"Supporting the criminal justice reform and harmonising the application of European standards in Armenia"

OPINION

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

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

Prepared on the basis of comments by:

Jeremy McBride and Lorena Bachmaier Winter

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Executive Summary

This Opinion examines the compliance of the revised draft Republic of Armenia Criminal Procedure Code with European standards. It is comprised of a section by section analysis of the draft, which focuses only on provisions that seem problematic and which provides recommendations for resolving them. The Revised Draft Code can be regarded as generally providing for a balanced set of rules for investigating and adjudicating criminal cases in accordance with human rights and fundamental freedoms, while protecting the public interests and those affected by criminal conduct. However, there are various matters which still need addressing, particularly as regards effective access to and representation by a lawyer throughout criminal proceedings, strengthening the obligation to provide information to arrested persons as to their rights and obligations, making it clear that detention should be the last resort where restraint measures might be justified, removing from the Investigators and the Supervising Prosecutor certain powers relating to restraint measures rights, improving compliance with the requirements of the Lanzarote Convention and taking account of the particularities of electronic evidence in the formulation of provisions. Certain aspects of provisions also should be made more explicit or otherwise elaborated. In addition, some clarification is needed as to the exercise of certain responsibilities or as to the making of certain organisational arrangements. Finally, there are some concerns to be taken into account relating to the implementation of the draft once it is adopted. The matters to be addressed include ones relating to provisions that have remained unchanged despite concerns being previously expressed about them. Nonetheless, there should be no difficulty in taking on board the recommendations or suggestions for action. Furthermore, their adoption would make for a Code of Criminal Procedure that accords fully with European standards and would contribute to ensuring that the criminal justice system is one in which there is wide public confidence.

A. Introduction

1. This Opinion is concerned with the revised draft Republic of Armenia Criminal Procedure Code ("the Revised Draft Code") prepared by a working group of the Ministry of Justice.

2. The Revised Draft Code will replace the Republic of Armenia Criminal Procedure Code that was adopted on 1 July 1998 ("the 1998 Code"), albeit that some of its provisions will be re-enacted.

3. The Opinion reviews the compliance of the Revised Draft Code with European standards and, in particular, with the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ('the European Court') and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("the Lanzarote Convention"). It also points out certain issues relating to the coherence of the proposed provisions.

4. In connection with the European Convention, an important consideration in relation to the evaluation of the Revised Draft Code is the need for legal certainty – i.e., the ability to act within a stable framework without fear of arbitrary or unforeseeable State interference – and the extent to which the proposed amendments satisfy the requirements of clarity and foreseeability.

5. Remarks will not be made with respect to those provisions in the Revised Draft Code that are considered appropriate or unproblematic unless this is required for an appreciation of their impact on other provisions.

6. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised. These include ones in respect of a significant number of provisions that have not been changed following comments made on an earlier draft.* [1]

7. The Opinion first examines the proposed provisions of the Revised Draft Code on a section by section basis and then concludes with an overall assessment of their compatibility with European standards.

8. This Opinion has been based on an unofficial English translation of the Revised Draft Code.

9. The comments on which the Opinion has been based have been prepared by Jeremy McBride[2] and Lorena Bachmaier Winter[3] under the auspices the Project *"Supporting the criminal justice reform and harmonising the application of European standards in Armenia",* co-funded within the European Union and Council of Europe Partnership for Good Governance for 2019-2021.

[1] See *Opinion of the Directorate General Human Rights and Rule of Law of the Council of Europe on the Draft Criminal Procedure Code of the Republic of Armenia*, 2016.
[2] Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest.
[3] Professor, Law School, Universidad Complutense, Madrid, Spain.

B. Section by Section Analysis

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

Section 1. Criminal Procedure Legislation and the Criminal Proceedings

Article 1. Legislation Regulating Criminal Procedure

11. The proposed reference to the "international treaties" in paragraph 1 is insufficiently explicit as to the importance of interpreting and applying the Revised Draft Code in the light of the requirements of the European Convention and the case law of the European Court.

12. *It would thus be desirable to highlight at the beginning of the Revised Draft Code that its provisions should be interpreted and applied in the light of those requirements*.

13. The proposed prohibition in paragraph 2 of the use of "analogy" in the application of criminal procedure legislation would not be desirable where this method of interpretation could lead to various safeguards and other provisions being construed in a more favourable light for the Accused and the Defence.

14. *Paragraph 2 should thus be amended accordingly*.

Article 4. Effect of the Criminal Procedure Code in Time

15. The stipulation in paragraph 2 of this provision that the admissibility of evidence would be governed on the basis of the law in force at the time the evidence concerned was obtained seems unproblematic at first sight.

16. However, such a stipulation does not take into account the possibility that the law in question – in particular that laid down in the 1998 Code - might be incompatible with the standards elaborated by the European Court and thus the admission of such evidence would be contrary to the requirements of the European Convention.

17. Although Article 1 would provide that criminal procedure is regulated by, *inter alia*, the international treaties of the Republic of Armenia (which include, of course, the European Convention), it would still be preferable for the admissibility of evidence to be made clearly subject to the requirements of the European Convention.

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

Article 6. Key Concepts Used in This Code

19. There seems to be an error in the definitions as paragraphs 32 and 37 both would define "Procedural Action" but would do so in a different way.

20. *There is thus a need to clarify why there are two definitions for the same term and, if appropriate, to revise the paragraphs concerned.*

21. The proposed definition in paragraph 56 of a "House" would not be sufficient to cover apartments as they only form part of "a building or structure" and the reference to "other constituent parts thereof" comes long after a list of items that could not be assimilated to an apartment. It would make it clearer that apartments are to be included in the definition if a phrase such as "or a part thereof" immediately followed the term "a building".

22. *There is thus a need to revise paragraph 56 accordingly.*

Article 8. Materials of the Criminal Proceedings

23. Although this provision would rightly establish the mandatory documentation of all acts, decisions and actions taken in criminal proceedings, it does not make clear who would be responsible for the correct execution of this process and the preservation of all files and objects stored.

24. *There is thus a need to clarify who has this responsibility and, insofar as it is regulated by other legislation, it would be appropriate for this provision to include a reference to it.*

Article 10. Merger and Separation of the Criminal Proceedings

25. The proposed authorisation for the merger of proceedings in paragraph 1 is unsatisfactory in that the criterion in sub-paragraph 3 of "interconnected alleged crimes" is imprecise since it is obviously unconnected to the persons concerned given sub-paragraph 2. More generally there is not – unlike in paragraph 2 – going to be any requirement that a merger be "in the interests of justice and cannot negatively affect the fairness of the proceedings".

26. *There is thus a need to amend paragraph 1 by providing a definition as to what makes crimes interconnected if it is not the persons involved and by requiring any merger to be possible only if this would be in the interests of justice and could not negatively affect the fairness of the proceedings.*

Article 12. Circumstances Precluding Criminal Prosecution

27. The proposed preclusion of prosecution on the basis that "the person has not committed the act incriminated to him" is unclear as to the basis on which such a conclusion must be reached by the Prosecutor who is responsible for instituting prosecutions.

28. In particular, it is not clear whether this would cover the situation of there being: (a) evidence proving the non-commission or existence of the crime; (b) evidence proving the non-involvement of the person in a crime that has been committed; (c) the insufficiency of evidence as that person's involvement in that crime; or (d) all of these situations. Certainly, clarity as to what is intended given that there is the possibility – under Articles 196 and 198 - of appealing against the non-institution of a prosecution or renewing one.
29. *There is thus a need to clarify what is meant by the phrase "the person has not committed the act incriminated to him".*

30. The proposed right to request "rehabilitation" for a person against whom it has been established that criminal prosecution is precluded is presumably intended to refer to the definition of this term in paragraph 43 of Article 6. However, that provision would define that right by reference to an "acquitted person" and paragraph 23 would define an Acquitted Accused" as someone in relation to whom there has been "an acquitting verdict", which would not be the case where a prosecution is precluded. Moreover, Articles 345 and 348 would only regulate the procedure governing rehabilitation in respect of an "Acquitted Accused".

31. *There is thus a need to clarify the use of the term "rehabilitation" in either this provision or to amend the definition in paragraph 43 of Article 6 and to provide a procedure for obtaining rehabilitation in the present situation.*

32. The proposed possibility in paragraph 3 of continuing criminal proceedings for the purpose of "establishing the innocence of the deceased" would be inconsistent with the view of the European Court that it "is a fundamental rule of criminal law that criminal liability does not survive the person who committed the criminal act"[4] since it would allow a verdict that that person has committed a less serious crime than that charged, even if no punishment could be imposed.

33. Moreover, the proposed formulation of establishing the innocence of the deceased" would be incompatible with the presumption of innocence guaranteed by Article 6(2) of the European Convention and Article 17 of the Revised Draft Code. There would, however, be no objection to the continuation of proceedings where the sole objective was solely to put on the public record the fact that the deceased had not committed the offence. In such circumstances, there could not be any possibility of a conviction either of the original charge or for a lesser offence.

34. *There is thus a need to amend paragraph 3 to provide that proceedings in respect of a deceased person can only be continued in order to put on the record that he or she had not committed the offence with which he or she had been charged*.

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

Article 13. Grounds for Termination of the Criminal Proceedings

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

36. The proposed reference to "absence of a crime" in paragraph 1 echoes the problem already noted with the phrase "the person has not committed the act incriminated to him" in Article 12. In particular, would it mean a lack of sufficient evidence, evidence that the alleged facts did not exist or the facts did not entail an offence under the Criminal Code? The lack of specificity could lead to injustice in some cases.
37. *There is thus a need for Articles 12 and 13 to be merged and for the phrase "absence of crime" to be clarified insofar as it is retained.*

Article 16. Equality of All before the Law

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

39. *There is thus a need for this provision to be recast in a way that embodies a simple stipulation that no one should be treated differently in respect of the role being undertaken by them in criminal proceedings on any of the grounds enumerated in it*.

Article 18. Liberty and Security of Person

40. The proposed use of the term "proper behaviour" in paragraph 3 is too imprecise and would not reflect the grounds identified by the European Court as justifying restrictions on liberty under Article 5 of the European Convention in connection with criminal proceedings, namely, risk of flight, interference with the proceedings and commission of further offences, as well as a risk to public order. Certain of these are to be found in circumstances set out in Article 116 as justifying the use of a restraint measures - which could include a deprivation of liberty – but no link is made to that provision.

