with defence lawyers (both those involved in the provision of secondary legal aid and in private practice), investigators, judges and public prosecutors. In all cases those met were a mixture of persons working in Kyiv and in the regions. The object of the focus group meetings was to enable issues that had emerged in the first set of meetings to be explored in more detail, as well as to allow time for any others to emerge.

9. In addition, the report has taken account of the statistics prepared by the High Specialised Court of Ukraine on Civil and Criminal Cases[5], the Ministry of Internal Affairs[6], the Office of the Prosecutor General[7] and the State Penitentiary Service of Ukraine[8], as well as reports prepared by the NGO Center for Political and Legal Reforms[9], the Coordination Centre for Legal Aid Providing[10] and the Ukrainian Parliament Commissioner for Human Rights[11].

[5] *Review of court statistics on the application of certain provisions of the Criminal Procedure Code of Ukraine (CPC) as of 1 October, 2013*, (2013)

[6] Various *Reports on Performance of Pre-trial Investigation Agencies* covering the period 20 November 2012 to 30 September 2013.

[7] Various reports on *Statistical data on the application of the New Criminal Procedure Code of Ukraine* covering the period 20 November 2012 to 15 October 2013.

[8] *Information about the impact of amended criminal procedure laws on the inmate occupancy rate in pre-trail detention facilities of the State Penitentiary Service of Ukraine*, (2014).

[9] O. Banchuk, I..Dmitrieva, Z. Saidova and M. Khavroniuk, *Implementation of the new Criminal Procedure Code (CPC) of Ukraine, in 2013 (Monitoring Report)*, (2013) ('the Monitoring Report'), O. Banchuk, I..Dmitrieva, L.M. Loboyko, Z. Saidova and O. M. Moskalenko, *35 Informal Practices in the Criminal Justice of Ukraine* (2014) and *Comparative table on the draft Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine" (on the criminal justice system harmonization with European standards)*, (2014).

[10] *The Functioning of the System of Free Legal Aid in 2013*, (2013) and the *Information bulletin on the functioning of the system of free secondary legal assistance from January 1 to June 30, 2014*.

[11] *Annual Report of the Ukrainian Parliament Commissioner for Human Rights 2013* ('Annual Report 2013').

10. Furthermore, the report draws upon various written observations from individuals and organisations and its preparation has also benefitted from the discussions relating to the Code at several conferences[12].

11. The draft report was discussed during a round table meeting with main stakeholders in Kyiv on 27 April 2015. The comments made during the meeting were further taken into account by the authors.

3. GENERAL OBSERVATIONS

A. Introduction

12. After having got acquainted with the Code and gained experience from using it, most stakeholders consider it to constitute a major step forward for the criminal justice system. In particular, the significance of certain elements of it - such as the adversarial principle and the effect of the Unified Registry - has been especially emphasized. The introduction of new guarantees and mechanisms, ensuring the compliance with the rights and freedoms of individuals in the criminal proceedings, has also been noted. Furthermore, it has been found that the Code - as was the intention underlying it - has led to a humanization of the criminal justice system and the considerable reduction in the number of restrictive measures being imposed on accused or suspected persons brought about by the Code has not been accompanied by any unacceptable rise in the level of crime.

13. Moreover, the suggestions that the criminal justice would collapse - frequently made at the time of the Code's adoption and before it came into effect - have been shown to be unfounded.

14. Although the Code might require some amendments to secure both human rights and the efficiency of the system, any gaps or shortcomings which have been suggested to exist in the Code will be seen to be actually only minor ones. Indeed, most of them could be satisfactorily resolved through the case law of the High Specialized Court of Ukraine on Civil and Criminal Cases and/or the Supreme Court and other forms of guidance issued by them.

[12] Notably, the International Scientific and Practical Conference "Criminal Procedure Code of Ukraine: Practice of Application and Prospects for Development", 30 October 2013, the All-Ukrainian Conference on Criminal Law and Procedure organised by the National Bar Association of Ukraine and the Association of Lawyers of Ukraine, 14 November 2014 and the Round table Strategy of the judiciary reforms: tasks for the new parliament, 26 November 2014, organised by the Center for Political and Legal Reforms and the Reanimation Package of Reforms.

15. Certain concerns that have been raised about the Code seem to be no more than misunderstanding about the effect of provisions concerned, as will be seen in the discussion below.

16. Moreover, the main problems with the Code that have been identified relate, in fact, not to its content but to the manner in which these are being given effect in practice and the failure to adopt in a timely manner the necessary legislative reforms that need to accompany the changes that have been introduced by it.

B. Institutional shortcomings

17. In particular, certain stakeholders, especially the law enforcement agencies and the prosecution, do not yet seem to have drawn the necessary consequences of the Code - as to their mindset, the adaption of their organisational arrangements and the allocation of their resources - for the way in which they should be operating the law. This is a consequence of their unwarranted nostalgia regarding the former Criminal Procedure Code and their reservations as to its replacement. However, this failure to adapt and re-organise has resulted in the workload of investigators becoming overwhelming and public prosecutors failing to take the appropriate initiatives pursuant to their new responsibilities as procedural managers of investigations. There is thus an improper performance of duties by law enforcement officers.

18. An especially significant instance of the shortcomings in adapting to approach required by the Code can be seen in the response to its introduction of a new concept of pre-trial investigation. Thus, the average number of criminal cases initiated each month during 2011 under the former Criminal Procedure Code was approximately 43,000 per month but, according to the statistics provided by the General Prosecutor's Office this had risen to 132,500 per month. The total numbers for 2011 and 2013 respectively were 518,832 and 1,589,415, i.e., meaning that the number of initiated pre-trial investigations had increased more than three times[13]. However, these figures do not mean that there was a significant increase in the level of criminality following the Code's entry into force but simply that many allegations about offences having been committed were now being formally recorded. Thus, the absolute majority of these investigations, as expected under the Code, comprised basic (simple) ones leading to the termination of the pre-trial investigations concerned without the need for the matters concerned to be pursued to trial[14]. Nonetheless, the institutional and

[13]However, it should be noted that, according to some comparative figures after the initial increase in the first eight months of 2013, the number of registered criminal proceedings increased by just 35% or 20,000 cases (approximately 38 000 cases were opened monthly in 2012 and 58,000 proceedings remained in the Register each month in 2013); see the Monitoring Report.

[14] In 2013 the number of terminated investigations was 1,105,532; see the comments relating to Article 214 at paras. 175-187 below.

functional omissions and delays have meant that the overall number of initiated pre-trial investigations simultaneously assigned to some investigators in urban districts should at some time, reportedly, exceed a hundred.

19. Notwithstanding the five-year transitional period that the Code allowed for the transfer of investigative functions from the Public Prosecutors Office, the appropriate arrangements for the establishment of the State Bureau of Investigations, institutional changes within the Ministry of Internal Affairs and other stakeholders should have been immediately proceeded with. The mere upgrade of the status of investigative structures within the Ministry and just a limited increase in the numbers of their staff, not supported by any redistribution of tasks and format of interaction between investigators and operative officers, has not been sufficient for the proper implementation of the Code.

20. There may continue to be some genuine practical obstacles to making changes to working practices - e.g., electronic filing is not possible in rural areas and an electronic case management system for the whole country is also lacking - but these can be addressed and they are not a proper basis for resisting the approach required for the implementation of the Code.

21. The guidance and control on the part of the senior management of law enforcement agencies and the public prosecution service has not always been sufficient and appropriate. Indeed, in the case of the prosecution, there has even been at least one instance - the registration of information about alleged offences - where the guidance provided has clearly run counter to what the Code actually required[15]. Appropriate leadership in this way remains essential to the effective implementation of the Code's provisions.

22. The only adequate institutional development that has taken place is the parallel introduction of the Free Legal Aid system. It is crucial that this continues to be adequately funded and that the efforts to improve the quality of assistance are fully supported. The development of quality standards is an important initiative in this regard to strengthen the effectiveness of the legal aid arrangements[16].

23. Besides delays in the required institutional and functional changes, the protracted process that led to a new law for the Public Prosecutor's Office and the accompanying reform required following its adoption has sent detrimental signals to the stakeholders as to consistency with the Code of further reforms that need to be undertaken with respect to the criminal justice system as a whole.

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[15]See para. 179.

[16]Quality standards for free secondary legal aid (NN 1.1 and 4.1), approved by Ministry of Justice decree N368/5 of 25 February 2014. They were alsoapproved by the decision of the Council of Attorneys of Ukraine, No.267 December 17, 2013.

24. Apart from the introduction and application of procedural agreements that would alleviate the workload of investigative bodies and the judiciary, there is also a need to adopt, without further delay, legislation that would allow simplified procedures to be used in cases involving misdemeanours. The absence of this prevents a redistribution of the resources built into the Code from being properly applied. Currently, even the minor categories of crimes are being handled under the fully fledged format prescribed by the Code and the reform effected by it is undercut as a result of the difficulty in coping with the number of initiated procedures.

25. In addition, the absence of adequate overall institutional reforms has resulted in further delays in developing an effective (independent) system or mechanism for the investigation of serious human rights violations, as required in general by in the Guidelines adopted by the Committee of Ministers of the Council of Europe[17]. Moreover, Ukraine has so far failed to meet the direct obligation in this regard imposed by a number of judgments of the European Court of Human Rights ('European Court'), including its quasi-pilot one in *Kaverzin v. Ukraine*[18]. This failure

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[17] Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted on 30 March 2011. Available at https://wcd.coe.int/ViewDoc.jsp?id=1769177.

[18] "172. The Court notes that a part of the present case concerns recurring problems underlying frequent violations of Article 3 of the Convention by Ukraine. (...) 173. The Court further notes that the above-mentioned violations were neither prompted by isolated incidents, nor were attributable to a particular turn of events, but were the consequence of regulatory shortcomings and the administrative conduct of the authorities with regard to their obligations under Article 3 of the Convention.175. Another common factor leading to the violation of Article 3 of the Convention in the present case and in the cases with which the Court has dealt in the past is the prosecutors' reluctance to take all reasonable steps, in a prompt and expeditious manner, to establish the facts and circumstances pertinent to complaints of ill-treatment and to secure relevant evidence. In their inquiries, prosecutors rarely went further than obtaining explanations from police officers. The police officers' version of events prevailed and no effort was made to verify it through other means of inquiry.176. The Court considers that such reluctance on the part of prosecutors, in particular in situations where criminal suspects were allegedly ill-treated with the aim of extracting a confession, could be explained, at least to a certain extent, by prosecutors' conflicting tasks in criminal proceedings – prosecution on behalf of the State and supervision of the lawfulness of pre-trial investigations (...) Since confessions have often constituted one of the principal pieces of evidence in criminal proceedings, it cannot be ruled out that prosecutors have not been interested to conduct full-scale investigations that would be potentially capable of undermining the reliability of such evidence.177. Appeals to courts against prosecutors' refusals to investigate, either on the basis of the separate procedure provided for under Article 236-1 of the Code of Criminal Procedure or in the course of legal argument concerning the admissibility of evidence at trial, have not resulted in the required improvement in the prosecutors' inquiry. Trial judges would rarely give an independent assessment of the reliability of evidence allegedly obtained under duress if such allegations were rejected by prosecutors.178. The present case, along with similar previous cases against Ukraine in which the Court has found a procedural breach of Article 3 of the Convention, also demonstrates that, in spite of the general legal prohibition of torture and inhuman and degrading treatment in Ukraine, in practice agents of the State responsible for such ill-treatment have commonly gone unpunished (see, in particular, Teslenko, cited above, § 116). The lack of any meaningful efforts on the part of the authorities in this regard perpetuates a climate of virtually total impunity for such acts.179. The systemic character of the above issues is further evidenced by reports and observations concerning the human rights situation in Ukraine obtained from domestic authorities and various national and international organisations (see paragraphs 55-60, 63, 64, 74-79 above). Moreover, given the most recent reports and, in particular, the Committee of Ministers' records concerning the execution of the Court's judgments addressing the issues (see paragraphs 71-72 above), they have remained unresolved.180. Accordingly, the Court finds that the situation in the present case must be characterised as resulting from systemic problems at the national level

is exacerbated by current practice in which alleged victims of ill-treatment do not seem to receive any details from the General Prosecutor's Office as to the progress of the investigation in their cases[19].

C. The judiciary

26. Furthermore, it is clear that the judiciary has still not fully comprehended the implications of the Code for its reinforcement of the conditions supporting their independence and impartiality. Nor have they appreciated that a more proactive role is required of them in order to ensure that the requirements of the Code are fully respected. This is most evident in their failure adequately to fulfil their responsibility under Article 206 to protect human rights[20]. This is not helped by their insufficient familiarity with the case law of the European Court and a reluctance to consider submissions based upon it.

27. However, they have also not so far been sufficiently assisted in the performance of their functions by the provision of appropriate guidance from the higher courts as to the application of the Code's provisions. In particular, the adequacy and internal consistency of information letters issued by the High Specialised Court of Ukraine on Civil and Criminal Cases has been criticised. This is perhaps not surprising given the lack of practice on which they were based and the High Specialised Court is now concentrating more on generating practice through specific decisions, as well as contemplating codifying practice through special resolutions[21]. There still seems to be a weakness in the arrangements for disseminating its rulings in individual cases, which are important not only for judges but also for defence lawyers, investigators and public prosecutors. So far the Supreme Court has had little to say as to the proper application of the Code, essentially because of the limited scope of its cassation review and the few cases referred to it. However, its opportunities to provide useful guidance have recently been increased since its conclusions on points of law will now,

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which, given the fundamental values of democratic society they concern, call for the prompt implementation of comprehensive and complex measures. 181. In the present case, the Court is not in a position to determine the general and individual measures to be implemented by Ukraine in order to comply with the judgment. It falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent State by way of compliance (...) 182. Nevertheless, the Court considers it necessary to stress that Ukraine must urgently put in place specific reforms in its legal system in order to ensure that practices of ill-treatment in custody are eradicated, that effective investigation is conducted in accordance with Article 3 of the Convention in every single case where an arguable complaint of ill-treatment is raised and that any shortcomings in such investigation are effectively remedied at the domestic level. In so doing, the Ukrainian authorities should have due regard to this judgment, the Court's relevant case-law and the Committee of Ministers' relevant recommendations, resolutions and decisions.

[19]Meeting with civil society representatives on 24 June 2014. See also the findings in the *Report of the International Advisory Panel on its review of the Maidan Investigations* at paras. 503-508.

[20]See further paras. 168-172.

[21]The latter - Plenum Resolutions - cover issues such as measures of restraint, remand in custody, plea agreements, search and ensuring criminal proceedings. However, the majority of them were not published yet when this report was being prepared and therefore are not covered by the Report.

in principle, be obligatory for the lower courts, with their ruling against such conclusions being a ground for quashing their verdicts in criminal proceedings and since it is now authorised to determine for itself whether to grant leave to an application for revision of a judgment[22].

D. Defence lawyers

28. The main problem with respect to defence lawyers concerns the extent of their qualifications and experience. Certainly complaints were heard about the insufficiency of the preparatory training that they received prior to the entry into force of the Code, particularly when compared with that provided for judges and public prosecutors. However, this is an issue that seems now to be being taken much more seriously as was evident from the strong level of attendance at a recent professional conference on criminal law and procedure[23].

29. Moreover, judges have remarked on the fact that defence lawyers now seem better prepared for hearings. Further development of their professional competence is certainly critical for them to be able fully to exploit the rights afforded by the Code but they have the professional associations that can facilitate this.

30. Since the adoption of the Code there have, however, been repeated objections to it by lawyers on account of the fact that the rights of the defence are stated to be those of the suspect, accused and that there is no discrete listing of rights for defence counsel. This is a rather bogus objection as the role of the defence lawyer is to act for the suspect, accused and, once a working relationship is established between them, the appropriate authority to act to secure a person's defence is clearly endowed by the Code[24]. Nonetheless, the insertion of rights for lawyers when acting as 'defenders' into Article 45 of the Code was a proposed amendment in the Draft Law of Ukraine On Introduction of Amendments to Certain Legislative Acts of Ukraine concerning Practice of Law. However, the formulation of the proposed amendment was not appropriately derived from and did not fully mirror the rights of the suspect, accused. Moreover, the proposed rights were not appropriately reconciled with other important provisions in the Code, as well as with its overall construction[25]. Although, the Draft Law was not adopted[26], an amendment such as the one that was proposed remains under consideration by the Presidential Administration.