41. *There is thus a need to clarify what is understood by "proper behaviour" and to ensure that this is limited to conduct for which deprivation of liberty is permitted under Article 5 of the European Convention.*

Article 19. Provision of Legal Aid

42. It is not clear why the provision of legal aid as regards an Accused would be dealt with in paragraph 2 rather than in paragraph 1. Moreover, it is also not clear why paragraph 1 would provide that it is just the "Legal Representative of the Accused" and not "the Accused" who would be entitled to receive legal aid. Furthermore, the result of using two paragraphs instead of one is that it would not be made clear that "the Accused" – unlike those listed in paragraph 1 – is able to invite the Attorney who will represent him or her. It would be more appropriate for there to be a single paragraph dealing with entitlement to legal aid.

43. *There is thus a need for paragraphs 1 and 2 to be merged*.

44. The proposed obligation in paragraph 3 to secure the participation of Defence Counsel in cases where this is deemed mandatory would be incomplete since the requirement under Article 6 of the European Convention is that the defence has to be practical and effective and not mere "theoretical and illusory"[5], which this has implications for the competence and timeliness of securing legal representation.

45. *There is thus a need to provide in paragraph 3 that the body conducting criminal proceedings should ensure the timely and competent participation of Defence Counsel*.

Article 21. Equality of the Parties and Adversarial Proceedings

46. The requirement of adversariality under Article 6 of the European Convention is not limited to proceedings in court but is also relevant to pre-trial proceedings, particularly as regards the collecting of evidence by or on behalf of an Accused, participation in pre-trial examination of witnesses and access to the Criminal Case File (as long as such access does not prejudice the outcome of the investigation).[6] However, this would not be recognised by the proposed use of "In court" at the beginning of paragraph 1.

47. *There is thus a need to delete the reference to "In court" at the beginning of paragraph 1*.

Article 22. Proper Proving

48. The proposed formulation of paragraph 3 would give the impression that it is concerned only with evidence against an Accused. However, consideration should also be being given to evidence that tends to exonerate him or her.

49. *There is thus a need to expand the second sentence of paragraph 3 so that there is an obligation also to take account of evidence that tends to exonerate the Accused*.

[5] See, e.g., *Artico v. Italy* 13 May 1980, no. 6694/74, 13 May 1980 and *Czekalla v. Portugal*, no. 38830/97, 10 October 2002.
[6] See, e.g., *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.

50. The proposed formulation of paragraph 5 does not place any emphasis on the strength of the evidence as opposed to factors such as its relevance or credibility.

51. *There is thus a need to add a requirement that the evidence being relied upon to establish guilt should also be "compelling".*

52. It should be noted that the test proposed in paragraph 7 would be potentially stricter than that now formulated by the European Court since the latter is prepared to accept that a conviction will not result in a violation of Article 6 of the European Convention where this is based solely or to a decisive degree on the evidence of a witness who is absent from the trial but where sufficient counter-balancing factors to ensure fairness exist[7]. Nonetheless, adherence to the stricter – and simpler - requirement is not inappropriate.

Article 24. Reasonable Period of Proceedings

53. The possibility envisaged in sub-paragraph 4(2) of giving preference to a case in which the "accused has been under custody longer" would be inappropriate as it does not take account of the reason for the lengthier custody - such as the proceedings involved being more complicated – which might mean that neither the length of the proceedings or the duration of the detention was not unreasonable. A more suitable basis for preference would be that the maximum time limit in custody was about to expire or its length would become unreasonable.

54. *There is thus a need to amend sub-paragraph 4(2) accordingly. In addition, suitable software should be employed to ensure that the setting of cases automatically takes into account the fact that the Accused is in custody and the time that he or she has already spent in prison.*

Article 25. Impermissibility of Being Tried Twice

55. The proposed annulment of an administrative or disciplinary liability envisaged in paragraph 6 would not be sufficient to prevent the criminal proceedings being inconsistent with the right not to be tried under Article 4 of Protocol No. 7 to the European Convention as that applies to a second trial and not just a second conviction so long as the first set of proceedings have become final.[8]

56. If a second prosecution is brought in error "in error", the appropriate response should be to acknowledge this and acquit the Accused concerned as this will mean that he or she would no longer be a victim for the purpose of Article 34 of the European Convention.[9]

57. *There is thus a need to revise paragraph 6 accordingly*.

[7] *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.
[8] See *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009.
[9] See *Toporovschi v. Republic of Moldova* (dec.), no. 50857/08, 21 April 2015.

Article 28. Publicity of Court Proceedings

58. The provision in paragraph 3 for holding proceedings in camera would not be intrinsically incompatible with the requirement under Article 6(1) of the European Convention for hearings to be in public. However, while such a ruling might be permissible in a given case, the apparent absence from this Article of any possibility for media organisations to challenge it – whether in its entirety or as to its particular scope – could entail a violation of the right to an effective remedy under Article 13 in respect an arguable claim that in a given case this interfered unjustifiably with their right to freedom of expression under Article 10[10].

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

Article 29. Prohibition of Illegitimate Conduct

60. It would not necessarily be incompatible with the European Convention for a court to take action against a defendant whose conduct disrupts the conduct of proceedings[11] or of other participants who cause prejudice to them[12] or anyone who discloses material that should remain confidential[13]. However, it would be important to ensure that a wide view of what conduct is to be regarded as prohibited and thus undermining the ability of an Accused to defend him or herself effectively

61. *There is thus a need for appropriate guidance to be given to judges regarding the use of this provision.*

Section 2. The Bodies and Persons Engaged in Criminal Proceedings

Article 36. Relationship between Public Participants in the Proceedings

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

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

Article 43. Rights and Obligations of the Accused

64. For ensuring the effectiveness of all the rights listed in this provision, it is essential that an Accused be informed promptly and in sufficient detail so that they can exercise them

[10] See *Crook and National Union of Journalists v. United Kingdom* (dec.), no. 11552/85, 15 July 1988.
[11] See, e.g., *Ensslin, Baader and Raspe v. Federal Republic of Germany* (dec.), no. 7572/76, 8 July 1978.
[12] See, e.g., *Dallas v. United Kingdom*, no. 38395/12, 11 February 2016.
[13] See, e.g., *Furuholmen v. Norway* (dec.), no. 53349/08, 18 March 2010.

in an effective manner. However, only a few of the rights listed specifically in the present provision would refer to any obligation to provide them with such information.

65. *There is thus a need for this provision to be amended so as require an Accused to be informed promptly and in sufficient detail about all the rights listed in it.*

66. The proposed reference to "whereabouts" in sub-paragraph 1(4) is rather vague and it would be more appropriate to specify that the Accused can specify the reasons for his or her detention, the location of the place where he or she is being held and the conditions there.

67. *There is thus a need to amend sub-paragraph 1(4) accordingly*.

68. In case of serious threats, an Accused and his or her family members should be provided with protection measures after an assessment of the context and the seriousness of the threats concerned. As a result, it would be more appropriate for the sub-paragraph to specify that, where there are such serious threats, an Accused and his family members have the right to be provided with those measures. and not just be entitled to request such protection measures.

69. *There is thus a need to amend sub-paragraph 1(33) accordingly.*

70. The proposed specification in sub-paragraph 2(3) that an Accused should not "obstruct the criminal proceedings" and not "interfere illegally with the proving process" is not problematic as such. However, it ought to be applied in a way that takes account of the absence of any obligation under Article 6 of the European Convention either to cooperate with the criminal investigation or to facilitate it. Apart from the right to remain silent, the prohibition against self-incrimination means that there can be no obligation to comply with production orders that may incriminate oneself, such as the provision of passwords for computers.

71. *There is thus a need for appropriate guidance to be given to judges and prosecutors regarding the use of this provision.*

Article 44. Legal Representative of the Accused

72. The limited circumstances in which criminal proceedings can be continued in respect of an Accused who is deceased – which is also addressed in paragraph 2 - have already been noted.[14]

73. *There is thus a need to revise paragraph 2 so that it is consistent with the changes required for Article 12(3).*

[14] See paras. 32-34 above.

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

74. Although the proposed appointment of an attorney by the Chamber of Attorneys of the Republic of Armenia might in many instances be satisfactory, there should be a possibility of rejecting someone and requiring a fresh appointment where the attorney concerned does not have the requisite competence or there is a well-founded basis for the Accused lacking confidence in him or her because of their past dealings[15].

75. *There is thus a need for such a possibility to be introduced into this provision or as a qualification on paragraph 4 of Article 47*.

Article 46. Mandatory Participation of the Defence Counsel

76. The stipulation in paragraph 1 that this participation would be required from the expiration of 6 hours from the arrest of the person or from the moment of presenting the charges is in need of some modification as there is a risk of such participation being unnecessarily delayed and it is unclear what the status of the person would be at the moment of presenting the charges.

77. Although there may sometimes be practical difficulties in Defence Counsel being present straight after the arrest, there is no reason to encourage delay in participation where these do not exist.

78. Furthermore, the alternative situation envisaged in paragraph 1 of presenting charges is possibly one where the person concerned has not been arrested but this should be specified expressly.

79. *There is thus a need to provide that the participation shall be mandatory "as soon as possible but no later than 6 hours after the arrest or, if the person has not been arrested, from the moment of presenting charges".*

Article 47. Refusal from a Defence Counsel

80. The stipulation in paragraph 2 that a refusal from a Defence Counsel should occur in the presence of the latter is somewhat unclear as to whether this envisaging a situation at the outset of the proceedings or only after an Accused has already accepted the appointment of one but wishes to have someone else to act for him or her.

81. Both should be possible but in the former situation the Defence Counsel could only be one that has been appointed by the Chamber of Advocates on the basis of the demand by the body conducting the proceedings pursuant to Article 45.1(2). It would be appropriate for the paragraph to reflect these distinct situations.

82. *There is thus a need for paragraph 2 to be amended accordingly*.

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

83. The stipulation in paragraph 3 that participation of a new Defence Counsel should not constitute a basis for restarting the proceedings could result in them being regarded as unfair if this were the absolute rule. This is because it would not take account of the reason for the change, which may reflect a failure of the Defence Counsel to fulfil his or her role either at all or adequately.[16] In any event, the provision ought to allow both for this possibility and for the granting of time for the new Defence Counsel to prepare for the proceedings.

84. *There is thus a need to qualify paragraph 3 by the addition of the phrase "unless the interests of justice so require" and by a requirement that the new Defence Counsel shall be granted time to prepare for the proceedings.*

Article 49. Rights and Obligations of the Defence Counsel

85. It would be appropriate for a Defence Counsel to be given sufficient notice about the time and place of court hearings. However, the term "proper" used in sub-paragraph 1(15) is too vague for this purpose[17].

86. *This provision should thus be amended to require that a Defence Counsel be given notice that is sufficient for him or her to be able to attend the court hearing concerned*.

87. Although the requirement in sub-paragraph 4(3) that the Defence Counsel should abide by the instructions of the "body conducting the proceedings" would generally be appropriate, this requirement ought not to apply where those instructions are manifestly unlawful.

88. *There is thus a need to qualify this provision accordingly*.

Article 50. Rights and Obligations of the Victim

89. Although paragraph 4 would provide for the rights of a minor or incapacitated Victim to be exercised by his or her Legal Representative, there is no provision in this Article that would take account of the performance of the obligations of such a Victim or indeed of one that is otherwise vulnerable. This is particularly important as regards the obligations to give testimony or to undergo inspection and examination, in which there could be a risk of double victimization.

90. These are matters dealt with to some extent in Articles 212 and 329, with regard to which some recommendations are made. It would be desirable for a link to be made to these provisions so that the need for particular care in proceedings involving such persons is always kept in mind.

[16] See, e.g., *Daud v. Portugal*, no. 22600/93, 21 April 1998.
[17] It should be noted that Article 55.1(8) provides for the giving of "due notice" of a court hearing to a Property Respondent which is slightly more appropriate.

91. *There is thus a need for paragraph 4 to be made expressly subject to the requirements of Articles 212 and 329.*

Article 51. Recognising as a Victim Instead of a Deceased Victim or Instead of a Person Subject to Recognition as a Victim

92. The stipulation in paragraph 3 that only one close relative should be recognised as a Victim in the event of the death of the actual Victim would not explain how a selection is to be made between close relatives if more than one of them wishes so to be recognised. This could be addressed by requiring them all to be represented by the same lawyer. However, another solution might be required if there is a conflict between them.

93. *There is thus a need for some means of choosing the one close relative or making some other arrangement about the recognition process where several close relatives wish to be recognised.*

94. It is not clear why it is proposed in paragraph 4 that a relative should be recognised as a Victim if there is no close relative or none of them applies to be recognised as this is unlikely to facilitate the conduct of the proceedings.

95. *There is thus a need for consideration to be given to deleting paragraph 4.*

Article 59. The Expert

96. The proposed absolute bar in paragraph 4 on experts being involved in relation to issues of international law seems surprising as there might not always be relevant expertise available for the multifarious aspects of this field and there would be a risk of the Court being wrongly advised on some issues.

97. *There is thus a need for consideration to be given to deleting this element of the prohibition in paragraph 4.*

Article 61. The Interpreter, His Rights and Obligations

98. The proposed requirement in paragraph that the interpreter should always be a "person disinterested in the subject matter of the proceedings" could prove problematic at the early stage of proceedings, notably after someone has been arrested as it may be there are very few (if any) interpreters for certain languages spoken by such persons.

99. In such cases, it might be in the interests of justice for someone who speaks the relevant language to act as an interpreter even if he or she is not disinterested so long as this is with the consent of the participant needing interpretation.

100. *There is thus a need for consideration to be given to allowing someone who is not disinterested to act as an interpreter in urgent situations where the person requiring interpretation consents.*

Article 62. The Attesting Witness, His Rights and Obligations

101. This provision is not at all problematic. However, the role performed by the Attesting Witness could also be adequately performed in at least some instances by video-recording of the evidentiary action. It could, therefore, be useful to give this as an option for those performing these actions.

102. *There is thus a need for consideration to be given to introducing the possibility of video-recording of evidentiary actions instead of using an Attesting Witness.*

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

103. It is correct that participation in preliminary hearings would not necessarily mean that there is reason to doubt a Judge's impartiality. However, the proposed statement in paragraph 2 that this "shall not be a circumstance precluding his subsequent participation in the respective proceedings" is too absolute. This is because it would not take account of the possibility that a Judge may have had to reach a conclusion as to an Accused's guilt in the course of a preliminary hearing and so would not be regarded as impartial for the purpose of Article 6(1) of the European Convention..

104. *There is thus a need to amend paragraph 2 by the insertion of "automatically" between "shall not" and "be a circumstance" in its second sentence*.

Section 3. Evidence and Proving

Article 96. Types of Evidence

105. Those types of evidence listed in this provision would not cover electronic forms of evidence as opposed to the items on which this might be stored (e.g., a computer or mobile phone). While those items and certain forms of electronically gathered evidence might be characterised as physical evidence pursuant to the provisions in Article 96 on Extra-Procedural Documents, this would not apply to all electronic evidence. This omission has implications for the provisions in Articles 98-100 on preservation of evidence.

106. *There is thus a need for express provision to be added to the existing provisions to deal with electronic forms of evidence.*

Article 97. Admissibility of Evidence and Restrictions Upon the Use Thereof

107. The proposed limitation in paragraph 9 on the use of data obtained in violation of the law for the benefit of the Accused where the violation had "infringed upon any person's lawful interests" would, e.g., have the effect of precluding the use of an unlawfully recorded telephone conversation that exonerates the Accused.

108. Although such a recording would be in violation of the right to private life under Article 8 of the European Convention of the persons having the conversation, the inability of the Accused to rely upon it seems harsh when the interests of those affected could be protected by the consideration of the evidence in a hearing from which the public are excluded and not referring to it in detail in the judgment. Such an approach would also render a challenge by an interested party under paragraph 11 unnecessary.

109. *There is thus a need to amend paragraph 9 accordingly and to delete paragraph 11*.

Article 100. Preservation of Non-Documentary Physical Evidence

110. The proposed provision does not address the issue of electronic evidence on an item of physical evidence. The electronic evidence could, in fact, be the photographs or other data recorded on, e.g., a mobile phone where the taking or recording of it is the actual offence (such as child pornography). While it might be appropriate to return the mobile phone to an offender, he or she should not receive it back with the item of evidence that constituted the offence of which he or she was convicted.

111. *There is thus a need to provide for the wiping of electronic evidence from an item being returned where this constituted the offence*.

112. It is not clear why there is proposed to be an absolute rule in paragraph 2 requiring the destruction of physical evidence in cases involving particularly grave crimes or crimes against life as such evidence need not be the means by which the offence was committed and could indeed belong to someone who was not implicated in its commission.

113. *There is thus a need for paragraph 2 to be deleted*.

Article 105. Assessment of the Evidence

114. The stipulation in paragraph 2 that the investigator, prosecutor and judge shall assess the evidence following "their inner belief" would run the risk of conveying the notion that there are no fixed rules for assessing the evidence and that this can be done by subjective and not objective considerations, as required when giving effect to the rights under Articles 5 and 6 of the European Convention.

115. *There is thus a need to delete the reference to "their inner belief" in paragraph 2.*

Article 106. Legal Presumption of Fact

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

117. *There is thus a need for a more precise formulation to be used in this provision*.

Section 4. Compulsory Measures

Arrest 110. Rights and Obligations of a Person Arrested on the Basis of an Immediately Arisen Reasonable Suspicion on Having Committed a Crime; Conditions and Safeguards of Their Implementation

118. The reference to "whereabouts" in sub-paragraph 2(3) is rather vague and it would be more appropriate to specify that the arrested person can specify the reasons for his or her detention, the location of the place where he or she is being held and the conditions there.

119. *There is thus a need to amend sub-paragraph 2(3) accordingly*.

120. As previously noted,[18] Article 46(1) would provide that the participation of Defence Counsel is mandatory from the expiration of 6 hours from the arrest of the person. However, it has been indicated that this needs to be amended as there would be a risk of such participation being unnecessarily delayed. This objective would not seem to be being fulfilled by the stipulation in sub-paragraph 2(4) that, prior to acquiring the relevant rights of an Accused, the arrested person has the right "to invite an Attorney". Such a formulation would not guarantee that the arrested person can meet and confer with the Attorney invited unless there are justifiable reasons for delaying this.[19] This could thus result in him or her obtaining legal advice that may be required.

121. *There is thus a need to provide that the right in sub-paragraph 2(4) shall be to "invite and confer with an Attorney"*.

122. The stipulation in paragraph 3 that the rights in sub-paragraphs 2(3)-(5) – i.e., the rights to inform a person about his whereabouts, to invite an attorney and to undergo a medical examination – should only arise from the moment of entering the administrative body of the Inquiry Body or of a body that has the power to conduct the proceedings would be inappropriate since there is no indication as to the maximum interval between an Arrest and reaching the building concerned so as to judge whether such a postponement would be without prejudice to the rights of the Arrested Person.

123. *There is thus a need for paragraph 3 to be amended so that a short interval of no more than two hours is specified for the effect of any postponement*.

[18] See paras. 76-79 above.
[19] See *Ibrahim and Others v. United Kingdom* [GC], no. 50541/08, 13 September 2016.

124. The proposed obligation in sub-paragraph 4(1) to abide by the instructions of the Person performing the Arrest, the Inquiry Body and the body conducting the criminal proceedings should only be one that applies to instructions that are lawful.

125. *There is thus a need to confirm that there can be no liability for refusing to comply with unlawful instructions and that a use of force to implement unlawful Instructions would itself attract criminal responsibility*.

126. The stipulation in sub-paragraph 5(1) that the agent carrying out the detention, shall inform the person arrested of "his minimum rights and obligations" would be inappropriate as the obligation to inform should extend to all the rights of the arrested, and not just the minimum ones.

127. *There is thus a need to amend sub-paragraph 5(1) accordingly*.

128. The proposed possibility in paragraph 6 of delaying the possibility of an arrested person informing a person of his or her own choosing of the reasons and place of the detention for up to 12 hours is overbroad in that it would apply to any offence. It would be more appropriate to limit this to arrests involving grave or very grave crimes, such as terrorism or serious forms of organised crime.