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[22] The Law of Ukraine *On Ensuring the Right to Fair Trial* of 12 February 2015,whichenteredinto force on 12 March 2015.
[23]See n. 12.
[24]In particular in Articles 42-54.
[25] See Comments on the Draft Law of Ukraine *On Introduction of Amendments to Certain Legislative Acts of Ukraine concerningPractice of Law*, (December, 2014)
[26]It was prepared by the Cabinet of Ministers in 2014 but not submitted to the Verkhovna Rada.

E. Capacity-building and public awareness

31. Training on the requirements of the Code has certainly been provided since its adoption. This has especially been so for investigators, judges and public prosecutors. However, the relatively short period between the Code's adoption and its entry into force - together with the unavailability of authoritative guidance as to what its provisions entailed and the absence of enthusiastic leadership regarding the changes it effected - undoubtedly limited the impact of this training. It is not surprising that there was a consistent call from all stakeholders for an increase in capacity building efforts. This is clearly a need of the highest importance, which needs to be addressed with some urgency. However, it is unlikely to be effective unless this is accompanied by an unequivocal commitment on the part of those in leadership positions in all the relevant criminal justice institutions to the reforms that are embodied in the Code.

32. Although much attention needs to be given to those who are, or should be, professionally engaged in implementing the Code, there continues to be an insufficient level of knowledge of the rights that it confers on those most directly concerned by the operation, namely, victims and suspects, accused. Such ignorance on their part continues to provide opportunities for those professionals who do not take seriously their responsibilities under the Code.

F. Conclusion

33. Despite some improvements noted above, there continues to be an imbalance in the criminal justice system, with by far too strong representation of the state and by far too weak defence of the individual, and the intended impartial actor, the judiciary, has not yet sufficiently taken command of the situation. Central elements in the Code like equality of arms and presumption of innocence have still to play the prominent role in the procedure which it was supposed to. This is not, however, a reflection of shortcomings in the Code but of the failure to make sufficient adaptation in terms of institutional and organisational arrangements, as well as outlook.

34. Ukraine urgently needs, therefore, to continue to take all the steps required to fully implement the Code in accordance with European standards and to complete the reform of its criminal justice system. However, although some relatively minor, non-conceptual, changes would be appropriate, no significant amendment to the Code's provisions is required.

35. *Further implementation of the Code clearly requires:*
    - *the effective implementation of the Law of Ukraine On the Public Prosecution Service and the consequential remodelling of the Public Prosecutor's Office;*

- *the adoption of a law on the State Bureau of Investigation and the transfer to this new entity of the investigative functions currently in the Public Prosecutor's Office; the appropriate legislative and institutional framework for the investigation of serious human rights violations within the criminal justice system; and*
- *the adjustment of the framework of substantive criminal law so as to introduce the concept of misdemeanours.*

36. *In addition, it is also necessary for:*

- *the carrying out of a comprehensive functional analysis of the investigative and operative structures of the Ministry of Internal Affairs and other law-enforcement or investigative agencies conducting or contributing to pre-trial investigation;*
- *the identification of an appropriate model of distribution of tasks and interaction between these agencies in line with the pre-trial investigation concept built into the Code, with appropriate consequential adjustments to their staffing levels and profile;*
- *the complete modification of the performance indicators and targets currently being used and the introduction of a relevant performance management system for investigators and prosecutors;*
- *the continued provision of an appropriate level of resources and other forms of support for the Free Legal Aid Centres;*
- *the adoption and dissemination of more appropriate and extensive guidance as to the implementation of the Code's provisions, which takes into account the requirements of the European Convention and the case law of the European Court that it embodies;*
- *the undertaking of significant efforts to develop the capacity of those responsible for implementing the Code's provisions in a supportive environment for the change in outlook that this requires; and*
- *the taking of steps to increase public awareness of the changes effected by the Code and the rights and responsibilities that it entails.*

4. SECTION I. GENERAL PROVISIONS

37. The issues raised with respect to this section concern certain aspects of the principles of criminal proceedings and some problems relating to the parties and other participants in those proceedings and to evidence and proving in them.

A. Chapter 1: Criminal Procedure Law of Ukraine and Its Scope [Articles 1-6]

38. No issues of specific relevance to the provisions in this chapter have been raised.

B. Chapter 2: Principles of Criminal Proceedings [Articles 7-29]

39. Three issues relevant to the provisions in this chapter have been raised, namely, as regards challenging procedural decisions (Article 24), publicity (Article 25) and the reasonable time requirement (Article 28). However, these issues are considered in the context of the examination of other related provisions below[27].

C. Chapter 3: Court, Parties, and Other Participants in Criminal Proceedings [Articles 30-83]

40. The issues that been raised with respect to the provisions in this chapter concern referral of proceedings from one court to another, public prosecutors, the pre-trial investigation agency, operational units, suspects, accused, participation by the defence in procedural actions and witnesses.

i. Referral of proceedings from one court to another

41. Article 34 when originally adopted allowed proceedings to be transferred from one court to another in just five situations, namely, where it is established before their commencement that the case had been submitted to the court concerned in violation of the rules on territorial jurisdiction, it is impossible to form a new composition after sustaining motions of recusal or other disqualification, the accused or the victim is or was employed in the court concerned, the court conducting the trial has been liquidated or, for reasons of effectiveness, the place of residence of the accused or the majority of the victims or witnesses is elsewhere.

42. In general, it is desirable for the possibility of transferring cases to be restricted in order not to give rise to uncertainty and to avoid the risk of manipulations and forum shopping, particularly in an environment that is not always free from corruption[28]. However, the present provision has proven too restrictive for a number of reasons.

[27] See, respectively, Article 303, Article 214 and Chapter 24 at paras 237-248, 175-187 and 229-236.
[28] Para.102 of the “Opinion on the draft Criminal Procedure Code of Ukraine”; (DG-I (2011)16 of 2 November 2011 ('draft Code Opinion').

43. Firstly, the current situation in the country has adversely affected the operation of the legal system in certain parts of it, bringing pending trials to a stop and preventing other proceedings from starting. Additionally there is a risk of rulings and judgments being passed under pressure. The possibility of transferring cases in such circumstances to functioning courts was not sufficiently clearly authorised by Article 34[29].

44. Secondly, Article 34 does not provide for change of jurisdiction, even within the same region, in cases where a court is unable - for circumstances such as absence - to gather the required three judges in order, for example, to make a decision according to Articles 314 and 315[30].

45. Thirdly, the technical procedure for transferring cases is extremely burdensome and sometimes impossible to apply. Thus, Article 34 provides that the 'participants' in the proceedings have the right to be notified of the time and place of consideration of requests for transfer and the decision is to be considered within 5 days after having received the request. However, Ukrainian case law is not completely clear as to who are the participants. Certainly, if it includes victims of a crime, there can be hundreds of them in a case, and they then all have to be notified within the five-day period prescribed for determining a request for transfer following the submission of a request[31].

46. The first problem has been addressed by an amendment to the Code in October 2014, providing a further exception that allows transfer of proceedings

> in case it is not possible for the corresponding court to administer justice.(including man-made emergencies or natural disasters, epidemics, epizootics, regime of martial law, a state of emergency, the counterterrorist operation)[32].

47. *Although this is not an inappropriate addition to the Code, there is still a need for:*

    - *the provision of clear guidance as to when it is not possible for courts 'to administer justice' so that this possibility is not abused.*

48. The other problems relating to the transfer of cases could be addressed by arrangements to optimise the organisation of courts and provision of guidance as to the meaning of 'participants'. No amendment to the Code should be required unless it is established that the understanding of 'participants' is too wide for it to be practicable to give everyone concerned the necessary notice in good time to permit their participation in the relevant hearing.

[29] Focus group meeting with judges on 15 July 2014.
[30] *Ibid.*
[31] Part 3 of Article 34.
[32] Law № 1689-VII of 7 October 2014.

ii. Public prosecutors

49. The independence and other fundamental principles relating to the functioning of the Public Prosecutor's Office that are outlined in the Code need to be reinforced and developed in the legislation concerned with public prosecutors and a thoroughgoing reform of the system.

50. However, the absence, until recently[33], of any profound, institutional, functional and structural reforms of the Public Prosecutor's Office has undermined appropriate implementation of the concept of procedural guidance envisaged by the Code for the prosecution.

51. Nonetheless, there is also considerable controversy as to how the concept of prosecutorial guidance is to be interpreted. Thus, the scope of procedural prerogatives assigned to public prosecutors under the Code and its predecessor comprise both proactive and reactive powers and functions. However, whereas the role under the latter was predominantly a reactive one (with the accent being put on the exercise of supervisory functions), the Code - in line with the most common approach of prosecutors having responsibility for criminal prosecutions - now puts the emphasis on prosecutors having a dominant and guiding position at the pre-trial investigation stage.

52. The leadership and representatives of different prosecutors' offices and other counterparts met in the course of the assessment suggested that, on account of the factors already discussed[34] - including insufficient number of prosecutors handling criminal procedures - and noticeable inertia, the Public Prosecutor's Office could not fully assume and appropriately perform the role of procedural guidance for pre-trial investigations as required by the Code[35].

53. Similarly, while defending their proposals to transfer the majority of relevant decision-making powers back to investigators and accordingly downgrade the role of public prosecutors, the Ministry of Internal Affairs representatives suggested that it would be not unusual for ordinary public prosecutors to be assigned to handle up to 400 criminal cases at a time[36].

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[33] The Law of Ukraine *On the Public Prosecution Service*wasadopted by VerkhovnaRada on 14 October 2014 and promulgated on 25 October 2014.
[34] See paras. 17-21 above.
[35] Focus group meeting with public prosecutors on 15 July 2014.
[36] It should be noted, however, that the absolute majority of them would concern inactive or basic pre-trial investigations. See comments to Article 214 below at para. 175-187.

54. In addition, it appears that public prosecutors and investigators still greatly interact by means of presenting documents in person. Thus, it was reported that up to a quarter of the working time of investigators is taken up in their visiting public prosecutors and obtaining their approval of procedural documents. There is no electronic database for case processing and no possibility for using any other more efficient working methods.

55. *Accordingly, the effective implementation of the provisions in the Code relating to prosecutors necessitates:*

- *an intensification of the reform of the Public Prosecutor's Office that fully takes into account the essence and rationale of the concept of procedural guidance of the prosecution with regard to pre-trial investigations;*
- *the carrying out of an appropriate functional analysis of the Public Prosecutor's Office;*
- *the introduction of an electronic database of case processing and other contemporary working methods;*
- *the identification of an appropriate model of distribution of tasks and a consequential adjustment to staffing levels that accords with the workload required for adequate performance of the role of procedural guidance required by the Code; and*
- *the complete modification of performance indicators, targets and the introduction of a relevant performance management system for prosecutors directed to the proper fulfilment of their new responsibilities.*

56. The Code envisages that, when providing procedural guidance, public prosecutors are entitled to institute audits and examinations in accordance with the procedure established by law[37]. The same power is also given to investigators[38]. Contradictory opinions were expressed with regard to this power during the assessment missions. Thus, while defence lawyers and civil society representatives referred to frequent abuses of it and suggested that it should be eliminated, representatives of investigating agencies proposed some elaboration of it in the Code. However, the new Law of Ukraine *On Public Prosecution Service* provides for the removal of the said competences. Consequently, this issue is likely to seize to be relevant after July 2015, when the said Law is supposed to enter into force.

[37]By clause 6 of Part 2 of Article 36.
[38]By clause 4 of Part 2 of Article 40.

iii. Pre-trial investigation agency

57. Although the Code has reinforced the guiding role of the prosecution and underlined its natural dominance, investigators continue to have considerable functions and certain procedural powers under it, as well as provision for their institutional (as opposed to procedural) independence. Nonetheless, as compared with the former Code of Criminal Procedure, the powers of the investigative agencies, while still significant, have rightly been reduced. Thus, along with an enhanced judicial control over pre-trial investigations, the Code provides for a more reasonable distribution of powers in the area of conducting pre-trial investigations and prosecution[39].

58. *In view of the increased risks of institutional imbalance and/or facilitating individual abuses:*

    - *any significant redistribution of powers and functions between the stakeholders that once again favoured the investigative agencies would be inappropriate*[40].

59. Other issues relating to the status and powers of investigative structures, as well as their workload and the requirements applicable to them have already been addressed in the general observations above[41].

iv. Operative units

60. The limitation of the involvement of operative units in investigative activities to the execution of written assignments from investigators - i.e., the functional subordination of the operative officers to investigators - has been specified by the Code in order to restrict the previous unfettered and often abusive manipulation of the criminal procedural framework by those officers. However, as already discussed[42], this change in their role has not yet been properly implemented, nor found full support.

61. Moreover, in spite of the clear rule in the Code - reiterated in clauses. 1.7-1.8 of the Order "*On organisation of the conduct of covert investigative/operational activities*

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[39] At the same time it should be re-iterated that, along with its guiding role in handling pre-trial investigations, the Public Prosecutor's Office is also to be stripped of excessive powers outside the criminal justice field. This move that would be particularly crucial in the Ukrainian context and circumstances. See the Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Venice Commission and the Directorate General of Human Rights, adopted at the plenary session of the Venice Commission, 11-12 October 2013 (CDL(2013)039) ('the Joint Opinion').

[40] See paras. 17-21 above.

[41] See paras. 17-21 and 49-54 above.

[42] See the comments in paras. 17-21 above.

and use of their results in criminal proceedings"[43] - which bans operative subdivisions from carrying out investigative activities without an investigator's request, there are allegations that investigators are formally remitting such requests to operative officers without exercising the necessary control over their work and its results.

62. At the same time, there are proposals to expand the scope of interaction between investigators and operative units over the identification of suspects or even persons 'involved in committing crimes' and certain factual circumstances, using the Law of Ukraine *On Operative Search Activities*. However, this would undermine the conceptual approach in the Code of differentiating between operative and procedural activities[44]. Moreover, the Code already puts a sufficient range of covert and other investigative activities at the disposal of the investigators, whereby they are allowed and supposed to engage operative structures for the search of suspects, the identification of those implicated in alleged offences and the establishment of certain factual circumstances relating to them.

63. On the other hand, it seems that at times the scope of the provisions regulating some investigative activities - such as temporary access to belongings and documents[45] and the search of a dwelling or other property of an individual[46] - are being too narrowly interpreted, excluding any combination with Article 41 and thus any engagement of operative units. However, if not misused but properly applied, there is nothing in the Code's provisions which precludes the contribution of these units to and support in carrying out such investigative activities. Indeed, when requesting temporary access to belongings and documents, the investigation could indicate operative officers as being the persons who are to execute the relevant court ruling. Furthermore, while Article 236 specifically mentions prosecutors and investigators as those who are entitled to conduct a search of a dwelling or other property of an individual, the unlimited formulation of Article 41 could be interpreted as allowing the subsequent delegation of the actual execution of the search to operatives.

64. *There is a need, therefore, for:*

- *the provision of appropriate guidance on the undertaking of investigative activities by operative units*; *and*
- *a review of legislation regulating operative search activities with a view to ensuring that this is fully in harmony with the provisions in the Code.*

[43]See Joint Order of the Office of the Prosecutor General of Ukraine, Ministry of Interior of Ukraine, State Security Service of Ukraine, Administration of State Border Service of Ukraine, Ministry of Finance of Ukraine and Ministry of Justice of Ukraine No 114/1042/516/1199/936/1687/5 of 16.11.2012.

[44] See also the comments relating to Article 93 at paras. 93-94 below.

[45]Under Article 164.

[46]Under Article 236.

65. Issues relating to the status and powers of operative structures, as well as their workload and the requirements applicable to them, have already been addressed in the general observations above[47]. An issue arising from their conduct of investigative and covert investigative search actions is considered further below[48].

v. Suspect, accused

66. The only issue raised relates to granting requests for investigative measures, which is discussed below[49].

vi. Engagement of defence counsel

67. The proposed amendment by the Draft Law of Ukraine *On Introduction of Amendments to Certain Legislative Acts of Ukraine concerning Practice of Law*[50] of Article 50 so as to provide that the powers of a defence counsel to participate in the criminal proceedings should be confirmed by a warrant would probably be slightly more straightforward than the original formulation of the relevant requirement in Part 1[51] and so, if adopted, could possibly help avoid the sort of disputes that appear to have been occurring as to whether a particular lawyer is actually authorised to act on behalf of the suspect, accused.

68. There are consistent allegations and indications concerning misuse by investigators of the circumstances in which Part1 of Article 53 allows a defence counsel to be engaged for the suspect, accused by the investigator, public prosecutor, investigating judge or court. Such an engagement is allowed either where such a counsel who was informed in advance cannot appear to participate in procedural actions or send a replacement or where the suspect or accused person is willing to have a defence counsel engaged but either there was not enough time to engage one or the appearance of selected counsel chosen was not possible. This provisionis designed to reconcile the justified interests of criminal procedure and the actual availability of defence lawyers for carrying out particular procedural actions. However, it has been suggested by defence lawyers that the *ad hoc* engagement of lawyers is resorted to in order to carry out crucial investigative activities and assemble evidence, resulting in the participation of

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[47] See paras. 15-17 above.
[48]See paras. 210-215.
[49] On the granting of suspects' requests for investigative measures, see the comments with regard to Article 93 at paras. 93-94 below.
[50] See para. 30 above.
[51] '1. Defense counsel's authority to participate in criminal proceedings shall be confirmed by: 1) the certificate of the right to engage in legal practice in Ukraine;2) an order, agreement with defense counsel or a power of attorney issued by a body (institution) authorized by the law to provide legal aid at no cost'.

lawyers that are not aware of a case's nuances, indifferent to the position of the accused and occasionally showing loyalty to the investigation and prosecution[52].

69. The situation has led to requests for this norm to be eliminated. However, this would be far too radical a response to the problem given that there will indeed be exceptional circumstances where a chosen lawyer is not available to participate in an urgent procedural activity. Moreover, the Code spells out specific conditions - linked to the genuine urgency of the activity - that justify the use of this exception. Thus, this is clearly linked to genuine urgency of such an activity. As a result, Article 53 - in combination with Part 2 of Article 49 - should be interpreted as requiring the substantiation of the asserted detrimental effects of delaying the activity and impossibility of ensuring the participation of the duly notified lawyer (or of a nominated replacement) engaged under the regular framework. Any violation of these conditions should then be seen as amounting to a breach of the right to defence, leading to the inadmissibility of the evidence concerned, under clause 3 of Part 2 of Article 87 and the right to fair trial in general.

70. Accordingly, it would be advisable for all such instances of possible misuse of Part 1 of Article 53 to be challenged in accordance with Parts 2 and 3 of Article 303 and Articles 314-316 of the Code and similarly for evidence assembled by means of procedural activities carried out with a defence lawyer engaged under Article 53 to be challenged.

71. *The malpractice in issue could be averted through:*
    - *the issue of the engagement of defence counsel in a particular procedural action being addressed in the course of trainings for lawyers, investigators, prosecutors and judges;*
    - *the paying of particular attention to the participation of lawyers in procedural activities under Article 53 of the Code as specified in the relevant quality standards and their application within the Free Legal Aid System;*
    - *the issuing of relevant internal instructions on the engagement of defence counsel in a particular procedural action for the investigative agencies and the Public Prosecutor's Office; and*
    - *the forming of a uniform judicial practice with regard to issues concerning application of Article 53.*

vii. Witnesses

72. Recurrent indications regarding the questioning of, and the undertaking of procedural actions with respect to actual suspects while being treated as having the status of

[52]Focus group meeting on 15 July 2014.

witnesses suggest that this is a practice that continues to persist despite the specific safeguards against such activity that were included in the Code.

73. Thus, in addition to clause 3 of Part 1 of Article 66, Part 8 of Article 224 and certain other norms spelling out the right to remain silent when being questioned as witness so as not to incriminate oneself, this practice was supposed to have been eliminated by the formal ban in clause 1 of Part 3 of Article 87 on the admission of evidence obtained through questioning of "a witness who subsequently will be found a suspect or accused in these criminal proceedings".

74. However, there have been suggestions that, in combination with neglecting the principle of immediacy (i.e., the direct examination of evidence) that is established in Article 23, the judiciary has been turning a blind eye to such violations of the Code's provisions and thereby contributing to the continuation of this unacceptable practice[53].

75. *In view of that, there is a need for:*

- *the encouragement of lawyers acting as defence counsel to engage in a more active manner the safeguards and procedural tools against the undertaking of procedural actions with respect to actual suspects who have the status of witnesses; and*
- *the development of a uniform and solid judicial practice with regard to the manipulation of the status of witness in the case of persons who are actual suspects.*

D. Chapter 4: Evidence and Proving [Articles 84-102]

76. The issues raised with respect to the provisions in this chapter concern the timing of decisions on the admissibility of evidence, its inadmissibility, the collection of evidence and the actual examination of witnesses.

i. Timing of admissibility decisions

77. It was generally acknowledged that the provisions in Articles 87 and 88 of the Code that define the circumstances in which evidence should be considered inadmissible represented real progress and there was no suggestion that any substantive change to them was required.

[53] Focus group discussion with defence lawyers providing free secondary legal aid on 15 July 2014.

78. However, there was concern about the question of admissibility of evidence being decided during the evaluation of evidence in general, i.e., when the court has retired for rendering its decision and thus in the course of the trial's final phase.

79. The view that this timing is required by Part 1 of Article 89 - which uses the formulation in the preceding paragraph - is supported by Article 315, which specifies the decisions that a court can take during the preparatory phase of the trial and these do not include decisions relating to the admissibility of evidence.

80. Nonetheless, it should be noted that Part 2 of Article 89 provides for the possibility of evidence being "found manifestly inadmissible during the trial", which would require the court to "declare such evidence inadmissible, which shall entail impossibility of its examination or termination of its examination if such was commenced". This provision ought to allow for decisions on admissibility - at least in some cases - to be taken well before the court retires for rendering its decision. Nonetheless, this provision does not seem to be being used with the result that questions of admissibility are only being determined in the trial's final phase.

81. Such an approach has been described as problematic since it results in the court being presented with, and potentially influenced, by evidence which it is later supposed to exclude and which it is thus not allowed to take into consideration when reaching its final verdict[54]. Moreover, it is rightly considered that the difficulties resulting from this approach are likely to be exacerbated in the event of the use of jury trials being extended.

82. The Center for Political and Legal Reform has thus proposed the addition of "rendering evidence inadmissible" to the list of motions that are to be considered under clause 4 of Part 2of Article 315, with a view to allowing the court to decide on issues of admissibility during the preparatory meeting[55].

83. However, judges have stated that their practice as to taking decisions on the inadmissibility of evidence before the start of the trial has not yet been consolidated and they have also described the alleged problem as being somewhat overestimated[56].

84. Furthermore, public prosecutors have pointed out the difficulties involved in ruling on admissibility without a proper examination of all the facts, which will often not be available to the court until the end of the trial[57].

[54]Meeting on 24 June 2014 with Oleg Levytskyi, Helsinki Human Rights Foundation.
[55]*Comparative table on the draft Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine" (on the criminal justice system harmonization with European standards*), (2014)
[56]Focus group meeting with judges 15 July 2014.
[57] Focus group meeting with public prosecutors 15 July 2014

85. There is no specific European standard as to the time at which the decision of admissibility should be taken, as long as it complies with the demands of a fair trial by an independent and impartial tribunal under Article 6 of the European Convention on Human Rights ('European Convention'). Furthermore, there is no case law of the European Court finding a lack of impartiality of the part of a judge solely on the basis that he or she had, at an earlier stage in the trial proceedings, declared evidence to be admissible or inadmissible.

86. The position would undoubtedly be different if the judge determining the admissibility of evidence justified his or her decision with an assumption of its consequences for the question of the accused's guilt or innocence. The situation is, in principle, no different if the decision is made during a jury trial[58].

87. In the circumstances, there is an insufficient basis for supporting the proposed amendment to the Code.

88. *Nonetheless, it remains appropriate for:*

- *Part 2 of Article 89 to be used to find inadmissible evidence at the outset of the trial or during its course – rather than waiting to its conclusion – in those cases where it would be clearly evident that its admission would be in violation of the Code.*

ii. Inadmissibility of evidence obtained through significant violation

89. See the comments to Articles 65 and 66[59].

iii. Collection of evidence

90. By specifying that collection of evidence to be carried out in accordance with the procedure provided by the Code[60] and establishing the rules of direct examination of evidence by courts, the automatic initiation of pre-trial procedures, and, in particular, pointing out that conducting pre-trial investigation before entering the information in the register or without such entering shall not be permitted and shall entail liability established by law[61], the Code has banned, as a matter of principle, the use of any

[58]However, given the non-professional nature of itsmembers, the consideration as to whetherevidence is admissible is not alwaystaken in theirpresence; this the situation, e.g., in the United Kingdom.
[59]Paras.72-75 above.
[60]Article 93.
[61] Under Articles 23 and 214.

other legal frameworks for the purposes of confirming circumstances to be proved in criminal proceedings.

91. Accordingly, although the Code provides clear criteria for differentiating between it and the Law of Ukraine *On Operative Search Activities,* all the stakeholders confirmed that there is a practice of applying both sets of provisions in parallel. Defence lawyers and civil society representatives suggested that the latter would not so infrequently be abused for the purpose of assembling actual evidence without applying all the safeguards and procedures required by the former. Subsequently this evidence is then introduced into criminal procedures as documents and material evidence and through the questioning of those involved. However, lawyers engaged in the secondary free legal aid scheme have suggested that the intensity of resorting to this practice has been decreasing when compared with the initial period in which the Code was being implemented.

92. *In order to discontinue this practice fully, there is a need for:*

- *the provision of guidance to investigators and other legal professionals as to the difference between the operative search and investigative (in particular covert) activities;*
- *the encouragement of defence lawyers to challenge more actively the instances in which the operative search framework is being used instead of the procedures under the Code for the purpose of criminal proceedings; and*
- *the development of a uniform and solid judicial practice as to the unacceptability of such manipulations involving operative search activities; and*
- *a review, as previously suggested*[62]*, of legislation regulating operative search activities with a view to ensuring that this is fully in harmony with the provisions in the Code.*

93. Part 3 of Article 93 specifies the rights of the defence to collect and produce evidence and to submit motions to conduct the procedural actions. In combination with provisions of Part 6 of Article 223 as to the defence's mandatory involvement in investigative activities requested by it, as well as a possibility to challenge a decision of the investigator, prosecutor to dismiss its motion for conducting investigative or covert investigative actions envisaged by clause 7 of Part 1 of Article 303, the Code has established quite straightforward rules aiming at balancing equality of arms between the investigation and the defence. Nevertheless, it was asserted in the focus group meetings that there was a widespread practice of investigators arbitrarily rejecting motions by the defence for investigative or covert investigative actions to be conducted.

[62]See para.64.

94. *In addition to the recommendations made below as to the enhancement of the remedies provided in Article 303 and the possibilities for questioning the decisions and omissions of the investigation and prosecution at the trial stage*[63]*, there is a need for:*

- *the alerting of investigators and prosecutors to the risks for a successful prosecution in disregarding motions by the defence for investigative or covert investigative actions to be conducted;*
- *the provision of other legal professionals with guidance on the norms with respect to the granting of such motions by the defence;*
- *the encouragement of defence lawyers more actively to challenge refusals to grant their motions for investigative or covert investigative actions to be conducted through deploying the remedies provided by Article 303 and through exploiting the general possibilities for questioning of the related decisions and omissions of the investigation and the prosecution at the trial stage.*

iv. Testimonies

95. The drafters' preoccupation with reinforcing the principle of immediacy, i.e., the direct examination of evidence by courts[64]appears to have led to the omission of any mention in Article 95 of the protocols or minutes of interrogations that are conducted. Moreover, in contrast to the norms concerned with specific investigative activities[65], they are also omitted from the provisions in Article 224 that regulate interviews and questioning. However, records of interrogation of witness are referred to in clause 7 of Part 1 of Article 66 and Chapter 5 sets out the general rules applicable to the recording of a procedural action. Moreover, reference to records in general are found in a series of other norms, notably, in Article 42 on relevant rights of a suspect and accused concerning their questioning and other records[66], Article 221 concerning review of 'all records of the pre-trial investigation' and Article 223 referring somewhat inconsistently but still mentioning "procedural documents, which were drawn up' and 'records of pre-trial proceedings".

96. Thus, the omission of any mention of protocols or minutes of interrogation of a witness in Articles 95 and 224 should be seen as a deficiency in the Code which can be adequately remedied through systemic interpretation of the other provisions cited.

[63] See the comments relating to Articles 303-304, at paras. 237-248 below.
[64]Under Article 23.
[65].E.g., Article 229 on the presentation of objects for identification.
[66]Clauses 10 and 14 of Part 2.

E. Chapter 5: Recording Criminal Proceedings. Procedural Decisions [Articles 103-110], Chapter 6: Notifications [Articles 111-112], Chapter 7: Procedural Time Limits [Articles 113-117], Chapter 8: Procedural Expenses [Articles 118-126] and Chapter 9: Repair (Compensation) of Damage in Criminal Proceedings [Articles 127-130]

97. No issues of specific relevance to the provisions in these chapters have been raised.

5. SECTION II. MEASURES TO ENSURE CRIMINAL PROCEEDINGS

98. The only issues raised with respect to this section concern Chapters 15, 16 and 18.

A. Chapter 15: Provisional Access to Objects and Documents [Articles 159-166] and Chapter 16: Provisional Seizure of Property [Articles 167-169]

99. The procedural status and, more importantly, the targeted character of provisional access to objects and documents and of *and other related measures* presuppose a more limited and targeted intrusion on the rights protected by Article 8 of the European Convention than exercise of the powers of search under Chapter 20.

100. However, instead of using the provisions under Chapters 15 and 16, it appears that the pre-trial agencies and the prosecution are resorting to searches since it seems to be easier to obtain a court ruling authorising them than to seek provisional access to objects and documents and provisional seizure of property[67].

101. However, this does not reflect any shortcoming in the provisions in these two chapters of the Code but an inappropriate approach to the use of Chapter 20.

102. Furthermore, the unjustified resort to searches instead of seeking provisional access to objects and documents or other related measures - which can only occur following proceedings in which the person affected will normally be entitled to participate - is contrary to the principle of proportionality under Article 8 of the European Convention whenever there is any interference with the right to respect for home, family life or other privacy rights.

103. *There is, therefore, a need for:*

[67] See also comments to Articles 234-236, at paras. 195-203 below.

- *the provision of investigators, prosecutors, other legal professionals with guidance as to the difference between provisional access to objects and documents or other related measures to ensure criminal proceedings and searches and to be alerted to the potential violation of the right to respect for home, family life or other privacy rights if resort is unjustifiably made to the latter;*
- *the encouragement of defence lawyers more actively to challenge abuses involving the conduct of searches instead of seeking provisional access to objects and documents and other related measures to ensure criminal proceedings and to have resort to relevant remedies for protection of rights under Article 8 of the European Convention; and*
- *the exercise of judicial control over the use of all these measures, with the development of a uniform and solid judicial practice that would insist on the observance of the principle of proportionality and put legal obstacles in the way of using searches instead of the other less intrusive measures provided by the Code*.

B. Chapter 18: Measures of Restraint, Apprehension of a Person [Articles 176-213]

104. Eight issues have been raised with respect to this chapter, namely, the power of apprehension, the proper recording of the timing of apprehension, the timely and proper informing of detainees of their right to legal advice, the timely notification of both detainees' relatives and the Free Legal Aid Centres, the engagement of a Free Legal Aid lawyer without notification, the practical application of the position of 'custody officer', the imposition of measures of restraint and the general duties of a judge regarding the protection of human rights.

i. Power of apprehension

105. There has been some concern that the scope of the power of apprehension without authorisation by a judge under Part 2 of Article 207 is deficient as it is not possible for an investigator to arrest someone a few days after he or she has committed a crime. The problem is said to arise because of the uncertainty of the meaning in the second clause of 'immediately after the commission of a criminal offence". However, it is not evident that there is any uncertainty about a word such as 'immediately', which connotes action straight after the commission of the offence. This is confirmed by the context of the phrase, which is linked to apprehension following 'hot pursuit'.

106. Nonetheless, the uncertainty seems to being used to justify apprehensions occurring 2 or 3 days after the offence. This seems inappropriate, not least since the

lapse of this time and the apparent awareness of the suspect's identity would enable a judicial ruling authorising a measure of restraint to be imposed on him or her.