129. *There is thus a need to amend paragraph 6 accordingly*

Article 111. Arrest for Bringing before the Court the Accused who is at Large; Article 112. Arrest of the Accused who Violated the Terms of the Restraint Measure

130. *There is a need to confirm that a person arrested under these provisions has the rights of an arrested person under Article 110.*

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

131. The stipulation in paragraph 1 that the authority detaining a foreign citizen or stateless person should respectively inform the authorities of the state of his or her citizenship or permanent residence ought to be qualified as there might be good reasons why the arrested person did not want such a state informed; e.g., a fear of persecution or other danger to him or her.

132. *There is thus a need to provide that the obligation to inform applies only where the arrested person so wishes this to occur.*

Article 114. Release of the Arrested Person

133. The stipulation in paragraph 5 that an arrested person who has been released "may not be arrested again on the basis of the same suspicion" is, inappropriately worded, even though the aim is appropriate.

134. This is because the issue is not whether the suspicion is the same but whether the same grounds for a suspicion are being relied upon. Thus, a person may have been suspected

of committing an offence on grounds *x* but he or she should not be arrested by reference to those grounds after his or her release but he or she could be arrested on grounds *y*, albeit that the offence of which he or she is suspected remains the same[20].

135. *There is thus a need to modify paragraph 5 accordingly*.

Article 116. Lawfulness of Application of a Restraint Measure

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

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

138. The proposed third ground set out in sub-paragraph 2(3) would be "to ensure the fulfilment by the Accused of obligations placed on him by this Code or by the Court decision", which is quite different from a third ground recognised by the European Court, namely, the potential risk of interfering with the course of justice. Undoubtedly, the ground set out in sub-paragraph 2(3) – the use of which could be consistent with Article 5(1)(b) of the European Convention in particular cases - could cover that in a case where the aim of the measure was, for example, to preclude contact with witnesses. However, there seems to be no ground covering interference with the administration of justice in the absence of a specific court order, which could prove problematic in practice.

139. *There is thus a need for consideration to be given to adding the existence of a well-founded risk of interference with the administration of justice to the grounds set out in paragraph 2*.

140. Paragraph 3 would require the possible circumstances ensuring or hindering proper conduct of the Accused to be taken into consideration when choosing the type of a restraint measure. However, while, their imposition is subject to the requirement in paragraph 1 of being "necessary", paragraph 3 would not make it clear that any measures imposed must observe the principle of proportionality and thus be excessive in their limitation on the freedom of the person concerned.[21]

[20] *Cf.* the more appropriate formulation found in Article 121.1 in connection with a further detention in respect of the same accusation.
[21] See, e.g., *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, 31 October 2006.

141. *There is thus a need for paragraph 3 to require that any restraint measures imposed are consistent with the principle of proportionality*.

Article 117. Substitution or Termination of a Restraint Measure

142. The possibility envisaged in paragraph 2 of the Supervising Prosecutor substituting the restraint measure previously adopted by the court would be inappropriate since this a matter which Article 5(3) of the European Convention allows only to be determined by a court as part of the periodic judicial review required of the use of such measures.[22]

143. This would be equally be the case with any changes made to restraint measures pursuant to paragraphs 3 and 4 insofar as the authority conferred by them to make the changes is not being exercised by a court. There is nothing problematic, however, in the prosecutor terminating the imposition of a restraint measure.

144. *There is thus a need to amend this provision so that the substitution of a restraint measure can only be performed by a court*.

Article 119. The Time Period of Detention

145. The proposed limit on prolongation on detention in paragraphs 2 and 3 in pre-trial and court proceedings for respectively pre-trial and court proceedings would not be problematic if the requirement in paragraph 1 that "the grounds for keeping a person in detention are present". However, there is always a risk that the maximum possible period allowed becomes the norm and this could then result in violations of Article 5(3) of the European Convention. It will be important to ensure that judges and prosecutors are alert to this possibility when prolongation is under consideration.

146. *There is thus a need for appropriate guidance to be provided for judges and prosecutors as to the importance of effective and timely judicial supervision of the use and prolongation of detention*.

Article 122. Peculiarities of Lawfulness of the Alternative Restraint Measures

147. The proposed provision would allow alternative measures other than house arrest, administrative supervision and bail to be imposed by an Investigator or a Supervising Prosecutor, notwithstanding that such measures would still involve an interference with the rights and freedoms of the person concerned, particularly those regarding civil rights under Article 6 and freedom of movement under Article 2 of Protocol No. 4 of the European Convention. However, any interferences with these rights and freedoms should only be authorised by a court.

148. *There is thus a need to remove the possibility of any alternative measures being imposed by an Investigator or a Supervising Prosecutor from this provision*.

[22] See, e.g., *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006.

Article 123. House Arrest

149. The prohibitions that a Court might impose on an Accused subjected to house arrest regarding various forms of communication, visits and guests hosted would have the potential to interfere with the rights to private and family life under Article 8 of both the Accused and his or her family members, as well as of the right to freedom of expression under Article 10 of the European Convention. Such prohibitions would need to be clearly related to the justifications accepted by the European Court for the use of restraint measures in general.

150. The absence of a specific or express objective of preventing an interference with the administration of justice has already been noted and yet this is the most likely reason why such prohibitions could be regarded as necessary. Furthermore, the prohibitions that would be authorised would not be likely to be considered appropriate by the European Court except for the more serious crimes and they should also take account of the interests of persons sharing the residence with the Accused concerned. It will be important for these considerations to be expressly stated as the basis on which any prohibitions can be imposed.

151. *There is thus a need to amend this provision accordingly.*

Article 126. Suspension of the Term in Office

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

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

Article 133. Procedure of Seizing Property

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

155. *There is thus a need to amend paragraph 7 accordingly*.

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

156. The possibility envisaged by paragraphs 1 and 2 of placing the Accused in a medical institution if there is a "reasonable assumption" that he or she has a mental disorder would be incompatible with Article 5(1)(b) of the European Convention,

notwithstanding the requirement in paragraph 2 that the need for this on account of "the sufficient totality of factual circumstances".

157. Although Article 5(1)(b) allows deprivation of liberty to enable fulfilment of an obligation prescribed by law – which would apply to an expert examination – there would need to have been either a prior refusal to undergo the examination[23] or the need for his hospitalisation stemmed from it being established on medical evidence that the disorder entailed danger for the society or for the Accused him or herself[24]. Where these conditions are not satisfied, it would only be appropriate for examination by psychiatrists and psychologists to be done without a deprivation of liberty.

158. *There is thus a need for the factual circumstances to which paragraph 2 to be elaborated in a way that meets the requirements of Article 5(1)(b) of the European Convention*.

159. Paragraph 3 would have no connection with the title or the first two paragraphs of this provision as it relates to the adoption of such placement as a security and not an evidential measure. It should be noted that there is an in identical paragraph in Article 140 where this would be appropriate since this Article is concerned with medical supervision as a security measure.

160. *There is thus a need for paragraph 3 to be deleted*.

Article 141. Types and Grounds for Imposing Procedural Sanctions

161. The possibility of imposing procedural sanctions envisaged by the present provision would be problematic in that the concept of "obstruction of the normal course of the proceedings" as a ground for doing so is rather vague, notwithstanding the link to abuse of rights and malicious non-fulfilment of obligations. Moreover, this power would be exercisable by Investigators and Public Prosecutors who come within the bodies conducting proceedings and their rulings are not subject to the judicial safeguards in Chapter 40.

162. The first concern might be addressed by the provision of guidance to Judges, Public Prosecutors and Investigators as to how not to misconstrue legitimate initiatives on the part of the defence. However, it should not be possible for any sanction to be imposed by Prosecutors or Investigators, who should instead have the right to bring misconduct by a participant in the proceedings before a Court to determine the matter.

163. *There is thus a need for this provision to be amended accordingly and for appropriate guidance to be issued to Judges, Prosecutor and Investigators regarding what conduct should properly be understood as meriting the imposition of procedural sanctions*.

[23] See, e.g., *Petukhova v. Russia*, no. 28796/07, 2 May 2013.
[24] See, e.g., *O.G. v. Latvia*, no. 66095/09, 23 September 2014.

Article 144. Removal from Courtroom

164. The European Court accepts that there may be circumstances warranting the removal of an Accused from the courtroom because of his or her disruptive behaviour. However, this is likely to be more acceptable if the Accused could remain in contact with his or her lawyers and follow the proceedings remotely – such as through a video link[25] - and the need for this possibility would not be envisaged in the proposed provision.

165. *There is thus a need for paragraph 4 to be modified to allow for an Accused to remain in contact with his or her lawyers and to follow the proceedings remotely in the event of a third or subsequent removal.*

Article 147. Removal from the Proceedings

166. The possibility envisaged in this provision for the removal of an attorney, Authorised Representative or Lawful Representative would need to be applied with considerable care given the potential this could have for undermining the defence or the participation of other Private Parties to the Proceedings.

167. However, given the risk of an adverse effect on the fairness of the proceedings, it would be inappropriate for removal from proceedings to be decided upon by either the Investigator or the Supervising Prosecutor, whose role necessarily prevents them from being considered to be impartial.

168. *There is thus a need to replace the reference to "the body conducting proceedings" to be replaced by "the Court" and for paragraph 2 and the first sentence of paragraph 3 to be deleted.*

169. Although judicial supervision is a potentially important safeguard against such potential being realised, this would only be so if appeals to the court were expedited and the proceedings did not continue until the matter is resolved and, in the event of a removal being upheld, a replacement attorney, Authorised Representative or Lawful Representative has had adequate time to prepare him or herself. It is doubtful whether the 20 day period envisaged as being applicable to these proceedings by sub-paragraph 1(3) of Article 392 would satisfy this requirement.

170. *There is thus a need for the 5 day period specified in sub-paragraph 1(1) of Article 392 to be made applicable to a decision to remove an attorney, Authorised Representative or Lawful Representative from participating in the proceedings*.

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

Section 5. Other General Provisions

Article 151. Delivery of Written Notice; Article 153. Propriety of Notification

171. The stipulation in paragraph 7 of Article 151 and sub-paragraph 1(5) of Article 153 (that electronic communications should be sent "to the official e-mail address of the person being notified" would not seem appropriate for participants who are not public authorities. A more appropriate approach for them would be for the electronic communications to be sent to the e-mail address to which they have indicated they wish these to be sent.

172. *There is thus a need to amend paragraph 7 of Article 151 and sub-paragraph 1(5) of Article 153 accordingly.*

Article 163. Resolution of the Property Claim

173. There is ground for concern about the possibility envisaged in paragraph 2 of granting a property claim fully or partially in the "case of rendering an acquitting judgment, terminating the criminal prosecution or terminating the proceedings" as there would be a risk that, in a particular case, this could result in a violation of the presumption of innocence guaranteed by Article 6(2) of the European Convention as it might lead to comment about the culpability of the Accused when dealing with the claim.[26].

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

Article 164, Compensation of the Property Damage Upon the Initiative of the Court

175. There is a risk that the taking of an initiative by a judge that is envisaged by this provision would affect the appearance of his or her impartiality. It would be preferable for a Victim who is "deprived of the possibility of defending his pecuniary interests due to his dependence from the Accused, or his incapacity or limited capacity, or for any other reason" being provided with legal representation at public expense so that the judge does not give the impression of acting on behalf of a particular Party.

176. *This provision should be amended accordingly*.

Section 6. Pre-trial Proceedings

Article 178. Procedure for Initiation of Criminal Proceedings

177. Although this provision deals appropriately with the preparation of the protocol on the initiation of criminal proceedings and what this should contain, there would be no

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

requirement as to the registering of decisions on the initiation and non-initiation of such proceedings. The keeping of a registry of decisions is, however, crucial for effective supervision over the conduct of criminal proceedings.

178. *There is thus a need, insofar as this is not regulated elsewhere, for this provision to be supplemented by an obligation to keep a registry of these decisions on the initiation and non-initiation of criminal proceedings.*

Article 193. Grounds of Suspending Public Criminal Prosecution

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

180. *Consideration should thus be given to stating in sub-paragraph 2(4) that "where the Accused is outside the borders of the Republic of Armenia and is unwilling to participate in the proceedings concerned".*

Article 198. Renewal of Non-Instituted or Terminated Criminal Prosecution

181. This provision would enable the Supervising Prosecutor or the Prosecutor General of the Republic of Armenia to annul a decision on the non-institution or termination of the criminal prosecution. However, there is no indication as to the criteria governing such an annulment, It may be that, these would be the non-applicability or applicability of the conditions in the Criminal Code referred to in paragraph 1 of Article 197 but the present formulation gives the impression that the discretion has no bounds, which would obviously be inconsistent with legal certainty.

182. *There is thus a need to specify the criteria governing annulment decisions taken pursuant to this provision.*

Article 200. Procedure of Becoming Familiarised with the Materials of the Proceedings Prior to Composing an Indictment

183. Making the Materials of the Proceedings available to the Accused, his or her Legal Representative and his or her Defence Counsel is crucial for the preparation of an adequate defence. This would only be satisfactorily accomplished if there was also a possibility of copying materials and enough time is granted to review them. Both issues are addressed in the present provision.

184. Nonetheless, as regards copying – which can be expensive– there is no clarity in this provision about the cost involved or as to who would have to pay for it. Moreover, there ought to be a suitable place made available to those familiarising themselves with the Materials for this purpose. The provision to these persons of an electronic file with a copy of the Materials would obviate the necessity to deal with these issues.

185. *There is thus a need to ensure that the cost of copying is not an impediment to the preparation of an Accused's defence and that those familiarising themselves with the Materials are given access to a room suitable for this purpose. Consideration should also be given to including in this provision the possibility of giving the parties an e-file containing the Materials even if this cannot be implemented immediately*.

Article 204. Circumstances Subject to Verification Based on the Materials of the Proceedings Received with an Indictment

186. An element of this provision relating to the studying of the materials and indictment by the Supervising Prosecutor would be inapt. This is the reference to him or her checking "whether the guilt of the Accused in committing a given act has been proven". Such a formulation should not be used as it is for the Court to determine "guilt". It would be better to provide instead that "there is sufficient evidentiary elements to prove the guilt of the Accused".

187. *There is thus a need to amend sub-paragraph 1 accordingly*.

Section 7. The Evidentiary Actions

Article 209. Grounds for the Performance of Investigative Actions

188. This provision's title is not completely accurate as only paragraph 1 would deal with the grounds for undertaking an investigative measure, whereas paragraphs 2, 3 and 4 list the actions that an Investigator would be able to carry out without judicial warrant, those that can be carried with the permission of a prosecutor and those requiring a court decision.

189. *There is thus a need for this provision to be given a more accurate title*.

190. While the initial inspection of a House that is the Incident Scene (i.e., the scene of a crime) without a judicial warrant – as is envisaged in sub-paragraph 2(1) - might be compatible with Article 8 of the European Convention, there would be no urgency specified in sub-paragraph 2(2) as regards showing that there would be a need for the Investigator to be able to conduct an exhumation without first obtaining such a warrant.

191. *There is thus a need to limit the possibility to exercise the power in sub-paragraph 2(2) without first obtaining a prior judicial warrant to just situations where there was a well-grounded fear that evidence would otherwise be destroyed, damaged or otherwise compromised*.

Article 210. Participants in an Investigative Action

192. Two "attesting witnesses" would be envisaged by paragraph 5 as being involved in certain investigative actions, namely, checking testimony on the spot, exhumation, experimentation, recognition, search and seizure.

193. The provision under European continental criminal procedure codes for the use of such witnesses is no longer frequent, having been replaced by a mandatory recording of all actions undertaken. Nonetheless, their involvement in investigative actions could be an adequate safeguard in cases where the Accused does not have a Defence Counsel. However, a more satisfactory safeguard would be to make the audio-visual recording of the investigative actions mandatory in all cases and not just – as paragraph 7 provides – where the procedure observers are not available.

194. *There is thus a need for this provision to be amended accordingly*.

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

195. The formulation of this provision would not really give full effect to the requirements of Article 35 of the Lanzarote Convention. This Article requires that interviews with a child take place without unjustified delay after the facts have been reported to the competent authorities, they take place, where necessary, in premises designed or adapted for this purpose and are carried out by professionals trained for this purpose.

196. Furthermore, it requires that the same persons, if possible and where appropriate, conduct interviews with the child and that the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings. In addition, it should be possible for the child to be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

197. Certainly, it would not be sufficient for the purposes of the Lanzarote Convention just to allow the psychologist to pose questions and to present professional recommendations with regards to the investigative action performed with participation of a minor, which in any event may be rejected by the Investigator. Rather, in order to protect the minor, especially when he or she is the victim, the psychologist should be given sufficient leeway to decide the form in which the minor should be questioned, as well as to indicate which questions would not be appropriate.

198. Moreover, any other person posing questions should be specially trained for this purpose. In addition, there ought to be provision for the questioning to take place in suitable premises and the questioning should be video recorded so that, if giving evidence at the trial is not possible or desirable, a recording will be available for the Court.

199. *There is thus a need to revise this provision so as to fulfil these requirements*.

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

201. *There is thus a need for paragraph 3 to be modified to require this explanation to be given to disabled persons*.

Article 218. Questioning a Witness

202. Although generally adequate, this provision could be improved by specifying that, if the Investigator had any doubts at the outset of the proceedings as to the possibility of the supposed witness being in some way involved in the commission of the offence concerned, he or she should be required to inform the person concerned of the right to call a lawyer and the right to remain silent if some answers may lead to a self-incrimination.

203. In any event, it would be consistent with Article 6 of the European Convention for it to be specified that the questioning should be suspended until the assistance of a lawyer is obtained where this has been requested by the witness on account of the questions showing that he or she is being considered as a possible suspect.

204. *There is thus a need for this provision to be amended accordingly*.

Article 221. Questioning the Accused

205. Paragraph 3 would provide that, if the Accused expresses a desire to give testimony, "the investigator shall inform him on the obligation to give truthful testimony and the liability prescribed for giving false testimony. This fact shall be confirmed by the signature of the accused". There is no objection from the perspective of the European Convention to an offence of perjury being applied to a defendant who is willing to testify.

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

207. The existence of liability for giving false testimony[27] in this context would also be problematic in that there would then be a danger that the subsequent prosecution of the defendant for perjury will require the criminal court trying a person for allegedly having given such testimony, in practice, to reconsider the guilt or innocence of defendant of the crime that was the subject of the first trial. Such a procedure could be abused and

[27] This would be maintained in Article 464 of the revised draft Criminal Code currently under consideration.

would then lead to a violation of the prohibition of double jeopardy provision in Article 4 in Protocol No. 7.

208. *There is thus a need for further consideration to be given as to whether the imposition of liability on an Accused for giving false testimony is actually necessary or appropriate for the Armenian criminal justice system.*

209. The provisions for confrontation at this stage in the proceedings would not be at all problematic. However, in view of the case law of the European Court as to the conditions for the admission of testimony of persons who cannot be present at the trial[28], it would be desirable for its conduct to be video-recorded so that this can assist the judge in determining whether the testimony of an absent witness can – consistent with the requirements of Article 6(1) of the European Convention - be taken into account.

210. *There is thus a need for this provision to authorise such recording.*

Article 225. Checking Testimony on the Spot

211. The provision for checking of testimony at a place where the events described in it have taken place would not, in itself, be problematic.

212. However, where such checking involves an arrested person or an Accused, there would be a need for some safeguard against possible abuse or mistake in the manner in which this process takes place. This would be provided by a requirement that the arrested person or an Accused has the right to have his or her Defence Counsel with him or her during the checking and it to be possible to object to the accuracy of the protocol of the results obtained by this process.

213. *There is thus a need to amend this Article accordingly.*

Article 226. Examination

214. Paragraph 6 would go beyond inspection as this term is described in paragraph 1 - i.e., "visual observation … for the purpose of determining circumstances of significance to the proceedings and finding traces of the alleged crime" – in that it would provide for the making of computer and paper copies of computer software, websites and automated data.

215. Such action should more properly be characterised as a taking of documents under Article 233 or a search and seizure under Articles 234, 236 and 239. Furthermore, the actual examination of the material concerned should only take place pursuant to specific judicial authorisation.

[28] See, in particular, the judgments in *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

216. Furthermore, as will be noted in respect of Articles 236 and 239, the computer copies of computer software, websites and automated data should be made prior to any examination takes place. Moreover, compliance with Article 19(3)(c) of the Convention on Cybercrime would necessitate a requirement to maintain the integrity of both these copies and the originals.

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

218. The meaning of the second sentence of paragraph 7 – authorising the taking of "objects or documents taken out of circulation under the legislation, regardless of their relationship to the proceedings at hand" – needs to be clarified since it would appear to allow the taking of property which is not required for criminal proceedings and this would be contrary to the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1, as well as potentially in breach of the prohibition on self-incrimination under Article 6(1) of the European Convention..