107. Insofar, as there is a real practical problem in apprehending persons for whom there is a reasonable suspicion that they have committed an offence - such as where there is a risk of them fleeing abroad or seeking to destroy evidence and there is no time to seek a court's approval - it would be more appropriate for this to be explicitly authorised by the Code. Certainly, the current limitation on the power under the Code is more restrictive in this regard than the European Convention, under which reasonable suspicion of having committed an offence is not time limited (unlike 'fleeing after having done so' at the end of Article 5(1)(c)). An amendment to this effect has already been made to the Code on 12 February 2015 with regard to specific corruption-related offences. However, there remains a need to clarify whether or not this new power is compatible with Article 29 of the Constitution.[68]

108. *There is clearly a need for:*

- *the provision of guidance for operative officers, investigators and prosecutors as to the meaning of 'immediately after' in Article 207; and*
- *consideration of whether the extended power of apprehension without the approval of a court would be in line with the Constitution.*

109. It should be noted that the protection afforded by the Code can be evaded by apprehending persons under administrative procedures[69]. This is not a matter to be addressed through its amendment but *the safeguards afforded by the Code should either be extended to such procedures or they should not be being used to evade the protection which it affords*.

ii. Recording of apprehension time

110. The proper recording of the apprehension time is crucial for a number of time limits in the Code. As a consequence, Part 5 of Article 208 provides that a report shall be drawn up, specifying the exact time (hours and minutes) of apprehension. Furthermore, Article 209 provides that an individual is considered to be apprehended

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[68] Article 29 provides: "No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law. In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody"

[69] O. Banchuk, I. Dmitrieva, L.M. Loboyko, Z. Saidova and O. M. Moskalenko, *35 Informal Practices in the Criminal Justice of Ukraine*, (Kyiv, 2014), pp. 18-19.

if he or she, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by that official.

111. The proper recording of the time of apprehension thus determines the time within which an apprehended individual shall be presented to the investigating judge or the court or be released. Any breach of the requirement as to the proper recording of when the apprehension occurred could thus lead to an illegal extension of the period for which someone can be held without first obtaining a ruling from an investigative judge or the court, pursuant to Part 2 of Article 211.

112. However, there are strong indications the time of apprehension is frequently not recorded correctly.

113. Thus, in the Free Legal Aid lawyers 2013 survey, 22,57 % of their clients claimed to have experienced situations in which the time of their actual detention (according to the detainee) did not match the time indicated in the detention protocol[70].

114. Furthermore, according to private lawyers, there can be up to 5-10 hours' difference between the actual apprehension time and the one which is registered[71]. During that time, the investigator is clearly in a position to influence the defendant improperly.

115. Moreover, the 2013 Annual Report from the Ukrainian Parliament Commissioner of Human Rights mentions that it is quite frequent for an apprehended person to be kept in the police department for a long time without the detention protocol being drawn up and that the latter, when ultimately compiled, only specifies the time that this occurred[72], i.e., later than the time of the person's actual apprehension.

116. In addition, the Ukrainian Parliament Commissioner of Human Rights receives frequent complaints about the inappropriate registration of the correct time of arrest, for instance, when the person concerned has been summoned to the police department in some other capacity[73].

117. Judges have also confirmed that apprehended persons/criminal suspects are frequently treated initially as a witness and it is not until late in the course of the

[70] *The Functioning of the System of Free Legal Aid in 2013*, p. 17.
[71] Focus group meeting with private practicing lawyers on 15 July2014.
[72] Section 2.1.1.5.
[73] Meeting on 26 June 2014 with Olena Ostrovska, Head of Department of Observance of Procedural Legislation, Office of the Ukrainian Parliament Commissioner for Human Rights.

interview that their status is changed, with the time when the latter occurs being registered as the time of their apprehension and not the outset of the interrogation[74].

118. Indeed, according to the judges, the period during which investigators characterise someone suspected of a crime as a witness can even last for months in the course of an investigation and it is only in the very last stages of it that they formally treat him or her as an accused or suspected person. Moreover, if they then immediately finalise the investigation after doing so, this also has the effect of giving the defence little, if any, time and possibility to seek the conduct of investigative actions on behalf of the person concerned.

119. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the CPT') has also received many allegations from detained persons that they had been initially kept and interviewed as 'witnesses' about criminal offences by law enforcement officials for periods ranging from several hours to days on end before an appropriate protocol of detention was drawn up. In some instances, the CPT found corroborating evidence of these allegations in the documentation which it consulted. Furthermore, in a few cases the CPT spoke to persons who had been interviewed as 'witnesses' by operational officers despite having been apprehended and brought to premises of the Internal Affairs agencies several hours previously[75].

120. According to the CPT, the time of detention of the apprehended persons/criminal suspects is often miscalculated and the period of 60 hours that can elapse before they are presented in court is not counted from the moment of their actual apprehension, sometimes because the operative police officer does not comply with the regulation to draw up a detention protocol. This is then done by the investigator, who does not have the correct information.

121. The CPT concluded that practices consisting of interviewing apprehended persons/criminal suspects as 'witnesses' outside of any formal legal proceedings in order to detect crimes and gather evidence appeared to continue unabated in all the parts of Ukraine which were visited by its delegation[76].

122. Thus, despite the positive aspects of the Code in this respect, it is clear that, in practice, the important legal safeguards in it are often not granted from the outset of the actual deprivation of liberty but only once the persons concerned have been formally detained. It also remains the case that, following their deprivation of liberty,

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[74] Focus group meeting with Judges on15 July 2014.

[75]Paragraph 28 of the Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 October 2013 (CPT/Inf (2014) 15) ('the 2013 Report').

[76]Para. 22 of the 2013 Report.

persons are often subjected to informal questioning, during which confessions are obtained without them having had the benefit of the safeguards in the Code.

123. It should also be noted that the Ministry of Justice accepts that there are a number of situations in which persons are being invited to the police station and questioned, without actually being apprehended, thereby postponing the start of the relevant time limits and suspending the rights of those persons[77]. It is highly inappropriate for internal instructions to be used in this way to curtail rights established by the Code.

124. However, investigators have stated that many complaints about the recording of the time of apprehension are due to misunderstandings by the Free Legal Aid Centres about the facts in particular cases[78].

125. Nonetheless, private lawyers have argued that the Code should be amended - in order to discourage the officers concerned - by adding a stipulation that any illegal apprehension must lead to the immediate release of the person concerned[79]. Certainly, there seem to be no consequences in practice for those who apprehend persons illegally and defence lawyers are thus unable to take advantage of their illegal apprehension.

126. According to the High Specialised Court of Ukraine on Civil and Criminal Cases, there has so far been no challenge at the appellate level - based on a claim that the evidence obtained thereby was inadmissible - to an allegedly improper recording of the time of a person's apprehension.[80].

127. The evidently considerable problem of the proper recording of the time of apprehension lies in the approach being followed with respect to the interpretation and application of the Code, which does not, therefore, require any amendment.

128. *However, for this problem to be remedied, there is a need for*

- *the provision of appropriate instructions, guidance and training for law enforcement officers and investigators as to the proper approach required for recording the time of apprehension; and*
- *the development of consistent judicial practice as to the unacceptability of delaying the recording of the time of apprehension and the strict application of the 60 hours deadline for presenting an apprehended person in court,*

[77]The meeting with the Ministry of Justice on 24 June 2014.
[78]Focus group meeting with investigators on 15 July 2014.
[79]Focus group meeting with private lawyers on 15 July 2014.
[80] Meeting with the Deputy President of the High Specialized Court on 16 July2014.

relying in particular on the power to find inadmissible evidence obtained in breach of these requirements.

iii. Timely and proper information about the right to legal advice

129. Part 4 of Article 208 of the Code requires the apprehending officer to 'immediately' inform the apprehended person about his or her right to involve a defence counsel, as well as about the other procedural rights which he or she has, as set out in Part 3 of Article 42.

130. However, several stakeholders have indicated that this information is not always being provided to an apprehended person and those who are not aware of their right to legal advice can thereby be deprived of it.

131. Thus, in 2013, the Ukrainian Parliament Commissioner for Human Rights received over 400 complaints about violations of the citizen's right to defence. In most cases, the complaints referred to a violation of the right to free secondary legal assistance and the right to a defence counsel but they also included attempts by the investigators to convince the suspect, accused to abstain from being assisted by a defence lawyer and the failure of investigators to explain the right to challenge his or her detention in court[81].

132. Furthermore, in a survey of their clients made by the Free Legal Aid lawyers, 16.51 % of them stated that they had not been informed about their right to defence and 22.94 % of them maintained that they had not been informed about their right to a pro bono lawyer[82].

133. Moreover, the CPT delegation, during its visit in October 2013, observed that the situation hardly differed from the one described in its previous reports, namely, that the written information on rights was generally only given to detained persons when the detention protocol had already been drawn up, rather than at the very outset of their custody[83]. In addition, it found that the written information was still drafted in a manner that was difficult for anyone without legal training to understand and that in most cases detained persons were not provided with a copy of the relevant document.

134. These reports are indicators of a legal system, which has not yet fully given effect to a specific and crucial requirement in the Code and established appropriate practices for this purpose.

[81]Annual Report 2013.
[82]*The Functioning of the System of Free Legal Aid in 2013*, p. 17.
[83]The 2013 Report.

135. *However, for this problem to be remedied, there is a need for*

- *the provision of appropriate instructions, guidance and training for law enforcement officers and investigators as to the proper approach required for giving timely and proper information about the right to legal advice;*
- *the development of consistent judicial practice as to inadmissibility of evidence obtained following any failure to give timely and proper information about the right to legal advice; and*
- *the continued external monitoring of the information provided to apprehended persons by law enforcement officers and investigators.*

136. Where there was no failure to give information about the right to legal advice, the exercise of this right was reported to be impeded by difficulties experienced by lawyers in gaining access to pre-trial detention facilities - including requests for unnecessary documentation to establish their authority to act on behalf of detained persons - and the absence of appropriate facilities for confidential discussions between the suspect, accused and his or her lawyer.

137. *The right to legal advice is one that must be practical and effective rather than theoretical and so there is a need for:*

- *the elimination of such difficulties in gaining access and the provision of appropriate facilities for confidential discussions between suspects, accused and their lawyers in all places of detention.*

iv. Timely notification of relatives and Free Legal Aid Centres

138. The official, who detains a person, is required by Part 1 of Article 213 of the Code to give the detainee the opportunity to inform relatives, family or other persons about his or her detention, or to do it him or herself. In addition, this official is required by Part 4 to notify the Free Legal Aid Centre about the detention of the person concerned. These duties must be performed 'immediately'.

139. Furthermore, Part 5 of Article 213 requires that compliance with those two notification requirements should be verified by the competent official responsible for the keeping of detainees verify, who should then perform them him or herself in any case where they have not been fulfilled

140. The Free Legal Aid Centres have the impression that, in general, they do get timely notification of apprehensions[84]. Thus, in respect of the situation in the first half of 2013, it was reported that:

> The analysis of the functioning of the system of free secondary legal aid in the first six months of 2013 shows that there are still a few problems relating to the right of detained individuals to defence guaranteed by the state and provision of state-financed free legal aid. These include failure to ensure 100% notification as well as delays of the police officials to notify the Centers about the cases of detention[85].

141. However, the CPT got a somewhat less favourable impression during its visit in October 2013, reporting that:

> Most of the detained persons interviewed by the delegation indicated that they had been informed of this right and that their detention had been notified to a family member. That said, similar to the situation observed in the past many persons complained about delays in notifying their families (e.g. until their arrival at an ITT, their first court hearing or even their admission to a SIZO), and a few persons (especially in Kyiv and Odessa) alleged that their request to notify their relatives of their detention had been expressly rejected by law enforcement officials. Further, as a result of delayed recording of custody detained persons were often unable to have their next-of-kin informed of their custody until several hours (or even days) after their *de facto* apprehension.
> As on previous visits, several detained persons told the CPT delegation that they did not know whether their relatives had been informed of the fact of their detention.
> The delegation observed in the establishments of the Ministry of Internal Affairs which it visited that, as a rule, the exercise of the right to notify one's next-of-kin of one's custody was not properly recorded. In particular, neither the registers nor the protocols of detention contained reliable and accurate information on whether (and when) such notification of custody had been performed. It found that only a few of the numerous detention protocols examined contained the relevant details, such as the name and telephone number of the person notified, the time of notification and the detained person's signature confirming the above (...)
> In practice, it became clear during the 2013 periodic visit that access to a lawyer was still often provided only after the initial questioning by operational officers, at the moment when the detention protocol was drawn up, or even later (i.e. several hours – or even days – after the *de facto* deprivation of liberty)[86].

142. The International Renaissance Foundation has underlined the need for the management of law enforcement agencies to control their staff's compliance with the requirements of the law regarding immediate notification of the Free Legal Aid Centres about any detention and to bring them to liability for failure to provide such notification[87].

143. The 2013 Annual Report from the Parliament Commissioner of Human Rights pointed at the fact that

[84]Focus group meeting on 15 July2014.
[85]*The Functioning of the System of Free Legal Aid in 2013*, p. 4.
[86]Paragraphs 75-77 and 79 of the 2013 Report.
[87]*Association with the EU: how does Ukraine fulfil the benchmarks for signing the Agreement? Independent monitoring report as of 1 October 2013*, p. 24.

> on the initiative of the Coordinating Centre for Free Legal Assistance the Cabinet of Ministers of Ukraine adopted resolution No.869 dd. November 27, 2013 *On amending the Procedures for informing the centres for free secondary legal assistance about the cases of apprehension of individuals*[88]

Pursuant to this order a detainee or a detainee's relatives can notify the centres by phone or in writing about the fact of detention where the authorities have failed to do so. This should reduce the number of cases of improper performance of duties by law enforcement officers in regard to their duty to immediately inform the centres of apprehension, and, thus, improve realization of citizen's right to defence at the initial stage of a criminal process.

144. The problems of informing relatives and the Free Legal Aid Centres were during 2013 countered by a massive information campaign, and this, combined with the mentioned resolution, ought to be sufficient for the situation to continue to improve. It however requires continued management supervision and control.

145. These reports are indicators that another specific and crucial requirement in the Code has yet to be properly implemented.

146. *For this problem to be remedied, there is a need for*

- *the provision of appropriate instructions, guidance and training for law enforcement officers and investigators as to the proper approach required for giving timely notification of a person's apprehension to his or her relatives and Free Legal Aid Centres;*
- *the development of consistent judicial practice as to the inadmissibility of evidence obtained where any failure to give such a notification meant that the apprehended person did not have access to legal advice; and*
- *the continued external monitoring of the information provided to relatives of apprehended persons and Free Legal Aid Centres by law enforcement officers and investigators.*

v. Engagement of a Free Legal Aid lawyer without a formal notification

147. In its report, the CPT drew attention to the fact that Free Legal Aid Centres may only assign an *ex officio* lawyer to defend a detained person after it has received the official notification of detention from a law enforcement agency[89].

148. However, Resolution No.869, mentioned above[90], has created an additional mechanism whereby these Centres can now be informed about someone's

[88] At p. 79.
[89] Paragraphs 81-82 of the 2013 Report.

apprehension through direct information from the person concerned and members of his or her family and close relatives.

149. This problem has thus been solved satisfactorily and requires no further action.

vi. Practical application of the position of 'custody officer'

150. Pursuant to Article 212 of the Code, at least one special officer who is not an investigator must be designated in every police station and other similar institutions as being responsible for immediately registering apprehended persons and all activities related to them and, in particular, advising them about their legal rights and ensuring their appropriate treatment (including medical assistance). The function of this 'custody officer' is an important independent monitor and extra control function, with the aim of ensuring that the fundamental rights of detainees are respected.

151. However, according to the Annual Report 2013 of the Ukrainian Parliament Commissioner for Human Rights, most police stations do not have such persons in place and they do not, therefore, record all the actions which are conducted with respect to apprehended persons, including the time when they started and were completed, as well as the persons who conducted such actions or were present during the conduct of such actions[91].

152. Furthermore, during its 2013 visit, the CPT observed that there was no uniform practice regarding who was supposed to contact the Free Legal Aid Centres and to keep the notification registers[92]. While in some establishments of the Ministry of Internal Affairs this task was performed by an investigator, in others it was performed by the officers in charge of the detention area. In both cases, the officials chosen to perform these tasks were primarily responsible for the later stages of custody and this also contributed to delays in notifying the Free Legal Aid Centres.

153. The function of custody officer thus does not seem to have been systematically established and it is certainly not functioning in accordance with the provisions of the Code. This shortcoming in implementation can be a contributing factor to the reported non-compliance with the rules on proper recording of the apprehension time, as well as the disregard of other rights of apprehended persons.

[90]At para. 145.
[91]Section 2.1.1.5.
[92]Paragraph 84 of the 2013 Report.

154. The CPT has recommended that the Ukrainian authorities establish common criteria for the selection of "custody officers" in establishments of the Ministry of Internal Affairs and ensure that they receive specific training[93].

155. On the other hand, Free Legal Aid lawyers have suggested that all registrations should be checked and controlled by a team and not just by a single police officer[94].

156. Either approach could be effective so long as those designated as custody officers are chosen by reference to criteria that enable them to discharge their responsibilities and they are given the training needed to fulfil this role.