219. *There is thus a need to clarify the aim and scope of the part of paragraph 7 and, if necessary, limit its scope to ensure that the rights mentioned are not violated*.

Article 228. Experimentation

220. Insofar as such an investigative measure as experimentation is considered necessary, it should only be carried out by persons with the specialised knowledge and the appropriate facilities to conduct the experimentation concerned and to evaluate its results for the purpose of a criminal investigation and for providing evidence at a trial.

221. However, the need to fulfil such a requirement is not specified in the present provision.

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

Article 230. Recognition of a Person

223. The regulation proposed for this action would generally be appropriate.

224. However, the proposed requirement that the persons other than the person to be recognised should resemble him or her as much as possible by clothing would be insufficient as it could allow for there to be material differences that would be prejudicial.[29]

[29] See, e.g., *Laska and Lika v. Albania*, no. 12315/04, 20 April 2010, in which the European Court observed: "the applicants and B. L were required to stand in the line-up wearing white and blue balaclavas, similar in colour to those worn by the authors of the crime. The other two persons in the line-up wore black balaclavas, in stark contrast to the white and blue balaclavas worn by the applicants and B.L who were accused of committing the offence. The change of position of the persons in the line-up did not result in any different outcome for the applicants, as they were consistently required to wear the same colour (white and blue) balaclavas (see paragraph

225. In addition, no provision would be made for the persons performing it not being seen by the persons to be recognised and for the presence of the Defence Counsel at the process.

226. Moreover, in most European systems it is now the practice for the person who is to make the identification being granted protection from being seen so that he or she does not feel intimidated and is inhibited from making a more precise recognition of the suspect.

227. Furthermore, the addition of a requirement to ensure that the Defence Counsel is present during the recognition process would be appropriate as he or she could then be satisfied that the legal requirements were observed, which would be beneficial if the recognition is intended to be used as evident at a later trial. It should be noted in this connection that the non-observance of the entitlement to legal assistance at the time of the identification parade has also been a factor in the European Court finding a violation of Article 6(1) of the European Convention.[30]

228. *There is thus a need for this provision to be revised so as to address these shortcomings*

Article 231. Recognition of an Object, Document, Animal or Corpse

229. Although the cleaning of an object for recognition – as authorised in paragraph 2 – might not having any bearing on this process in some cases, it is possible that in others way it would lead to a mistaken identification occurring. It would be important to ensure that this is something taken into account before any decision to proceed with cleaning is taken.

230. *There is thus a need for such a rider to be added to paragraph 2.*

Article 232. Demand for Information

231. The exception that would be provided in this provision as regards the obligation to provide information requested by an Investigator would be too narrow.

232. Certainly, it could be appropriate to protect secrets protected by law but, while the provision should generally apply to other official information, there should be no obligation for someone to disclose personal information concerning him or herself or anyone else without a prior judicial approval as otherwise there would be a violation of the right to respect for private life under Article 8 of the European Convention.

13 above). The Court finds that the identification parade was tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime" (para 66).

[30] *Ibid.*

233. Furthermore, a demand for information should not be capable of requiring the official concerned to incriminate him or herself contrary to the prohibition on this under Article 6(1) of the European Convention.

234. Moreover, there should be no compulsion for a journalist to identify his or her source – or to disclose documents or other material which might, upon examination, lead to such identification – in circumstances protected by the right to freedom of expression under Article 10 of the European Convention.[31]

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

Article 234. General Terms of the Search

236. Paragraph 9 would be concerned with the seizure of objects found during the search. Although potentially appropriate in this regard, it would allow the Investigator to take objects "regardless of their connection to the given proceedings", even though these do not have any connection to another alleged crime and which would otherwise need to have been separately authorised by a court.

237. As a result, this possibility is inconsistent with the principle of proportionality and likely to lead to violations of Article 1 of Protocol No. 1. Furthermore, it is in marked contrast to the formulation seen in Article 236 governing digital searches where the need for a connection with the crime being investigated or another is a precondition for the taking.

238. *Such an authorisation should thus not be retained.*

Article 235. Search of the House, Area, Building and Premises

239. The proposed deletion from the earlier version of paragraph 2 of the primary requirement that an adult member of the family being present where the legitimate owner is not there – leaving only a requirement for a representative of the condominium or local self-government body is regrettable as it would lead to an undermining of confidence in the process.

240. The qualification in paragraph 3 of the requirement for the Accused to be present where it is his or her house, building or site to be searched that this is not necessary where there are "objective reasons hindering" his or her presence would, in principle, be understandable. However, it would not be appropriate for those objective reasons to include the fact that he or she has been apprehended unless there is compelling evidence that his or her presence would involve genuine security risks.

241. *There is thus a need to reconsider the deletion from paragraph 2 and to limit the scope of the "objective reasons" in the manner noted in the previous paragraph*.

[31] See, e.g., *Sanoma Uitgevers B.V. v. Netherlands* [GC], no. 38224/03, 14 September 2010.

Article 236. Digital search

242. The stipulation in paragraph 2 that a copy would be made of the data is appropriate. However, it would important for this to be the first step that is taken and that this would also be done in a way that maintains the integrity of the data concerned and the copy made of it.

243. *There should thus be a specific requirement to maintain the integrity of the computer software, websites and automated data being examined and the copies of them that are made. There should also be appropriate procedures established for maintaining their integrity.*

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

244. The proposed provision would not indicate whether or not the person being searched might be required to undress, the circumstances in which this might take place, the possibility of examining body cavities and a requirement that searches should not normally be conducted by or in the presence of persons of the opposite sex (which is indirectly recognised in paragraph 3). However, it would be important for these issues to be addressed in order to ensure that a search does not humiliate or degrade the person concerned, contrary to the prohibition in Article 3 of the European Convention.

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

Article 239. Seizure

246. While it may be legitimate to seize digital data, documents, mail and correspondence – as paragraphs 1 and 3 would envisage – there would be no arrangements to protect material covered by lawyer-client privilege, such as a prohibition on removing documents covered by it, supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by it[32], a sifting procedure in respect of electronic data[33] and suitable safeguards to ensure that any later examination of material removed does not infringe this privilege[34].

[32] See, e.g., *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003, *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008 and *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008.
[33] See, e.g., *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16 October 2007, at para. 63 and *Kolesnichenko v. Russia*, no. 19856/04, 9 April 2009, at para. 34.
[34] See, e.g., *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portuga*l, no. 27013/10, 3 September 2015 and *Robathin v. Austria*, no. 30457/07, 3 July 2012

247. In addition, there are no provisions in the Article that would seek to maintain the integrity of copies made of computer data and the originals so as to comply with Article 19(3)(c) of the Convention on Cybercrime.

248. *There is thus a need for this Article to be amended so as to provide the safeguards referred to in the preceding paragraph*.

Article 243. Safeguards of the Lawfulness of Undercover Investigative Actions

249. The proposed bar in paragraph 1 on using any evidence obtained in undercover investigative actions that was not covered by the judicial warrant - albeit with an exception for acts in good faith - is possibly wider than in some European systems but it would certainly not be incompatible with the European Convention.

250. However, the proposed specification that such materials that as have been gathered beyond the scope of the warrant should be destroyed does not take into account any possible ownership rights relating to them and so could in some cases result in a violation of Article 1 of Protocol No. 1.

251. At the same time, where this would not be an issue, there is no indication as to how or when such destruction would be supposed to take place or as to who would be responsible for supervising this[35]. Moreover, there is no clarity as to where the burden of proof would lie regarding whether or not an agent that acted beyond the warrant nonetheless performed his or her activities in "good faith" or as to the circumstances in which this would be determined.

252. *There is thus a need for it to be specified that the information referred to in paragraph 1 must be provided to the court so that it can take a decision either authorising what is proposed or requiring some modification where this goes beyond what is permissible. In addition, there is a need to specify how and when destruction of the material is to take place and who has the burden of proving that an agent acted in good faith.*

Article 245. Protocol of an Undercover Investigative Action

253. It is unclear from paragraph 5 whether its proposed prohibition on transferring the Protocol of the undercover investigative action to anyone other than the Investigator who gave the Instruction to perform such an action would mean that the Prosecutor would not have access to it, which would be strange. Certainly, there would be a need for access to the protocol in the event there being subsequent challenges to the conduct of the actions covered by it.

254. *There is thus a need to clarify whether this is indeed the effect of the prohibition and whether or not this is intentional, as well as whether or not the non-disclosure*

[35] *Cf.* the arrangements for destruction in Article 249.3 regarding data not taken by the Inquiry Body.

requirement precludes subsequent proceedings that challenge the legality of particular undercover investigative actions.

Article 251. Simulation of Taking or Giving a Bribe

255. It would be appropriate, as is proposed, to require that such an investigative measure as simulating the taking or giving of a bribe could only be ordered when there is enough suspicion regarding the offence of bribing. However, the proposed specification that this investigative measure should be based on a "written statement of a person who received an offer of receiving or giving a bribe" would not be sufficient for this purpose since the fact of the statement being in writing would not in any way address its credibility.

256. *This provision should this be revised to require that the statement concerned be a credible one*.

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

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

Article 258. Additional and Repeat Expert Examinations

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

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

Section 8. General Conditions on Court Proceedings

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

261. A requirement that an Accused be present at his or her trial would not be necessarily incompatible with Article 6 of the European Convention and is the best way to ensure

his or her right to defence. Nonetheless, the European Court recognises that the right to be present can be waived.

262. Moreover, a trial in the absence of the Accused might serve the interests of efficiency, particularly where less serious offences are involved or the Accused intentionally absconds, so long as there are appropriate safeguards for the fairness of the proceedings concerned. Notwithstanding the exceptions referred to in paragraph 3, the Revised Draft Code does not seem to recognise that an insistence on the requirement of the Accused's attendance in other situations might not always be appropriate.

263. *Consideration should thus be given to relaxing the requirement of attendance by an Accused in a manner that accords with the case law of the European Court*.

264. As has previously noted[36], it would be appropriate for an Accused who has been removed from the Court to be able to follow the proceedings – whether by a video-link or through a window with audio facilities – and he or she should not only be legally represented but should be able to communicate with his or her Defender.

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

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

266. The present provision would envisage a general obligation of the listed persons to attend Court session, subject to the Court allowing them not to attend particular ones and the possibility of sanctions being imposed for non-compliance. This could be a potentially onerous requirement when the persons concerned might not actually be needed for particular sessions.

267. A more appropriate approach would be for the Court to be required to specify the sessions for which attendance would be necessary, subject to account being taken of the person concerned having an insurmountable difficulty in attending them (such as a scheduled medical operation).

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

Article 276. Scope of the Court Examination

269. This provision sets out of certain elements of the accusatorial model, namely, the facts cannot be amended by the Court and the accusation as a rule cannot amend the factual basis contained in the charges brought against an Accused.

[36] See paras. 164-165 above.

270. However, paragraph 2 would allow for the possibility of the indictment being amended after the Public Prosecutor has produced its evidence at court where "the Evidence examined during the principal hearings confirmed factual circumstances that have not been and could not have been known during the pre-trial proceedings and, as such, or in conjunction with other factual circumstances, make it necessary to bring new charges against the Accused".

271. The requirement that the facts "could not have been known during the pre-trial proceedings" is perhaps too exacting. It might be more appropriate to state that those facts were not known without fault on the part of the Prosecutor. At the same time, it should not be possible to change the indictment as a result of the facts that were already known.

272. *There is thus a need for consideration to be given to modifying paragraph 2 accordingly*.

273. Paragraph 4 would appear to respect the accusatorial principle by requiring discussion with the Parties before the Court changes the legal assessment of the factual circumstances underlying the accusation.

274. However, it would not address the possibility that this new qualification might entail the possibility of imposing a higher penalty in the event of a conviction. In such circumstances, without this different qualification being adopted by the Public Prosecutor, the Court could – contrary to the requirements of the accusatorial principle - be introducing elements of accusation *de officio*. This would be inappropriate if the "discussion" envisaged did not allow submissions to be made on behalf of the Accused regarding the different qualification and sufficient time to prepare those submissions.

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

Article 279. Protocolizing of Court Session

276. The proposed arrangements for the recording of court sessions are appropriate but the acceptance in paragraph 3 that computer-based audio recording might not be available reflect the reality arising from financial constraints.

277. As a result, until it becomes feasible to make computer-based audio recording generally available, it might be appropriate to make arrangements to ensure that such recording is available for use in cases of particular complexity or involving serious offences.

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

Article 282.2 Delivering a Judgment for Execution

279. Paragraph 2 would provide for the initiating of a criminal prosecution against someone other than the Accused after he or she has been acquitted. This would seem to be based on the assumption that an acquittal would necessarily means that there was evidence that the Accused did not commit the offence.

280. However, this will not always be the case as there may not have been enough evidence to prove his or her guilt or he or she may have had the benefit of some exemption from criminal liability. As a result, an acquittal should not automatically lead to the initiation of another investigation to find the perpetrator of the crime.

281. *There is thus a need for more precision in the drafting of this provision.*

Section 9. Judicial Safeguards of the Pre-trial Proceedings

Article 284. Scope of the Judicial Safeguards of the Application of Restraint Measures

282. The order in which the proposed restraint measures are listed in sub-paragraph 1 gives the impression that detention would be the starting point of any consideration of the ones to be imposed when the case law of the European Court actually requires the least restrictive measure to be considered first.

283. *There is thus a need for the order in which the three restraint measures are listed to be reversed*.

Article 287. Conduct of the Proceedings for Application of a Restraint Measure or Prolongation of the Term of a Restraint Measure Applied

284. The possibility of dispensing with the presence of the Accused in proceedings for the prolongation of a restraint measure involving detention or house arrest that would be envisaged in sub-paragraph 2(2) would not be consistent with the requirement under Article 5(3) of the European Convention that the judge should hear such a person in these proceedings.

285. *There is thus a need to qualify the scope of sub-paragraph 2(2) so that it does not apply to the prolongation of detention or house arrest*.

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

286. Paragraph 1 would require an Accused who is detained or his or her Defence Counsel or Lawful Representative to file a petition to abolish the detention or change it for another measure “not later than seven days before the end of the detention term”.

287. Although courts need to be able to organise their proceedings in an orderly fashion, the present provision fails to take account of possible difficulties that might be encountered in filing the necessary petition. Moreover, given that Article 285.2(9) would provide for the filing of a petition on prolonging the detention by the Investigator within five days before the end of the term for which this restraint measure was imposed, the Court would suffer no inconvenience from a later filing an Accused who is detained or his or her Defence Counsel where it has to consider all aspects of the issue of whether or not prolongation is warranted.

288. *There is thus a need for paragraph 1 to be modified to provide that a failure to file the petition within the specified deadline should not preclude the Court from considering the submissions of an Accused who is detained (or of his or her Defence Counsel) as to why his or her detention should be terminated or another measure of restraint should be adopted*.

289. As house arrest – as defined in Article 123 – would be considered by the European Court to be a deprivation of liberty for the purpose of Article 5 of the European Convention, there would also have to be a possibility for an Accused to submit a motion for its termination or replacement by another restraint measure.

290. *There is thus a need to add "or house arrest" after "detention" in the paragraphs of this provision.*

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

291. The requirement that, before filing an appeal to the court against a Pre-Trial Action, there would first have to have been an appeal against it to the Prosecutor reflects the supervisory role that the latter has over the conduct of the pre-trial investigation.

292. However, as no deadline for the determination of such an appeal is specified in Article 38(11), it is unclear from the present provision whether or not the issue can be considered by the court only after this has occurred.

293. *There is a need, therefore, to clarify whether an appeal to the court must await a prior determination by the Prosecutor and, if so, a strict time-limit of three days for such a determination should be specified in Article 38(11)*.

Article 309. Procedure of Deposition of Testimony

294. This and the preceding three Articles are designed to allow pre-trial statements to be secured from the Accused (i.e., a confession) and from witnesses who might not be able to be present at the trial or where there was a reasonable assumption that they would not provide reliable testimony during it[37].

[37] Article 306.

295. Although the content of the present provision is generally appropriate, it should be noted that paragraph 2 envisages only postponing the proceedings on one occasion should there be a failure of the Defence Counsel to attend the relevant court session. As a result, a deposition could be taken from an Accused in circumstances where he or she does not have the assistance of a lawyer, which would be likely to render any deposition problematic from the perspective of Article 6(1) of the European Convention.

296. It would, of course, be appropriate to try and prevent the organisation of court proceedings being frustrated by a Defence Counsel's intentional non-attendance but, at present, the paragraph 2 fails to take account of the possible good cause for non-attendance and makes no provision to ensure that the Accused would be legally represented.

297. *There is thus a need for further postponements to be allowed where there is good cause for a Defence Counsel's absence and for alternative legal representation to be provided for the Accused if the Defence Counsel's absence is found not to be justified*.

Section 10. Court Examination at the First Instance

Article 326. General Procedure of Questioning

298. The possibility envisaged in the last sentence of paragraph 3 of a person being called for questioning by Court upon its initiative would run counter to the principle of adversariality which Article 6 requires to be observed, in particular if this witness and his or her statements are not in the pre-trial record. In such cases it could affect the Court's impartiality.

299. *There is thus a need for the last sentence of paragraph 3 to be deleted.*

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

300. The arrangements that would be made under this provision for questioning minors would not be entirely appropriate.

301. Article 36(2) of the Lanzarote Convention requires that, as regards the questioning children in the course of court proceedings, the judge should be able to order the hearing to take place without the presence of the public and it should be possible to be heard in the courtroom without being present, notably through appropriate communication technologies.

302. The former requirement is not dealt with in this provision but is covered by Article 267. However, the requirement of a possibility of being heard in the courtroom without being present would not be sufficiently addressed by the present provision as there is no provision for the minor to be questioned while not present in the courtroom.

303. In any event, depending upon the age of the minor and the advice of a psychologist, it might be more appropriate – as already noted[38] - for him or her to be questioned only at the pre-trial stage.

304. *There is thus a need for the formulation of this provision to be revised to take account of these concerns, having regard to also to the recommendations made in respect of Article 212.*

Article 330. Publicizing of the Testimony

305. This provision would be concerned with the putting into evidence testimony which had not been heard by the court trying a case but which had been gathered at the pre-trial stage. This would not necessarily be incompatible with Article 6 of the European Convention but, insofar as it could lead to the testimony of witnesses who have not been cross-examined by, or on behalf of, the Accused, there would be the potential for a violation of paragraph (3)(d) of that provision.

306. In determining whether a conviction based on the testimony of an absent witness – i.e., one who has ever been examined by the defendant at any stage of the proceedings - is unfair, the European Court has developed a three part test, namely, (a) was there a good reason for the non-attendance of the witness; (b) was the evidence of that absent witness the sole or decisive basis for the conviction or, if not, was its weight significant or its admission such that it may have handicapped the defence; and (c) were there sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.[39]

307. The counterbalancing factors required by the European Court are ones that will permit a fair and proper assessment of the reliability of that evidence. At a minimum, this should mean the approaching of the untested evidence of an absent witness with caution, the courts showing that they are aware that it carries less weight and the requiring of detailed reasoning as to why it is considered reliable, while having regard also to the other evidence available. There does not appear in the present provision of any requirement for these considerations to be taken into account in determining whether or not reliance can be placed by a court on the testimony of an untested witness.

308. *There is thus a need for appropriate qualification to be made of this power to consider the testimony of an untested witness in the provisions concerned with the assessment of evidence*.

Article 333. Performance of Other Proving Acts

[38] See para. 198 above.
[39] See *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.

309. The possibility envisaged in this provision of the Court *ex officio* ordering expert examination and requesting objects and other pieces of evidence and performing inspections or examinations would run counter to the principle of adversariality and could affect the Court's impartiality.

310. *These possibilities should thus be deleted from the provision.*

311. Furthermore, paragraphs 2 and 3 would envisage the carrying out, upon the motions of a Party, of expert examinations during the course of the trial. However, this is something that should be regarded as exceptional since this is something that should generally have been done before the trial stage commenced.

312. *There is thus a need for this provision to be modified to require appropriate justification for such an exceptional step.*

Article 334. Supplementing the Body of Evidence Subject to Examination

313. The possibility envisaged in paragraph 4 of the Court being required to take measures *ex officio* to supplement the body of evidence would also run counter to the principle of adversariality and could affect its impartiality, notwithstanding that this requirement is limited to instances where it considers that the failure to take the measures concerned "may cast doubt on the fairness of the proceedings".