157. *Although there is no need for the Code to be amended, there should thus be:*

- *the adoption of appropriate criteria for the selection of 'custody officers', having regard to their important responsibilities;*
- *the provision of specific training for persons designated as 'custody officers' before they take on the responsibilities of this role; and*
- *the continued external monitoring of the function of custody officer.*

vii. Measures of restraint

158. It is generally acknowledged that the use of custody as a measure of restraint has significantly fallen and this is borne out by the statistics issued by the General Prosecutor's Office, with alternative measures being used in 69% of cases in 2013 and in 66% of them in the first five months of 2014. This has resulted in the numbers of persons taken into custody falling, from 41,610 in 2012 to 15, 361 in 2013 and 4,000 in the first five months of 2014. Moreover, in more than half the cases brought before the courts during 2013, the measure of restraint was just a personal commitment whereby the suspect, accused undertook to perform duties imposed on him or her by the investigating judge, court. House arrest was granted in 12% of cases whereas bail was used in just 2% of them.

159. Overall, this outcome suggests that the Code's provisions in this regard are being properly applied.

160. However, the statistics should not be the only measure of effective implementation and there are still grounds for concern in this regard, notwithstanding

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[93]Paragraph 90 of the 2013 Report.
[94]Focus group meeting on 15 July.2014.

the significant reduction in the numbers of person held in custody for some or all of the period leading to their trial.

161. Thus, the figures do not indicate whether the use of custody in those cases where it is a measure of restraint is always justified. Certainly, some investigators acknowledged that the use of custody was not always necessary and judges in the High Specialised Court of Ukraine on Civil and Criminal Cases considered that it was being used in too many cases without appropriate grounds. Furthermore, there was criticism by defence lawyers of judges missing the point when objections were being raised to particular measures being imposed and there was said to be a failure by courts always to reason their decisions, including whether there was any reasonable suspicion relating to the suspect, accused, the existence of risks justifying the use of a particular measure and the choice of a particular sum required when granting bail.

162. In addition, various practical problems were identified with respect to the operation of the provisions relating to the imposition of measures of restraint. These included: the defence not always receiving copies of the submissions supporting the motion for measures of restraint; public prosecutors tend to wait until the last moment before seeking to renew custody; there is inconsistency in the judicial approach to defining the duration of house arrest where it is not imposed for the full 24 hours; there is a failure to take account of the financial resources of the suspect, accused when determining the level at which bail is set; failing to release the suspect, accused promptly once the amount required has actually been paid; and the courts dealing with appeals in respect of measures of restraint do not consider that they have the necessary background of investigative judges.

163. A further problem has been identified by the European Court which, in respect of the former Criminal Procedure Code, has found violations of Article 5(1) as a result of the detention of persons without any judicial decision during the period between the end of the investigation and the beginning of the trial[95]. It has now found the same violation in respect of custody imposed as a measure of restraint under the Code where such a measure's validity lasted only until the day on which the case had been transferred by the investigating judge to the trial court, which assumed jurisdiction over the case and the competence to impose preventive measures but did not rule on the applicant’s continued detention until about one and a half months later[96].

164. The Court ruled that

> the applicant remained in detention, even though Article 203 of the CCP clearly provided that any decision on preventive measures should cease to have effect immediately after the expiry

[95]See, e.g., *Kharchenko v. Ukraine*, no. 40107/02, 10 February 2011.
[96]*Chanyev v. Ukraine*, no. 46193/13, 9 October 2014.

> of its term of validity (...). All his complaints concerning the unlawfulness of his pre-trial detention without a judicial decision and his requests for release were rejected on the ground that his detention was in accordance with the law. In particular, the investigating judge rejected his complaint, stating that the trial court had two months to decide on his continued detention, under Article 331 § 3 of the CCP (...). Thus, the domestic authorities considered that there had been no violation of the applicant's right to liberty, despite the clear fact that he had been detained without a judicial decision for one and a half months. What is more, they referred to the provisions of the CCP as permitting such a situation to exist.
> 30. In this latter respect the Court notes with concern that the new Code of Criminal Procedure of Ukraine, contrary to the Government's submissions to the Committee of Ministers (...), does not regulate in a clear and precise manner the detention of the accused between the completion of the pre-trial investigation and the beginning of the trial. Thus, as in the present case, Article 331 § 3 of the Code provides that the trial court has a period of two months to decide on the continued detention of the accused even where the previous detention order issued by the investigating judge has already expired.
> 31. The foregoing considerations are sufficient to enable the Court to conclude that the existing legislative framework allows the continued detention of the accused without a judicial decision for a period of up to two months, and that those provisions were applied in the case of the applicant, who was detained without a court ruling ordering his detention for the period between 28 February and 15 April 2013.
> There has accordingly been a violation of Article 5 § 1 of the Convention.

165. This ruling has indeed exposed a lacuna in the Code since the time limit for the validity of custody imposed by an investigating judge is fixed under Part 3 of Article 197 by the duration of the pre-trial investigation.

166. *There is a need, therefore, for:*

- *the Code to be amended to extend the competence of the investigating judge to prolong the imposition of custody as a measure of restraint in cases where this is warranted at the time of transferring a case for trial and after following the procedure otherwise required for making such a decision; and*
- *the trial judge to be required of his or her own motion to consider whether the measures imposed by the investigating judge continue to be warranted rather than, as Article 315 currently provides, these be deemed to continue .*

167. *In addition, in order to improve the process of decision-making with respect to the imposition of measures of restraint, there is a need for:*

- *the development of judicial practice as to how the requirements of the Code should be implemented, including the need for equality of arms to be respected and consistent and reasoned rulings, and the provision of training for judges on the application of these requirements.*

viii. General duties of a judge regarding the protection of human rights

168. The absolute majority of counterparts suggested that the innovative provisions in Article 206 - which established a proactive role for investigative judges in

safeguarding the rights of persons deprived of their liberty and entailed a special set of powers and concomitant obligations - remained unexploited.

169. Indeed, it was reported that investigative judges often neglect indications of possible human rights violations in the cases that come before them.

170. Moreover, defence lawyers, in their turn, mostly invoke this article just for the purpose of challenging the grounds on which suspects are remanded in custody and not with a view to securing protection for the whole range of their rights.

171. Furthermore, there seem to be uncertainties with regard to procedures to be followed when invoking Article 206, including their interrelation with the proceedings against the suspect concerned, the precedence of jurisdictions and the scope of the matters to be examined under this provision.

172. *In order for the fully-fledged application of the provisions in Article 206 to be achieved, there is a need for:*

- *the carrying out of a study on the practice of using this article, with particular attention being paid to the scope and manner in which the matters raised are examined, the interrelationship between it and any mainstream procedures against the individuals responsible for the alleged human rights violations of and the details of rulings that have been issued and the extent of their implementation;*
- *the exercise of judicial control to be enhanced and the development of a consistent judicial practice with regard to this article to be supported; and*
- *the provision of guidance and further training for defence lawyers on the use of this article, as well as the encouragement of them to invoke and engage it more actively as a remedy for human rights violations alleged to have been committed during the pre-trial stage.*

6. SECTION III. PRE-TRIAL INVESTIGATION

173. The issues of concern relating to this section involve a wide range of issues relating to the pre-trial investigation in general, investigative actions - both open and covert - the notification of suspicion, the observance of time limits and challenging decisions.

A. Chapter 19. General provisions in respect of pre-trial investigation [Articles 214-222]

174. The issues raised under this chapter concern the initiation of pre-trial investigation, the applicable time-limits and the review of records before its completion.

i. Initiating pre-trial investigation

175. The mode of initiating criminal procedures (pre-trial investigations) by entering all notifications of "circumstances which are likely to indicate that a criminal offence has been committed"[97] into the Unified Register of Pre-trial Investigations ('the Unified Register') was one of the most important conceptual changes introduced by the Code.

176. By providing for a direct ban on allowing any refusals to accept and enter relevant statements or information into the Unified Register - together with other norms such as the inadmissibility of evidence obtained prior to registration of a notification that make this automatic and mandatory - the Code was seeking to do away with the 'grey zone' of pre-investigative inquiry or verifications that was extensively exploited under the previous framework.

177. The former 'grey zone' was conducive to various abuses, including many entailing violations of the European Convention established by the European Court, including the wide-spread use of unregistered detention[98], deficiencies affecting investigations into serious human rights violations (including the failure to institute criminal proceedings or delays in doing so)[99] and the impossibility for alleged victims or their relatives to be involved in the procedures to the extent necessary to protect their legitimate interests[100]. The pre-investigative inquiry stage was also known for generating favourable conditions for corruption.

178. However, various factors have led to the requirement to enter all notifications into the Unified Register to become the most resisted and distorted of all the novelties introduced by the Code. They comprise, in particular, difficulties with comprehending the new spirit, principles and norms, inertia, the above-mentioned disparity between the model being established and the existing institutional and functional set-up of the investigative and overall law-enforcement, prosecutorial and judicial structures, as

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[97]Hereafter, 'notification(s) of crime(s)'.
[98] E.g., *Osypenko v. Ukraine*, no. 4634/04, 9 November 2011.
[99] E.g., *Myronenko v. Ukraine*, no. 15938/02, 18 February 2010.
[100]E.g., *Kucheruk v. Ukraine*, no.2570/04, 6 September 2006.

well as some open defiance reportedly related to the vested interests of those benefiting from the former opportunities for corruption. Indeed, this novelty has been amongst most resisted and distorted of those introduced by the Code.

179. Apart from alleged pressure of work and obstacles created in the way of notifications of crimes being filed by victims or other applicants, the deviation from the aim of the Code and the retention in practice of a stage of pre-investigative inquiry was also facilitated by certain provisions in the by-laws and instructions issued by certain stakeholders, notably the Regulations on Maintaining the Unified Register of Pre-Trial Investigations[101]and the High Specialised Court of Ukraine on Civil and Criminal Cases' Information Letter "On Certain Issues of the Procedure to Challenge Decisions, Actions or Omissions of Pre-Trial Investigation Authorities"[102]. Paragraph 2.2 of Section 2 of the former measure introduced a 7-day time limit for dealing with uncertain notifications[103]and the latter one provided for possibilities to exceed the 24-hour time limit for registration of notifications, replacing the moment of submitting a notification of crime with its assignment to an investigator and introducing other limitations to the principle of automatic registration. However, the proper implementation of that principle, supported by adequate institutional and functional reforms, would preclude any justified reasons being advanced for the insufficiency of the 24-hour time-limit on registration of notifications.

180. The official statistics provided by the Office of the General Prosecutor's include two entries: "Number of reports on crimes filed to pre-trial investigation agencies" and "Number of reports on crimes registered in the Unified Register of Pre-trial Investigations". In 2013 these entries respectively comprised 2,327,740 and 1,545,093, suggesting that around 33.5 % of the reports containing some indications of crimes were processed without entering into the Unified Register and outside the framework established by the Code.

181. Furthermore, it is significant that almost 17% of the 3,690 applications received in 2013 by the Ukrainian Parliament Commissioner for Human Rights from citizens concerning criminal procedures were complaints about the failure to enter information on criminal offences into the Unified Register[104].

182. One of arguments against the automatic registration and initiation of pre-trial proceedings that has been invoked concerns the allegedly frequent abuse of this procedure by means of filing 'invented' - i.e., not genuine - notifications in order to

[101] N 69 of 17.08.2012; № 113 of 14.11.2012 and № 13 of 25.01.2013. respectively approved and introduced by Orders of the Prosecutor General (then Mr. Pshonka).
[102]No. 1640 of 09.11.2012.
[103]However, this time limit was subsequently abolished.
[104]Annual Report 2013, section 2.1.1.Violating rights and freedoms in a pre-trial investigation. As to the efficiency of the procedures and possibility for challenging 'inaction' ('refusal' to register) envisaged by the Code, see the comments relating to Article 303, at paras. 237-248 below.

persecute certain individuals or for other malicious reasons. However, a mere registration of a notification does not bring immediate negative or intrusive results for anyone mentioned in it. Indeed, as regards the taking of investigative actions or procedural measures that might lead to such consequences, it should be recalled that the Code provides sufficient safeguards for the interests of those in respect of whom such actions or measures are taken. Thus, quite to the contrary of what is currently being suggested, it was much easier under the former unregulated and loose framework of pre-investigative activities for the law-enforcement machinery to be maliciously engaged.

183. The requirement to enter all notifications of crimes into the Unified Register has also been undermined by the practice of not handling notifications suggesting "circumstances which are likely to indicate that a criminal offence has been committed" under Article 214 but treating them instead as applications under the Law of Ukraine *On Citizens' Complaints*. As a result, many notifications appear to be retained or handled by operative officers[105]. Furthermore, if these are recorded at all, they are entered in general journal for ordinary complaints and incoming correspondence and not the special log-book and subsequently the Unified Register.

184. The practice of evading the requirement for automatic registration of notifications of crime is reportedly widespread in instances concerned with alleged human rights violations and other possible unlawful actions by law enforcement officers. Many such complaints and applications are mechanically attached to the pre-trial investigation files being processed against the individuals making them. It should be noted that such an approach, at least in cases concerning alleged serious human rights violations, constitutes a violation of requirement for them to be the subject of independent and impartial investigation that has been established in the case law of the European Court[106].

185. The sustained resistance to the framework established by the Code surfaces in the recurrent attempts to reconsider at the legislative level the rules governing the crime reporting process and the commencement of pre-trial procedures. Thus, in March 2014 a draft law was registered in the Verkhovna Rada[107] which sought to reinstate, albeit under the different title, the stage of pre-investigative inquiry. Indeed, it even envisaged enhancing this stage by providing an obligation for "managers of business entities, institutions, organizations and media outlets" to submit documents and other materials upon an investigator or public prosecutor's request, including powers to summon those submitting a confession (which is in fact a measure of

[105] Meetings with civil society and the thesecretariat of the Ukrainian Parliament Commissioner for Human Rights on, respectively, 24 and 26 June 2014 and focus meeting with private practicelawyers on 15 July 2014.
[106] See *Barabanshchikov* v. *Russia*, no.36220/02, 8 January 2009, at para. 48. See also *Toteva* v. *Bulgaria*, no. 42027/98, 19 May 2004, at para. 63.
[107]Draft No.4263.

ensuring criminal procedures) This draft law was not, however, examined following its introduction.

186. Nonetheless, the rejection of, or further deviation from, the mode of initiating criminal procedures (pre-trial investigations) envisaged by the Code would be a serious setback for the approach to criminal justice which it has sought to establish. It would, in particular, undermine the human rights safeguards and anti-corruption measures that the Code embodies, as well as running counter to the European aspirations and other democratic values to which the new authorities have clearly committed themselves.

187. *Thus, instead of operating with, and adjusting the Code to conform to, outdated concepts of crime statistics and in addition to the overall legislative and institutional measures recommended in the general observations section*[108]*, there is a need for:*

- *the review of the instructions and secondary legislation with a view to removing provisions that are inconsistent with Article 214 and to reinforcing the principle of immediate commencement of criminal procedures that it embodies;*
- *the development of statistical schemes and proper performance indicators for investigators that take account of the changed approach embodied in the Code; and*
- *the carrying out of targeted trainings on processing notifications of crime and initiating pre-trial investigations.*

ii. Time limits for pre-trial investigation

188. This is dealt with in connection with Chapter 24[109].

iii. Review of records of pre-trial investigation before its completion

189. Defence lawyers and representatives of civil society organisations have suggested that the investigative authorities and public prosecutors abuse their discretion under Article 221 regarding the early disclosure of all the records of pre-trial investigation.

[108] See para. 35 above.
[109] See paras. 229-236.

190. In particular, it is considered not infrequent for the investigative authorities and public prosecutors to reject relevant motions seeking such disclosure, either without specifying any particular reasons or by claiming that granting it will prejudice the pre-trial investigation. Furthermore, this practice is said to extend to motions for disclosure of expert examinations and their results.

191. However, as with some other rights and prerogatives attributed to the defence and other participants of criminal procedures, it should be noted that the Code already provides sufficient avenues and possibilities for challenging those decisions of investigators and prosecutors that are not subject to separate appeal procedures at the pre-trial stage[110].

192. *Accordingly, in order to correct the above-mentioned practice there is a need for:*

- *the carrying out of further targeted training for defence lawyers, members of the judiciary and other legal professionals on the avenues and procedural tactics for challenging refusals to grant motions as to early disclosure of materials of pre-trial investigations, expertises or any other similar restriction of the right to defence; and*
- *the development of a uniform and solid judicial practice on addressing challenges to refusals to grant motions as to early disclosure of materials of pre-trial investigations, expertises or any other similar restriction of the right to defence.*

B. Chapter 20: Investigative (Detective, Search) Actions [Articles 223-245]

193. The issues relating to this chapter concern interviewing witnesses and conducting searches.

i. Interviewing

194. This is considered in connection with Article 95[111].

ii. Search

195. Various shortcomings in the Code or its implementation have been said to exist with regard to the provisions governing searches.

[110] See the comments to Article 303 at paras. 237-248 below.
[111] See paras. 95-96 above.

196. There has been a proposal to extend the provisions of Articles 233 and 234 on forced entry to cover the property of enterprises, institutions, and organizations and not just a dwelling or other property of an individual. However, this appears to be based on a too restrictive interpretation of these provisions in the Code, not least since Part 2 of Article 233 specifically refers to premises for 'service, business, production or other use, etc.'.

197. The ruling to authorize a search of home or any other possession of a person is considered in connection with Chapter 15[112].

198. Controversial assertions have been made as to the need to reinstate protocols of searches, improve their accuracy (especially, in terms of listing the items seized during them), as well as proposals to amend the Code so as to require a copy of the protocol to be served on the owners of the premises concerned or on other relevant persons.

199. However, if there is a practice or numerous incidents of searches being carried out without compiling a protocol, this would be a clear breach of Part 8 of Article 236, which unequivocally provides for the compiling of a record of this 'investigative (detective) action'. Thus, in combination with the provisions of Chapter 5[113], there are already sufficiently clear rules on recording searches.

200. Moreover, Part 8 of Article 236envisages an effective remedy against the possibility of the protocols of searches being forged, including against any omission to indicate all the items seized during them.

201. Certainly, serving a copy of the protocol would not be a direct proof or indication of the suggested abuses if the persons present did not introduce relevant comments in the protocol (records), which is exactly what Part 8 requires.

202. Thus, the Code already provides for an immediate safeguard against possible irregularities or abuses said to be occurring since, if a search is carried out, there should be an original protocol with the comments/signatures of the persons present, including the owners and any other relevant persons. Any seizure of an item without recording it in the protocol can be subsequently appealed under the avenues provided by the Code, including Article 303 (since this would amount to temporary seizure of property[114]), and - depending on the particular context - there would also be the possibility of notifying the competent authorities about a crime committed by the official(s) who carried out the search. However, obtaining a copy of the protocol at

[112] See paras.99-103 above.
[113] See also the comments to Article 95 at paras 95-96 above.
[114] See the comments to Article 303 and corresponding recommendations at paras. 237-248 below.

the time of a search - which also recorded any comments made about it - would reduce the scope for disputes and subsequent further proceedings

203. *Thus, in view of the concerns that have been raised, it would be appropriate for:*

- *the Code should be amended so as to require a copy of the protocol, together with a record on it of any comments, to be served on the owners of the premises concerned or on other relevant persons;*
- *the provision of guidance/further training for investigators, prosecutors, other legal professionals on the requirements to be observed during searches and, in particular, their documentation, as well as the applicability of the powers concerned; and*
- *the raising of public awareness about and defence lawyers to be encouraged to use the avenues for challenging irregularities and abuses that occur during searches or similar intrusive investigative actions.*

C. Chapter 21: Covert Investigative (Detective) Actions [Articles 246-275]

204. Three issues have been raised with respect to covert investigative (detective) actions, namely, observance of the requirements applicable, the admissibility of evidence from certain actions and observance of the principle of adversariality.

i. Observance of the requirements

205. There have been general, but recurrent, assertions that investigative judges omit to check the justification for, and turn a blind eye to, the scope of covert or other intrusive actions requested by investigation and prosecution[115].

206. However, the Code provides clear criteria governing the authorisation of covert investigative (detective) actions and thus already provides appropriate safeguards against this alleged practice. Of particular importance in this connection is the requirement to substantiate the impossibility of otherwise obtaining knowledge about the crime and the individual who committed it, as well as the requirement to specify signs which will allow to 'uniquely identify' the persons or objects concerned[116].

[115] See the comments to Articles 234-236 at paras. 195-203 above.
[116]Article 248.

207. Moreover, the Code imposes an obligation to notify the individuals in respect of whom covert investigative (detective) actions have been conducted within twelve months from the date of their termination but also not later than any indictment has been produced to court[117]. However, there have been suggestions that this obligation is not always respected.

208. According to the official statistics, 82,518 motions on granting covert investigative activities were filed during 2013. The most frequently sought were those for collecting information from telecommunication networks (23,142) and for the audio and video monitoring of an individual (10,108). The rate of granting the motions to carry out these two types of covert investigative activities was 93%. These figures may not *per se* suggest that there is an excessive use of covert or other intrusive actions.

209. *Nonetheless, in view of the concerns that have been raised, it would be appropriate for:*

- *the carrying out of an in-depth study on the practice of using covert and other intrusive investigative actions, including the notification of those individuals in respect of whom covert investigative (detective) actions were conducted;*
- *the provision of guidance/further training for investigators, prosecutors, other legal professionals as to the requirements and safeguards to be observed when resorting to covert and other intrusive investigative actions and the alerting of them to the potential for such actions to violate the right to respect for home, family life or other privacy rights;*
- *the encouragement of defence lawyers to challenge more actively alleged abuses relating to the conduct of covert and other intrusive investigative actions and to seek relevant remedies for protection of the right to respect for home, family life or other privacy rights;and*
- *the enhancement of the exercise of judicial control and the development of a uniform and solid judicial practice that would pursue the principle of proportionality and put legal obstacles in the way of any misuse of covert and other intrusive investigative actions.*

ii. Admissibility of evidence

210. As already noted, Article 41 and Part 6 of Article 246 authorize the operative units of the law enforcement agencies to conduct investigative and covert investigative search actions in criminal proceedings upon written assignment of an

[117]Article 253.

investigator or prosecutor[118]. In these situations, the operative officer exercises some of the powers of the investigator. When performing such actions, the operative officer is regulated by the Code and not the Law of Ukraine *On Operative Search Activities*.

211. Paragraph 4 of the Transitional Provisions (Section XI) of the Code provides that detective and search cases that, on the day when it enters into force, are already undergoing proceedings by the operative units shall be continued and transferred to the pre-trial units for pre-trial investigation, when appropriate grounds exist.

212. This has led to questions being raised[119] related to the admissibility as evidence during trial of the findings from such searches. It has been argued, that evidence collected by operative units before the entry into force of the Code should not be admissible as evidence during trial, as there were insufficient procedural guarantees during its collection.

213. Indeed, prior to the adoption of the Code, it had already been noted that there was a need to clarify under which conditions investigative materials gathered under the Law of Ukraine *On Operative Search Activities* could be admissible as evidence and with regard to which types of offences[120]. Certainly, the tasks of the operative and search units within the criminal justice system were, and are, intended to remain the area of prevention, detection and stopping of crimes and were not to be identical to the aims of the prosecution. Thus, upon indicia of the committing of an offence, the investigation and all gathered materials should pass over to the pre-trial investigation authorities. However, it is still not clear whether those materials passed to the criminal investigators and public prosecutors following the entry into force of the Code should have evidentiary value[121].

214. The Ministry of Justice has indicated that a new bill on search and operational investigation as one of the future challenges, and "Cancelation of a separate legislative framework on operative investigative activities" is one of the main issues to be considered in reviewing proposals for amending the Code[122].

215. *It would be appropriate, therefore, for it to be clarified that*

- *investigative materials gathered under the Law of Ukraine* On Operative Search Activities *should only be admissible where the relevant requirements of the Code are shown to have been fully observed in the course of gathering them; and*

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[118]See paras. 57-65 above.
[119]Focus group meeting with private practice lawyers, 15 July 2014.
[120]Paragraph 322 of the draft Code Opinion.
[121]See also paras. 91-92 above.
[122]Meeting 24 June 2014 in the Ministry of Justice.

- *a review, as previously suggested*[123]*, of legislation regulating operative search activities with a view to ensuring that this is fully in harmony with the provisions in the Code.*

iii. Respect for the principle of adversariality

216. A further issue that arises is concerned with ensuring respect for the principle of adversariality, the right to defence and other fair trial requirements when the Law of Ukraine *On State Secrets* is applicable to court rulings concerning covert investigative actions.

217. It was confirmed by the judges met that their reasoning for the approval of covert investigative actions in such cases remains inaccessible to the defence, even after they have been executed or their term has expired. Where the Law of Ukraine *On State Secrets* is applicable, the defence will only be provided with a written answer confirming the fact of approving covert investigative action by a court ruling. The effect of this is to prevent the defence from assessing the lawfulness of the covert investigative action involved and then challenging it - on the basis that the evidence obtained thereby is inadmissible - should this be deemed necessary.

218. *The extent of the restrictions imposed on the defence could possibly be minimised in such cases if:*

- *there were a review of the arrangements for maintaining court rulings on covert investigative activities fully inaccessible for the defence, as well as the proportionality of restrictions on access to records, documents or materials of the covert investigative actions, and consideration were given to implementing the best practices developed in this regard in other jurisdictions.*

D. Chapter 22: Notification of Suspicion [Articles 276-279]

219. The criticism with regard to the implementation of the provisions on notification of suspicion has predominantly concerned a lack of clear criteria regarding the sufficiency of evidence (standard of proof) for suspecting a person of having committed a criminal offence, which results in the frequent intentional postponement of notifications until the latest stages of a pre-trial investigation[124]. However, it has also concerned establishing that a notification has been served.

[123] See para.64.

[124] Thus, it seems that this procedural measure fulfils the second of its two purposes, namely to serve as one of the formal barriers for using coercive procedural instruments against suspects. However, when prioritising the role to be played by the notification of suspicion, it should be taken into account that this aspect has a secondary

i. Delayed notification

220. The introduction into the Code of a separate procedural step of notification of suspicion that is formulated as an obligation for this to occur when sufficient evidence has been collected clearly suggests that the drafters and the legislator designed it with the primary focus on informing the individuals concerned at an early stage of their procedural status and relevant prerogatives from which they could benefit in order to protect their fair trial rights. This novelty echoes elements of Article 6 of the European Convention and the case law of the European Court.

221. When developing the practice on notification of suspicion, it would also be advisable to keep in mind the low threshold of applicability of this aspect of the fair trial standards identified by the European Court. Thus, whenever persons are implicated and their situation is substantially affected by procedural actions taken against them, they should benefit from the relevant fair trial rights regardless of the domestic classification of the procedures concerned as administrative rather than criminal[125]. As a result, it can be asserted that - albeit without the immediate consequence of constituting an irreparable violation - a failure to notify the suspect concerned of his or her actual status can undermine the fair trial requirements.

222. *In order to address difficulties in complying with the notification of suspicion requirement, it would be appropriate for:*

- *the carrying out of an in-depth study on the practice of notification of suspicion, including the circumstances in which, under the Code, a failure to notify a suspect of his/her actual status could not be reconciled with the genuine interests of efficiency of detecting crimes and perpetrators;*
- *the provision of guidance/further training for investigators, prosecutors, other legal professionals to be provided as to the requirements and safeguards to be observed with regard to notification of suspicion;*
- *the encouragement of defence lawyers to challenge more actively instances of supposedly unjustified delays in notifying someone about suspicion that lead to significant violation of the fair trial requirements;*
- *the development of a uniform judicial practice, providing guidance as to the criteria for when notification of suspicion may or may not be delayed; and*
- *the undertaking of a study into other possible ways in which timely notification of suspicion might be better secured.*

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importance. The key safeguards that are supposed to guarantee just application against suspects of the measures to ensure criminal proceedings and other intrusive procedural means are embodied in the judicial control norms and procedures.

[125] See *Deweer v. Belgium*, no. 6903/75, 27 February1980, para. 46.

ii. Service

223. As to difficulties said to exist with regard to meeting the norms on notification of suspicion of fugitives and obtaining an arrest warrant, it should be noted that the Code furnishes the investigation, prosecution and judiciary with appropriate and practicable options in this regard.

224. In particular, by referring to the way prescribed by the present Code for serving notifications[126], Part 1 of Article 278 suggests that a notification of suspicion in the case of absconding is to be served either against signature on the suspect's adult family member or to another individual who resides together with the addressee, to the residential management organization at the place of residence or to the administration at the place of employment.

225. Moreover, if a person is notified in advance by an investigator, public prosecutor, investigating judge, court on his email address, a document dispatched to such address shall be deemed received if the person confirmed receipt by an appropriate email.

226. Furthermore, serving can be confirmed by a hand receipt including on the post-office notice, a video recording of its submission to an adult family member and other abovementioned persons, any other data confirming the fact of such serving on the person or of learning its content.

227. Thus, the situations in which none of these options can be used should be rather rare and, in such cases, an investigation could still use the latter open-ended provision and find an option that would address person-specific circumstances.

228. *In these circumstances, it would thus be appropriate for:*

- *the examination of current practice and the provision of guidance as to the additional, avenues, including their technical aspects, for serving notifications of suspicion on fugitives.*

E. Chapter 24: Completion of pre-trial investigation. Extension of time-limits for pre-trial investigation [Articles 283-297]

229. It has been suggested that the Code lacks any indication as to the grounds for terminating further procedures in case of expiration of the statute of limitations. However, it is clearly covered by Articles 285-88 that deal with the general provisions

[126] Set out in Part 3 of Article 111and in Articles 135-136.

of criminal proceedings when relieving a person from criminal liability and the procedure to be followed for this purpose. These provisions set out the general norm according to which a person shall be relieved from criminal liability in the cases stipulated by the Law of Ukraine on criminal liability.

230. There is, therefore, no need for a specific provision dealing with the situation in which the statute of limitations with respect to a particular offence has expired.

231. Part 2 of Article 28 has spelt out in an appropriate manner the notion of a reasonable time for the conduct of proceedings, as well as the criteria for evaluating its fulfilment. In doing so, it reflects the requirements of the case law developed by the European Court with respect to Article 6(1) of the European Convention.

232. Furthermore, Article 219 elaborates formal time-limits for the completion of pre-trial investigation.

233. However, Articles 294-297 provide criteria and procedures for the extension of the time-limits for the completion of pre-trial investigation and attributes the power of decision-making in this respect - and thus control over observance of the reasonable time requirement to public prosecutors of rising seniority according to the length of the extension involved.

234. Although hierarchical control over compliance with the reasonable time requirement can be regarded by the European Court as providing effective remedies in this regard, the relevant powers do not seem so far to be being appropriately applied within the Public Prosecutor's Office.

235. As a result there have been proposals to transfer the power to extend the length of pre-trial investigations to the judiciary, as is already the case with decisions to extend remand in custody and measures of restraint.

236. *Before taking such a step, it would be appropriate for:*

- *the undertaking of a focused examination as to the application in practice of Articles 28, 219 and 294-297, with a view to establishing the possibility of making effective use of the existing prosecutorial avenues for ensuring compliance with the reasonable time for pre-trial investigations and feasibility of facilitating this through the introduction of suitable judicial remedies*; *and*
- *the development of performance indicators that focus on the need for a criminal investigation to be closed as soon as no sign of a crime is detected*

F. Chapter 26: Challenging Decisions, Acts or Omissions during Pre-Trial Proceedings [Articles 303-313]

237. Although these provisions specifically spell out means whereby victims, applicants can challenge any inaction or 'refusal' to enter notifications of crimes into the Unified Register, attempts to use them in practice have encountered some difficulties.

238. Thus, there is a somewhat inexplicable passiveness on the part of defence lawyers in making use of this remedy, preferring instead to pursue such matters through hierarchical avenues within the public prosecution service.

239. Moreover, investigators and prosecutors seem to take advantage of the insufficient awareness that Part 1 of Article 304 provides a strict 10-day deadline for challenging such inaction or refusal, as well as for other decisions, acts or omissions on the part of the pre-trial investigation agencies or public prosecutors. Recurrent assertions were heard to the effect that, under different pretexts, investigators and/or prosecutors would refrain from issuing formal written replies concerning a refusal to enter a notification of crime into the Unified Register. This would mean that any actual decision not to register a notification of a crime would become unchallengeable through judicial avenues since the 10-day deadline would have expired before it was appreciated that the relevant period had even started to run. Challenges were also reported as being undermined by 'last minute' notification and summoning of the defence or other appellants to relevant court hearings, thereby preventing them from attending or making adequate preparation since it was not then possible to consider all the materials, including the submissions of the investigation and/or prosecution.

240. Nonetheless, an analysis of the provisions in this chapter suggests that the Code has furnished victims, applicants and their lawyers with a straightforward and potentially effective remedy, which could and should be easily used provided there is sufficient knowledge and awareness about the procedures to be followed.