314. *There is thus a need to replace this possibility by authorising the Court in such a situation to require the Parties to consider whether such measures are necessary.*

Article 337. Content and Procedure of Closing Arguments

315. Paragraph 5 stipulates that the Parties in their closing arguments would not be able to rely on evidence that was not examined prior to them being begun. However, this would seem to be contradicted by Article 340, which would allow the Parties in their closing arguments to provide new circumstances of essential significance to the proceedings and to present new evidence previously unknown to them.

316. *There is thus a need for the apparent contradiction between the two provisions to be resolved by providing that the restriction in paragraph is subject to Article 340.*

Article 343. Resumption of the Principal Court Hearings

317. The possibility that would be given to the Court to require the resumption of the court hearing after it has begun to discuss the issues which it is required to resolve would be inconsistent with the adversariality principle.

318. *There is thus a need for this provision to be deleted.*

Article 344. Delivery of the Verdict; Article 347. The Judgment; Article 348. Content of the Judgment; Article 349. Structure of the Judgment

319. The proposed arrangement of delivering a written verdict dealing with conviction or acquittal and then, after holding a supplementary hearing concerned with sentencing and other related matters, rendering a judgment that deals with those issues but also, again, conviction or acquittal would be unduly wasteful of judicial time.

320. It would be more appropriate for the verdict to deal with sub-paragraphs 1(1)-(8) and (14) in Article 348 the ruling or judgment after the supplementary hearing to deal with the remaining matters. Both the verdict and the judgment would need to follow the scheme set out in Article 349.

321. *There is thus a need for these provisions to be revised to take account of the recommendations in the preceding paragraph.*

Section 11. Judicial Review

Article 353. Right to Lodge a Judicial Review for Appeal

322. The possibility that would be given in clause 2 of paragraph 1 for persons that did not participate in the proceedings to file appellate review to "is based on the fact that the judicial act directly concerns their lawful interests. This would not be problematic as such and indeed it might help ensure that the rights such as that to property are not improperly affected.[40] However, it would be preferable for their involvement to have taken place in the initial proceedings, with the possibility of them appealing then being limited to situations where they were not in a position to do this.

323. *There is thus a need for consideration to be given to limiting the scope of clause 2 of paragraph 1in this way*.

Article 369. Trial Examination under the Appellate Review Procedure

324. Paragraph 1 would leave it to the Appellate Court to decide whether the participation in the trial of persons other the one who submitted the appellate complaint should be mandatory. However, the participation of a person whose conviction or acquittal is the subject of the appellate complaint should always be mandatory as its outcome could affect him or her.

325. *There is thus a need for the participation of the acquitted or convicted person to be stated to be mandatory in paragraph 1*.

Article 392. Time Periods for a Special Review in the Appellate Court

326. As already noted, it would be more appropriate for appeals against decisions on removal from proceedings under Article 147 to be subject to the 5 day period specified in sub-

[40] *Cf. Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, no. 3503/08, 13 October 2015.

paragraph 1(1) rather than the 20 day period currently envisaged in sub-paragraph 1(3) as being applicable to those proceedings.

327. *There is thus a need for sub-paragraphs 1(1) and 1(3) to be amended accordingly*.

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

Article 411.Rapidity and Separation of the Proceedings Related to a Crime Attributed to a Minor

328. Paragraph 4 would rightly seek to restrict the dissemination of material relating to a crime attributed to a minor. Moreover, the exception made for participants having a "special need for it" could be understood as an Accused requiring this for his or her defence. However, there ought to be no ambiguity or uncertainty in that regard.

329. *There is thus a need for paragraph 4 to provide that "special need" includes for the defence of an Accused other than the minor, whether in the same or other proceedings*.

Article 415. Arrest or Detention of a Minor

330. There would appear to be some inconsistency between the stipulations in this provision regarding the maximum period of detention for minor since the maximum period is said in paragraph 6 to be one month for pre-trial proceedings but longer periods are also prescribed in this provision.

331. It might be that the intention is to set one month as the maximum duration for a specific instance of ordering detention, while allowing this to be renewed up to the longer periods prescribed. However, the present formulation could prove confusing for courts handling cases that involve juveniles.

332. *Insofar as this is the intention, there is a thus need for this to be clearly stated*.

333. As has been seen[41], house arrest is to be regarded as detention for the purpose of Article 5 of the European Convention.

334. *There is thus a need for the time limits regarding detention in paragraph 6 also to be made applicable to house arrest and it should be amended accordingly*.

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

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

[41] See para. 289 above.

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

Article 415. Questioning of the Minor Accused

337. The provision in paragraph 2 for informing an Accused who has not reached the age of 16 would, apart from the issue of the Accused's age, be the same as that for Accused generally in Article 221(3). As a result, the proposed provision is not really about the peculiarities of proceedings involving minors.

338. *There is thus no need for the repetition of this warning, which could be deleted*.

Article 417. Peculiarities of the Court Proceedings Related to a Crime Attributed to a Minor

339. The possibility envisaged in paragraph 3, where "the circumstances to be examined may negatively affect" a minor Accused, of removing him or her from the proceedings is rather vague. Furthermore, it does not seem appropriate for this decision to be solely a matter for the Court. Moreover, it also does seem appropriate for the Court – as opposed to the Defence Counsel of the minor Accused – to explain to him or her afterwards the substance of the actions performed in his or her absence.

340. Rather, it would be more appropriate for the removal decision to be taken by the Court only after hearing the views of the Defence Counsel and the psychologist and for the Defence Counsel to have an opportunity of explaining in private the actions performed to the minor Accused so that they could determine what questions to put to the person questioned during his or her absence.

341. *There is thus a need for paragraphs 3 and 4 to be amended accordingly*.

Article 428. Principal Court Hearings in the Medical Compulsion Proceedings; Article 430. Conclusive Judicial Act in the Medical Compulsion Proceedings.

342. In contrast to Articles 344 and 350, there is no indication in these provisions that verdicts or judgments should be written or published. This is probably not the intention but the failure for this to occur would be inconsistent with Article 6(1) of the European Convention.

343. *There is thus a need for it to be made clear that the verdicts and judgments in Medical Compulsion Proceedings should be written and delivered in an open court hearing, even if provision is made for limiting full disclosure of details that might infringe a person's right to respect for private life.*

Article 445. Interim Measures Applied to the Legal Person

344. It is not clear what purpose is supposed to be served by the interim measures that would be authorised by this provision.

345. Although there is a requirement of reasonable suspicion of an offence having been committed in paragraph 3, the test of necessity in paragraph would not relate to what the legal person might or might not do. In particular, it would not deal with the risk of hindering the administration of justice or of committing further offences. In these circumstances, the application of interim measures could be seen as an unjustified interference with the right to property under article 1 of Protocol No. 1.

346. *There is thus a need to clarify the objectives served by the imposed by the imposition of interim measures and, in particular, to establish that there is a clear link between such measures and the criminal proceedings being brought against the legal person concerned.*

Article 448. Negotiation

347. Although this provision would provide for judicial supervision as to the voluntariness of opening negotiations, there would be no requirement for judicial supervision to ensure that this is equally present after any "agreement" is subsequently reached since the court's role would then limited by paragraph 8 to merely being a recipient of a copy of it.

348. This arrangement would be in marked contrast to the role provided for the court in Articles 454(2) and 455(4) in cases of settlement of private prosecution and those in Articles 461(2) and 462(3). Indeed, the absence of similar requirements to the ones found in that provision would be incompatible with the need under Article 6(1) of the European Convention for appropriate judicial guarantees to be in place where an accused is accepting criminal responsibility and punishment outside the trial process. [42]

349. *There is thus a need for the present provision to have similar requirements regarding judicial supervision to those in Articles 454(2), 455(4), 461(2) and 462(3).*

Section 14. Final and Transitional Provisions

Article 465. Final Provisions

350. The proposed date of entry into force – 1 July 2020 – will come quite soon after the anticipated adoption of the Revised Draft Code by the National Assembly.

351. It is doubtful whether this really gives all affected by the significant changes which will be made to criminal procedure to be properly prepared - in terms of training and administrative arrangements - to implement them in a proper manner.

352. *There is thus a need for consideration to be given to ensuring that there is an interval of at least nine months between the adoption of the Revised Draft Code and its entry into*

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

force so that the necessary organisational arrangements can be made and the essential training required for investigators, judges, lawyers and prosecutors can be undertaken.

C. Conclusion

353. The Revised Draft Code reflects a considerable amount of work undertaken by the authorities of the Republic of Armenia and, in particular, by the members of the Working Group that prepared it. Much care has been taken to try and ensure that it takes account of European standards - including the developing case law of the European Court - and builds on the reform previously effected by the 1998 Code. In particular, many concerns raised with respect to the earlier draft have been taken on board.

354. As a result, the Revised Draft Code can be regarded as generally providing for a balanced set of rules for investigating and adjudicating criminal cases in accordance with human rights and fundamental freedoms, while protecting the public interests and those affected by criminal conduct.

355. There are, however, various matters which the section by section analysis indicates still need to be addressed so as to ensure that the Revised Draft Code is fully in conformity with the requirements of European standards. These include ones for which recommendations had previously been made in respect of the earlier draft.

356. The most significant ones are those concerned with ensuring that arrested and accused persons have effective access to and representation by a lawyer throughout criminal proceedings, strengthening the obligation to provide information to arrested persons as to their rights and obligations, making it clear that detention should be the last resort where restraint measures might be justified, removing from the Investigators and the Supervising Prosecutor certain powers relating to restraint measures rights, improving compliance with the requirements of the Lanzarote Convention and taking account of the particularities of electronic evidence in the formulation of provisions.

357. Other matters requiring attention are generally ones concerned with either making certain points more explicit or elaborating on the standards that have been prescribed. There are also instances where the organisation of provisions might benefit from some restructuring without any fundamental change of content. In addition, some provisions or aspects of them seem to be unnecessary.

358. Some clarification is needed as to the exercise of certain responsibilities or as to the making of certain organisational arrangements.

359. Finally, some comments only concern points to be borne in mind once the Revised Draft Code is adopted, as practice can run counter to what is intended. In this connection, it is emphasised that there should be an appropriate interval between the adoption of the

Revised Draft Code and its entry into force so that those charged with the latter responsibility are suitably prepared to undertake it.

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