241. It seems that it is not fully appreciated that even a refusal to issue a written confirmation about entering a notification of crime into the Unified Register should be considered as an inaction that is subject to challenge under Article 303. If adequately and intensively used, this remedy could certainly frustrate the efforts of those minded to disregard the requirement for notifications of crimes to be automatically registered[127].

[127] See the comments to Article 214 at paras. 175-179 above.

242. This would be equally applicable to the deliberate misclassification of crimes that are actually registered as less serious than the information submitted would warrant, which is also reportedly a widespread occurrence.

243. Furthermore, these considerations would also apply to the use of Article 303 for the purpose of challenging other acts or omissions of investigators and public prosecutors during pre-trial proceedings**.**

244. *In these circumstances more effective use of the remedies already provided in the Code could be achieved through:*

- *an intensification of the awareness of the public at large and the provision of targeted training for defence lawyers as to these remedies and, in particular, their applicability to an inaction or 'refusal' to enter into the Unified Register relevant notifications of crimes and the incorrect classification of crimes according to articles in the Criminal Code;*
- *the revision of the secondary regulations (instructions) so that they oblige investigators/prosecutors to provide, within a 24-hour deadline, the applicants or victims concerned with an official written reply as to the status of registration of their notifications in the Unified Register;*
- *the subjecting of the accuracy of all classification of registered notifications of crimes to an accentuated hierarchical control; and*
- *the adoption of guidelines for the judiciary directed to ensuring timely notification and summoning of the parties to any hearings, including those held under the framework Articles 303-304 of the Code.*

245. There are proposals to change the exhaustive character of Part 1 of Article 303 so that all decisions, actions or omissions of investigation and prosecution, and not just those which it lists, would be subject to judicial challenge at the pre-trial stage.

246. However, this would make the pre-trial stage excessively complex and run counter to the clearly auxiliary nature of the pre-trial investigation, as reinforced by means of the principle of immediacy (direct examination of evidence) established in Article 23 and other relevant approaches introduced by the Code. Under these approaches the defence and other participants in criminal proceedings already have avenues for questioning the decisions of investigators and prosecutors at the trial stage and getting a determination on submissions that their rights were violated, with a view to either recovering them or dealing appropriately with any irreparable consequences flowing from them[128].

[128] There is considerable case law of the European Court which could be invoked for pursuing better protection against such breaches or errors at the pre-trial stage. In particular, this case law suggests that certain shortcomings at the pre-trial stage can seriously undermine position of the defence and make it impossible for

247. It is for investigation and prosecution to understand that, in case of such violations and omissions, they take the risk of evidence being ruled inadmissible and of other negative consequences ensuing from their perspective.

248. *However, in view of the present shortcomings on the part of the investigation and the prosecution, there is a need for:*

- *the provision of further targeted training for defence lawyers, members of the judiciary and other legal professionals on the avenues for challenging decisions, actions or omissions of the investigation and prosecution provided by the Code;*
- *the development of a uniform and solid judicial practice with respect to addressing challenges brought against decisions, actions or omissions of the investigation and prosecution.*

7. SECTION IV. COURT PROCEEDINGS IN THE FIRST INSTANCE

249. The issues with respect to this section concern measures of restraint during preparatory proceedings, the rate of acquittals and jury trials.

A. Chapter 27: Preparatory Proceedings [Articles 314-317]

250. The only issues raised with respect to this chapter concern the extension of a measure of restraint during the trial stage, namely, as regards its length, the criteria used and the trial judge's role in taking such decisions.

251. Pursuant to Part 3 of Article 315 of the Code, the court during the preparatory session should only decide on enforcing, changing or repealing measures of restraint if there is a motion in this regard by one of the participants in the proceedings and, in the absence of any such motion, the decisions made during the pre-trial investigation are to continue.

252. However, in practice there are no motions on enforcing, changing or repealing measures of restraint and so the ones previously adopted during the pre-trial investigation are automatically extended at the preparatory hearing[129].

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them to be remedied at the trial, thereby undermining the fairness of the trial as a whole; see, e.g., *Pavlenko*v. *Russia*, no. 42371/02, 1 April 2010, para 119.

[129]Deputy Prosecutor General, Office of the Prosecutor General at a meeting on 24 June 2014. This also assumes that the validity of the measure of restraint continues after the transfer of a case from the investigating judge to the trial court, which is not always the case; see paras. 163-166 above.

253. The Center for Political and Legal Reform has thus proposed that the possibility in Article 315 for such automatic extension of measures of restraint be deleted[130]. This would be appropriate as an automatic extension means that there has been no judicial determination as to the need for such an extension and this is not compatible with the requirements of Article 5(3) of the European Convention.

254. *In these circumstances, there is a need for:*

- *the replacement of the provision in Part 3 of Article 315 for the automatic extension of measures of restraint by a requirement for the court preparing a case for trial to determine of its own motion whether their continuation is justified.*

255. However, one of the issues raised during the meetings was "Standardization (legislating) of judicial review on the detention of the accused in preparatory proceedings. The need to clarify certain provisions relating to the preparatory meeting"[131].

256. Any decision with respect to enforcing, changing or repealing measures of restraint during both the preparatory phase and the trial itself is to be taken by the trial court rather than the investigation judge, who has that responsibility only during the pre-trial investigation. The existence of such a role for the trial court has thus given rise to questions about its possible impact on that court's impartiality; does it mean that the trial court will have committed itself through enforcing or imposing a measure of restraint, especially one involving detention?

257. In general, the lack of bias of the court is presumed, unless there is evidence to the contrary. The mere fact that a trial judge or an appeal judge has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality. Special circumstances may in a given case be such as to warrant a different conclusion. This can be that the judge or the court has stated that there is a "particularly confirmed suspicion" that the accused has committed the crime with which he is charged[132]. However, this can be adequately addressed through judicial self-discipline and motions to challenge the impartiality of

[130] *Comparative table on the draft Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine" (on the criminal justice system harmonization with European standards)*, (2014).
[131] Meeting in the Ministry of Justice, 24 June.2014.
[132] See for instance the European Court's judgment in *Hauschildt v. Denmark*, no. 10486/83, 24 May.1989, at paras. 50-52, which found Article 6(1) to have been violated, as the wording "particularly confirmed suspicion", which had been used by the court to justify the detention, was explained as meaning that the judge had to be convinced that there was "a very high degree of clarity" as to the question of guilt. Thus the difference between the issue the judge had to settle when applying these words and the issue he would have to settle when giving judgment at the trial became tenuous.

a judge. This is not a matter that otherwise needs to be specifically addressed in the Code.

258. However, there was a feeling that insufficient use was being made of the powers in Article 315 to prepare cases for trial, with the focus of the preparatory hearing being just on the issue of imposing measures of restraint[133].

259. *There is a need, therefore, for*

- *guidance to be given as to how to make most effective use of the powers given in Article 315 so that matters are not unnecessarily left for determination at the trial.*

B. Chapter 28: Trial [Articles 318-368]

260. No issues of specific relevance to the provisions in this chapter have been raised.

C. Chapter 29: Court Decisions [Articles 369-380]

261. The only issue to be raised with respect to court decisions has concerned the rate of acquittals since the Code entered into force.

262. Historically the rate of acquittals has been extremely low and, indeed, far below what can be seen in countries with which Ukraine would want to compare itself[134].

263. It was generally expected that the implementation of the Code would lead to an increase in the rate of acquittals and, indeed, such an increase could help to build the system's credibility. However, although a slight tendency in that direction can be discerned, this has certainly not been as fast and as significant as expected.

264. Thus, based on the statistical data of the Unified Registry, the total rate of acquittals for Ukraine was 0.09% in 2013 and 1.6% for the period from January to May 2014.

[133] Focus meeting with judges on 16 July 2014.

[134] E.g., in France the acquittal rate is 4.1% and in Germany it is 7.7%; see M. Beissinger & S. Kotkin (eds.), *Historical Legacies of Communism in Russia and Eastern Europe*, (2014), p. 174.

265. Furthermore, according to information from the High Specialized Court of Ukraine on Civil and Criminal Cases, a total of 110 defendants were acquitted by trial courts from 19 November 2012 to 1 October, 2013. Of those defendants, 20 were acquitted for a lack of evidence of the alleged offence, 32 were acquitted for a lack of evidence that the alleged offence had been committed by the defendants concerned, 33 were acquitted on account of it not having been proved that actions of the defendants concerned constituted an offence, 3 were acquitted on account of a crime not having been proven under clause 1 of Part 1 of Article 284 of the Code and 22 defendants were acquitted due to the elements of crime not having been proven under clause 2 of Part 1 of Article 284[135].

266. This picture is confirmed by the statistics on acquittals prepared by the Office of Prosecutor General of Ukraine for the entire country, which are as follows;

December. 2012-March 2013 - 0
April 2013 - 3
May 2013 - 3
June 2013 - 7
July 2013 - 2
August 2013 - 9
September 2013 - 8[136].

267. A number of explanations have been offered for the continued low rate of acquittals.

268. In the view of at least some judges, the low rate stems from the absence still of a real adversarial environment in the courtroom, with many judges wanting to continue in their old ways and not adapt to the requirements of the Code[137].

269. Another reason, also according to judges, is that there is still no real equality of arms between a very strong public prosecution and the weak defence lawyers. In their view not all defence lawyers were sufficiently professional and capable, with motions being submitted by them being sometimes misdirected or not relevant. Furthermore, it was considered that public prosecutors were able to take advantage of the lack of skills of defence lawyers in that the latter rarely questioned the legality and admissibility of the evidence presented to the court on the basis of the way in which it was produced. In the view of the judges, courts could do little to help those lawyers who perform badly.

[135] Review of Court Statistics as of 1 October 2013, prepared by the High Specialized Court of Ukraine on Civil and Criminal cases.
[136] Application of the new Criminal Procedure Code of Ukraine, Data as of 15 October 2013, prepared by the Office of Prosecutor General of Ukraine, Kyiv October 2013.
[137] Focus group meeting on 15 July 2014.

270. In addition, judges cited the fact that many defendants confess and enter into agreements with the prosecution - in respect of which the role of the judge is limited - as an explanation for the low acquittal rate.

271. On the other hand, prosecutors justified the 'apparent' low rate of acquittals by the fact that many cases are not actually indicted so that the figure is higher if you don´t count the agreement cases[138]. However, while the exclusion of the latter cases would increase the percentage of acquittals in cases that have a full trial hearing, this suggestion is not really convincing since the plea agreements involve an acceptance of guilt and so should be included in the total number of convictions.

272. The provision on acquittals in the Code is no different from that of other countries, but the outcome is.

273. The present situation does not, however, give rise to any need for the Code to be amended. As indicated above the text of the Ukrainian law does not differ in any material way from that of other countries which have higher rates of acquittal. The reasons given by the judges confirm the general picture of a legal system in which the actors have not yet adopted the fundamental ideas underpinning European standards and need to improve their qualifications, as well as of a system which is still dominated by former institutional roles.

274. *In order for the momentum created by the Code not to be lost, there is thus a need for:*

- *the intensification of the process of institutional reform;*
- *the development of performance indicators for public prosecutors that take into account of the bar in Article 43 of the new Law of Ukraine On the Public Prosecutor's Office on an acquittal as a ground for bringing disciplinary proceedings against the public prosecutor in the case concerned; and*
- *the undertaking of extensive capacity building for all actors involved in the criminal justice system.*

D. Chapter 30. Special procedure of criminal proceedings in the court of first instance [Articles 381-391]

275. No specific concerns relating to the provisions in this chapter have been raised. However, there seemed to be much support amongst judges, at least, for extending the use of jury trial. At the same time, it was suggested that their operation was insufficient regulated, without giving any precise details in this regard.

[138] *Ibid.*

276. *In view of the limited experience so far with jury trials, it would be appropriate for:*

- *the deferral of any changes to the availability of jury trial and the arrangements for holding them until a more significant body of practice with respect to this form of trial has been developed and analysed.*

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

277. Only one issue has been raised with respect to this section of the Code.

A. Section 31: Criminal Proceedings in the Court of Appellate Instance [Articles 392-423]

278. There appears to be a problem of challenging verdicts, especially in the appeal court, in cases where the convicted person was represented by a legal aid lawyer as the latter may have withdrawn by that stage, having considered that he or she had discharged his or her responsibilities following the trial court's ruling. This so even in cases where the defendant had pleaded not guilty and so he or she is left to deal with the appeal alone. However, although this is a problem that could result in a violation of Article 6 of the European Convention, the change required is not to the Code but to the arrangements governing the provision of legal aid.

B. Chapter 32: Criminal Proceedings in Court of Cassation [Articles 424-443], Chapter 33: Proceedings in the Supreme Court of Ukraine [Articles 444-458] and Chapter 34: Criminal Proceedings upon Discovery of New Circumstances [Articles 459-467]

279. No issues of specific relevance to the provisions in these chapters have been raised.

9. SECTION VI. SPECIAL PROCEDURES FOR CRIMINAL PROCEEDINGS

280. The issues with respect to this section concern the use of plea and reconciliation agreements and participation in proceedings by incompetent defendants.

A. Chapter 35: Criminal Proceedings Based on Agreements [Articles 468-476]

281. The present Chapter introduced a simplified procedure for dealing with cases, involving a reconciliation agreement between the victim and the defendant or a plea agreement between the prosecutor and the defendant. During the preparatory session with participation of the parties, the court is responsible for ensuring that any such agreement has been made voluntarily and that it also complies with all the other requirements applicable. Where satisfied in both these respects, the court can then pass a judgment based on the agreement.

282. The percentage of cases based on agreements has been increasing since the Code entered into force, although there is some disagreement as to the exact level. Thus, according to the Office of the Prosecutor General, 5% of cases in the period November-December 2012 were the subject of such agreements, with the percentages for the whole of 2013 and from January to May 2014 being respectively 16% and 20%[139]. However, the High Specialized Court of Ukraine on Civil and Criminal Cases considered that, in 2013, 35% of the verdicts were based on agreements (both plea and reconciliation)[140], while the Ministry of Interior has suggested that one in six cases sent to court become the subject of an agreement[141].

283. In the view of the High Specialized Court, the scheme is working well and has reduced the time taken for appeals and their number. It indicated that most reconciliation agreements concerned cases of theft in which compensation was paid and were ones involving both strangers and persons who knew each other, while plea agreements were mostly cases concerned with the consumption of drugs (i.e., their use or storing but not their distribution)[142].

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[139]Information from Deputy Prosecutor General Vitaliy Kasko, Office of the Prosecutor General, at a meeting with the Experts 24 June 2014.
[140] Information from Deputy President Stanislav Kravchenko, 26 June.2014.
[141]Meeting with Deputy Minister of Interior, 24 June 2014.
[142]Meeting with Deputy President Stanislav Kravchenko, 26 June 2014.

284. However, although public prosecutors have complained that they cannot appeal judgments on agreements[143], the High Specialized Court has observed that the prosecution nonetheless do sometimes try to appeal judgments that are based on them[144].

285. "Improving procedural issues related to the criminal proceedings based on agreements" was one of the issues that the Ministry of Justice noted as necessary to be considered when evaluating the need for amendments to the Code[145].

286. However, from the information received, there does not appear to be any necessity for changes to be made to the Code itself with respect to the requirements governing the conclusion or plea or reconciliation agreements. Nonetheless, the absence of any mandatory requirement for participation of a defence counsel at the initiation of the conclusion of a plea agreement could mean that there is insufficient protection against undue pressure for those concluding such an agreement and thus create a risk of a violation of Article 6(1) of the European Convention[146]. However, this issue seems to be satisfactorily addressed by the amendments to the Code introduced on 12 February 2015.

B. Chapter 39: Criminal Proceedings in the Matter of the Application of Compulsory Medical Measures [Articles 503-516]

287. The provisions in this Chapter did not generally elicit any concerns as to their content or operation.

[143]Focus group meeting on 15 July 2014.
[144]Meeting on 26 June 2014.
[145]Information from the Ministry of Justice on 24 June 2014.
[146] See the emphasis by the European Court on the importance of legal advice being available in *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014 when finding that a plea bargain was accompanied by sufficient safeguards to prevent any violation of Article 6(1) of the European Convention: "93. In this connection, the Court first notes that it was the first applicant himself who asked the prosecution authority to arrange a plea bargain. In other words, the initiative emanated from him personally and, as the case file discloses, could not be said to have been imposed by the prosecution; the first applicant unequivocally expressed his willingness to repair the damage caused to the State (see paragraphs 14, 18, 22 and 27 above). He was granted access to the criminal case materials as early as 1 August 2004 (see paragraph 21 above). The Court also observes that the first applicant was duly represented by two qualified lawyers of his choice (compare Hermi v. Italy, cited above, § 79). One of them started meeting with the first applicant at the very beginning of the criminal proceedings, representing him during the first investigative interview of 17 March 2004 (see paragraphs 15 and 16). The two lawyers ensured that the first applicant received advice throughout the plea-bargaining negotiations with the prosecution, and one of them also represented the first applicant during the judicial examination of the agreement. Of further importance is the fact that the judge of the Kutaisi City Court, who was called upon to examine the lawfulness of the plea bargain during the hearing of 10 September 2004, enquired with the first applicant and his lawyer as to whether he had been subjected to any kind of undue pressure during the negotiations with the prosecutor. The Court notes that the first applicant explicitly confirmed on several occasions, both before the prosecution authority and the judge, that he had fully understood the content of the agreement, had had his procedural rights and the legal consequences of the agreement explained to him, and that his decision to accept it was not the result of any duress or false promises (see paragraphs 27, 28 and 31 above)".

288. However, the Helsinki Foundation did draw attention to one case concerning an incompetent defendant, who was ultimately sentenced to undergo medical treatment at a mental hospital but who had not - without the court individually assessing his situation - been allowed to take part in his trial was thus prevented from posing questions to witnesses. Furthermore, his motion challenging the sentence imposed had been turned down by the appeal court without it hearing him[147].

289. This experience occurred notwithstanding the stipulation in Part 1 of Article 512 provides that persons subjected to the application of compulsory medical measures may participate in their trial "unless prevented by the nature of mental disorder or illness".

290. The fact that the presence of such a person is a matter of discretion of the court under Part 2 of Article 506 and Part 1 of Article 512 is unlikely to conflict with the right of defence under Article 6(3)(c) of the European Convention since Article 507 provides that the participation of defence counsel is mandatory. Nevertheless, it is a discretion that should not be exercised in a way that prevents a person effectively from exercising his or her rights of defence, in particular as regards submission of his or her version of the facts.

291. *It would be appropriate, therefore, for*

- *the provision for judges of training on the exercise of the discretion under Part 2 of Article 506 and Part 1 of Article 512 and the development of relevant guidance as to its application.*

10. SECTION VII. RESTORING LOST RECORDS OF CRIMINAL PROCEEDINGS, SECTION VIII. EXECUTION OF COURT DECISIONS, SECTION IX. INTERNATIONAL COOPERATION IN CRIMINAL PROCEEDINGS, SECTION X. FINAL PROVISIONS AND SECTION XI. TRANSITIONAL PROVISIONS [Articles 524-540

292. No issues of specific relevance to the provisions in these sections have been raised.

[147] Meeting with Civil Society representatives, 24 June 2014.

11. RECOMMENDATIONS

The analysis performed in the process of the preparation of the report leads to the following recommendations, which in some cases are cross-cutting and propose multiple types of interventions for addressing the challenges identified:

Amendments to the text of the Code

293. It would be appropriate to amend the Code in the following respects:

- an extension of the competence of the investigating judge to prolong the imposition of custody as a measure of restraint in cases where this is warranted at the time of transferring a case for trial and after following the procedure otherwise required for making such a decision;
- a replacement of the provision in Part 3 of Article 315 for the automatic extension of measures of restraint by a requirement for the court preparing a case for trial to determine of its own motion whether their continuation is justified; and
- a requirement for a copy of the search protocol, together with a record on it of any comments, to be served on the owners of the premises concerned or on other relevant persons;

294. The Code should not be amended so as to bring about any significant redistribution of powers and functions between the stakeholders that once again favoured the investigative agencies.

295. Furthermore, any changes to the availability of jury trial and the arrangements for holding them should be deferred until a more significant body of practice with respect to this form of trial has been developed and analysed.

296. During the period covered by the report, the Code has already been amended in a number of respects, including to provide for the holding of proceedings *in absentia*, to authorise the use of preventive detention and to restrict the measures of restraint for some offences[148] to custody. The use of some of the amended provisions, in particular the ones on the preventive detention and limitation of the measures of restraint to custody for some offences, have the potential to encroach upon rights guaranteed by the European Convention and there is a need, therefore, to keep these amendments under review in order to foreclose the possibility of this occurring.

[148] Introduction of a new paragraph 5 for Article 176 and a rider to paragraph 1 of Article 183 - excluding various measures of restraint other than custody from being applied to persons suspected or accused of having committed the crimes specified by Articles 109-114-1, 258-258-5, 260 and 261 of the Criminal Code.

Measures of an institutional character

297. The following steps of an institutional character need to be undertaken:

- the carrying out of a comprehensive functional analysis of the investigative and operative structures of the Ministry of Internal Affairs and other law-enforcement or investigative agencies contributing to pre-trial investigation; the identification of an appropriate model of distribution of tasks and interaction between these agencies in line with the pre-trial investigation concept built into the Code, with appropriate consequential adjustments to their staffing levels and profile;
- the carrying out of an appropriate functional analysis of the Public Prosecutor's Office; the identification of an appropriate model of distribution of tasks and a consequential adjustment to staffing levels that accords with the workload required for adequate performance of the role of procedural guidance by the Public Prosecutor's Office required by the Code;
- the complete modification of the performance indicators and targets currently being used and the introduction of a relevant performance management system for both investigators and prosecutors;
- the continued provision of an appropriate level of resources and other forms of support for the Free Legal Aid Centres;

Practical measures for improving the implementation of the Code

298. The following practical measures are needed:

- the introduction of an electronic database of case processing and other contemporary working methods;
- the paying of particular attention to the participation of lawyers in procedural activities under Article 53 of the Code as specified in the relevant quality standards and their application within the Free Legal Aid System;
- the enhancement of the exercise of judicial control over provisional access to objects and documents or other related measures and searches;
- the enhancement of the exercise of judicial control over covert and other intrusive investigative actions;
- the elimination of practical difficulties in gaining access to legal advice and the provision of appropriate facilities for confidential discussions between suspects, accused and their lawyers in all places of detention;
- the use of Part 2 of Article 89 to find inadmissible evidence at the outset of the trial or during its course – rather than waiting to its conclusion – in those cases where it would be clearly evident that its admission would be in violation of the Code;

- the subjecting of the accuracy of all classification of registered notifications of crimes to an accentuated hierarchical control;
- the continued external monitoring of both the information provided to relatives of apprehended persons and Free Legal Aid Centres by law enforcement officers and investigators and the function of custody officer; and
- the development of statistical schemes that take account of the changed approach embodied in the Code.

Additional study or examination required

299. The following matters should be subjected to study or examination:

- the carrying out of a study on the practice of using Article 206, with particular attention being paid to the scope and manner in which the matters raised are examined, the interrelationship between it and any mainstream procedures against the individuals responsible for the alleged human rights violations of and the details of rulings that have been issued and the extent of their implementation;
- the arrangements for maintaining court rulings on covert investigative activities fully inaccessible for the defence, as well as the proportionality of restrictions on access to records, documents or materials of the covert investigative actions, and consideration were given to implementing the best practices developed in this regard in other jurisdictions;
- the instructions and secondary legislation with a view to removing provisions that are inconsistent with Article 214 and to reinforcing the principle of immediate commencement of criminal procedures that it embodies. This might include a revision of the secondary regulations (instructions) so that they oblige investigators/prosecutors to provide, within a 24-hour deadline, the applicants or victims concerned with an official written reply as to the status of registration of their notifications in the Unified Register;
- The compatibility with the Constitution of the extended power of apprehension without the approval of a court;
- the practice of notification of suspicion, including the circumstances in which, under the Code, a failure to notify a suspect of his/her actual status could not be reconciled with the genuine interests of efficiency of detecting crimes and perpetrators, and the possible ways in which timely notification of suspicion might be better secured; the current practice as to the additional, avenues, including their technical aspects, for serving notifications of suspicion on fugitives;
- the practice of using covert and other intrusive investigative actions, including the notification of those individuals in respect of whom covert investigative (detective) actions were conducted; and

- the application in practice of Articles 28, 219 and 294-297, with a view to establishing the possibility of making effective use of the existing prosecutorial avenues for ensuring compliance with the reasonable time for pre-trial investigations and feasibility of facilitating this through the introduction of suitable judicial remedies.

Improvement of guidance and regulations

300. There is a need for the adoption and dissemination of more appropriate and extensive guidance as to the implementation of the Code's provisions, which takes into account the requirements of the European Convention and the case law of the European Court that it embodies, and in particular as regards:

- when it is not possible for courts 'to administer justice' in the context of authorising the transfer of proceedings;
- the undertaking of investigative activities by operative units; the difference between the operative search and investigative (in particular covert) activities;
- the engagement of defence counsel in a particular procedural action for the investigative agencies and the Public Prosecutor's Office;
- the risks faced by investigators and prosecutors for a successful prosecution in their disregarding motions by the defence for investigative or covert investigative actions to be conducted; the norms with respect to the granting of such motions by the defence;
- the difference between provisional access to objects or other related measures and searches and the potential violation of the right to respect for home, family life or other privacy rights if resort is unjustifiably made to the latter;
- the meaning of 'immediately after' in Article 207;
- the proper approach required for recording the time of apprehension;
- the proper approach required for giving timely and proper information about the right to legal advice;
- the proper approach required for giving timely notification of a person's apprehension to his or her relatives and Free Legal Aid Centres;
- the selection of 'custody officers', having regard to their important responsibilities;
- the requirements and safeguards to be observed when resorting to covert and other intrusive investigative actions and the potential for such actions to violate the right to respect for home, family life or other privacy rights;
- timely notification and summoning of the parties to any hearings, including those held under the framework Articles 303-304 of the Code;
- making most effective use of the powers given in Article 315 so that matters are not unnecessarily left for determination at the trial; and

- the additional avenues, including their technical aspects, for serving notifications of suspicion on fugitives.

Development of consistent judicial practice

301. In addition, a consistent judicial or administrative practice should be developed with regard to:

- carrying out audits and examinations and their use, including evidential implications, for the purposes of criminal proceedings – as long as relevant provisions remain in force[149];
- issues concerning the application of Article 53;
- the manipulation of the status of witness in the case of persons who are actual suspects;
- the unacceptability of manipulations involving operative search activities;
- the observance of the principle of proportionality in the use of searches and the need to resort to other less intrusive measures provided by the Code**;**
- the unacceptability of delaying the recording of the time of apprehension and the strict application of the 60 hours deadline for presenting an apprehended person in court;
- the inadmissibility of evidence obtained where any failure to give such a notification of a person's apprehension to his or her relatives and Free Legal Aid Centres meant that the apprehended person did not have access to legal advice;
- the imposition of measures of restraint;
- the use of Article 206;
- addressing challenges to refusals to grant motions as to early disclosure of materials of pre-trial investigations, expertises or any other similar restriction of the right to defence;
- the requirements to be observed during searches and, in particular, their documentation, as well as the applicability of the powers concerned;
- the principle of proportionality and the use of covert and other intrusive investigative actions;
- the requirements and safeguards to be observed with regard to notification of suspicion; the criteria for when notification of suspicion may or may not be delayed; and
- addressing challenges brought against decisions, actions or omissions of the investigation and prosecution.

[149] The clauses on audits and examinations will be removed by the Law On the Public Prosecution Service, which is expected to enter into force in July 2015.

Targeted capacity building actions

302. Furthermore, significant efforts to develop the capacity of those responsible for implementing the Code's provisions in a supportive environment for the change in outlook that this requires, particularly as regards:

- the engagement of defence counsel in a particular procedural action;
- the role of those acting as 'custody officers';
- the use of Article 206;
- targeted trainings on processing notifications of crime and initiating pre-trial investigations;
- the avenues and procedural tactics for challenging refusals to grant motions as to early disclosure of materials of pre-trial investigations, expertises or any other similar restriction of the right to defence;
- the requirements and safeguards to be observed with regard to notification of suspicion;
- the avenues for challenging decisions, actions or omissions of the investigation and prosecution provided by the Code; and
- the exercise of the discretion under Part 2 of Article 506 and Part 1 of Article 512 and the development of relevant guidance as to its application.

Increased role for defence counsels

303. Moreover, there is a need for lawyers acting as defence counsel to be encouraged more actively to:

- engage the safeguards and procedural tools against the undertaking of procedural actions with respect to actual suspects who have the status of witnesses;
- to challenge the instances in which the operative search framework is being used instead of the procedures under the Code for the purpose of criminal proceedings;
- to challenge refusals to grant their motions for investigative or covert investigative actions to be conducted;
- to challenge abuses involving the conduct of searches instead of seeking provisional access to objects and documents and other related measures to ensure criminal proceedings and to have resort to relevant remedies for protection of rights under Article 8 of the European Convention;
- to use the avenues for challenging irregularities and abuses that occur during searches or similar intrusive investigative actions;

- to challenge alleged abuses relating to the conduct of covert and other intrusive investigative actions and to seek relevant remedies for protection of the right to respect for home, family life or other privacy rights;
- to challenge instances of supposedly unjustified delays in notifying someone about suspicion that lead to significant violation of the fair trial requirements; and
- to invoke and engage Article 303 as a remedy for human rights violations alleged to have been committed during the pre-trial stage.

Public Awareness

304. In addition, it is necessary to take steps to increase public awareness of the changes effected by the Code and the rights and responsibilities that it entails, particularly as regards:

- the remedies applicable to an inaction or 'refusal' to enter into the Unified Register relevant notifications of crimes and the incorrect classification of crimes according to articles in the Criminal Code;
- the right of access to legal advice.

Improvement of related legal framework and implementation of relevant reforms

305. In addition to the need for the clarification that investigative materials gathered under the Law of Ukraine On Operative Search Activities should only be admissible where the relevant requirements of the Code are shown to have been fully observed in the course of gathering them, more generally, there is a need for a review of legislation regulating operative search activities with a view to ensuring that this is fully in harmony with the provisions in the Code.

306. Finally, certain other legislative and administrative changes are necessary for the implementation of the Code, namely:

- the effective implementation of the Law of Ukraine On the Public Prosecution Service and the consequential remodelling of the Public Prosecutor's Office that fully takes into account the essence and rationale of the concept of procedural guidance of the prosecution with regard to pre-trial investigations;
- the adoption of a law on the State Bureau of Investigation and the transfer to this new entity of the investigative functions currently in the Public Prosecutor's Office;
- the establishment of the appropriate legislative and institutional framework for the investigation of human rights violations within the criminal justice system; and

- the adjustment of the framework of substantive criminal law so as to introduce into it the concept of misdemeanours through the adoption of a specific law on misdemeanours.

12. OVERALL CONCLUSION

307. There are no systemic shortcomings or deficiencies in particular provisions of the Code that prevent its successful implementation in general or appropriate application of its specific norms.

308. At this stage it seems that only urgent change in its provisions required concerns the judicial authorisation for custody as a measure of restraint once responsibility for the case has been transferred from the investigating judge to the trial court. Although there does appear to be a lacuna regarding this, the failure to appreciate that there was still an issue under Article 5(1) of the European Convention underlines the limited extent to which the requirements of that and other provisions in this instrument - which underpin the Code's own provisions - have yet to be satisfactorily understood and embraced.

309. Some of the supposed problems with the Code reflect either a failure of understanding or a misguided nostalgia for the approach of the former Code of Criminal Procedure.

310. Although some further revisions may prove necessary, it is essential that this is not undertaken in a piecemeal fashion or involve departures from the fundamentals of the Code and the requirements of the European Convention. Any further reform should entail a structured approach and be informed by practice with existing provisions that has been subjected to searching analysis of the claims made for it.

311. However, there are certainly difficulties and shortcomings with respect to the implementation of the Code but they stem in the main from this failure to make the necessary adjustments in institutional and organisational terms that its provisions clearly required.

312. At the same time effective implementation will be facilitated by more appropriate guidance and the development of judicial practice that is informed both by the issues raised in specific cases and the requirements of the European Convention, as elaborated in the case law of the European Court.

313. There is also a need for continued and more targeted training of all those involved in the criminal justice system, as well as the effecting of a number of reforms that complement the requirements of the Code.

314. The introduction and operation of the free legal aid system shows that significant change is possible. However, the task of giving effect to the Code will only be completed by the recognition of all involved in the criminal justice system that its provisions require a considerable change of outlook and a recognition that the pursuit of offenders through a system operating consistently with human rights standards will not only gain greater acceptance but will also become more effective as the risk of wrongful convictions is diminished.

315. The provisions in the Code provide essential tools for the modernisation of the criminal justice system but the opportunities that they afford in this regard still remain to be fully exploited.