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"Supporting the criminal justice reforms – tackling criminal aspects of the judicial reform"

REVIEW OF THE COMPATIBILITY WITH EUROPEAN STANDARDS OF GEORGIA'S CRIMINAL PROCEDURE CODE AND RELATED LEGISLATIVE PROVISIONS

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EXECUTIVE SUMMARY

This Review examines the compatibility with European standards of the Criminal Procedure Code, the provisions in the Criminal Code relevant to the conduct of criminal proceedings and the Law of Georgia on Operative Investigative Activities.

It deals first with some general issues requiring attention. These are matters relating to the approach to drafting and ones that are given insufficient consideration in the arrangements for the conduct of criminal proceedings, notably as regards the position of vulnerable persons, the arrangements for investigating complaints and the use of modern technology.

Thereafter, it examines in turn the provisions in the two Codes and the Law on Operative Investigative Activities, either on a Chapter by Chapter or Article by Article basis.

The review finds that there is a need for some reconsideration of the approach to drafting. In part, this concerns consistency of approach within a particular measure, as well as style and detail. However, it is also about the relationship between legislative provisions in one legal instrument and those in another one. In particular, the Law of Georgia on Operative Investigation Activities conflicts with the Criminal Procedure Code rather than being a complement to it. Moreover, the former deals with matters that really should be contained in the latter.

In addition, there is seen to be a need for: greater consideration of the position of vulnerable persons; more effective arrangements for investigating complaints and protecting complainants, particularly where domestic violence is involved; the introduction of a possibility to appeal against the way conduct is classified for the purpose of a prosecution, and better and more recognition of the advantages afforded by modern technology for the conduct of criminal proceedings.

Furthermore, there are many points of detail concerning individual provisions which need to be addressed. These include: the arrangements for jury trial; the rights of victims; the conduct of undercover operations; the use of alternatives to detention; the granting of bail; the conduct of plea bargaining; ensuring equality of arms and an adversarial procedure; and the approach to sentencing and the serving of sentences imposed.

Nonetheless, as many aspects of the foundations required for a criminal process that accords with European standards are already in place, the revisions to the Criminal Procedure Code and related legislation that are required should not be difficult to put into place.

A. INTRODUCTION

1. This Review is concerned with Georgia's Criminal Procedure Code ('CPC') and certain related provisions in the Criminal Code and the Law of Georgia on Operative Investigative Activities ('the Operative Investigative Activities Law').

2. It examines the compatibility with European standards of the CPC, the provisions in the Criminal Code relevant to the conduct of criminal proceedings and the Operative Investigative Activities Law ('the criminal proceedings legislation'), in particular as regards the requirements of the rights to liberty and security of person and to fair trial.

3. The relevant European standards comprise, in particular, the European Convention on Human Rights ('the ECHR') and the case law of the European Court of Human Rights ('the European Court'), as well as the Council of Europe Convention on preventing and combating violence against women and domestic violence ('the Istanbul Convention') and Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse ('Recommendation Rec(2006)13')[1], as well as Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ('Directive 2012/13/EU') and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime ('the Victims Directive'). In addition, account has also been taken of certain best practices in implementing these standards.

4. Furthermore, in connection with the foregoing standards, it takes into consideration the findings of violations of the ECHR by the European Court in respect of Georgia that are concerned with the conduct of criminal proceedings and whose execution is currently pending before the Committee of Ministers of the Council of Europe.

5. Moreover, it takes into account recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the CPT') and the OSCE's Office for Democratic Institutions and Human Rights ('ODIHR'), as well as the findings in various reports by non-governmental organisations and the Report of the Round Table Discussion "Ensuring the Right Balance Among the Actors in the Criminal Justice System"[2]. It has also taken account of comments made in respect of a draft version prior to and during an online meeting with a wide range of stakeholders on 25 March 2021.

[1] Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies.
[2] April 2019. This report was *produced as part of a project co-funded by the European Union and the Council of Europe*

6. In connection with the ECHR, an important consideration in relation to the evaluation of the criminal proceedings legislation 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.

7. Remarks will not be made with respect to those provisions in the criminal proceedings legislation that are considered appropriate or unproblematic, unless this is relevant to an appreciation of their impact on other provisions.

8. Furthermore, there will generally be no comment on provisions that have already been declared invalid by the Constitutional Court.

9. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised.*

10. The Review first addresses some general considerations of importance for the criminal proceedings legislation. It then examines in turn the provisions in the CPC, the Criminal Code and the Operative Investigative Activities Law, either on a Chapter by Chapter or Article by Article basis. It concludes with an overall assessment of the compatibility of the criminal proceedings legislation with European standards and a summary of the principal recommendations.

11. This Review has been based on an unofficial English translation of the criminal proceedings legislation.

12. The comments on which the Review has been based have been prepared by Stefanie Lemke,[3] Jeremy McBride[4], Jim Murdoch[5] and Levan Meskhoradze under the auspices the Joint Project "Supporting the criminal justice reforms – tackling criminal aspects of the judicial reform", funded within the European Union and Council of Europe Partnership for Good Governance for 2019-2021.

B. GENERAL CONSIDERATIONS

13. Most of the issues requiring attention in order to ensure that the CPC, relevant provisions in the Criminal Code and the Operative Investigative Activities Law is more fully aligned with European standards are dealt with in the examination of individual provisions in the following three sections.

14. However, there are certain more general issues that would also benefit from attention. These are matters relating to the approach to drafting legislative provisions and ones that are given insufficient consideration in the arrangements for the conduct of criminal proceedings.

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15. As regards drafting, there are several points which should be considered.

16. Firstly, there is a problem of always ensuring internal consistency as a result of the coverage of the same issue in more than one provision. Such repetition is problematic because the content is not always identical and indeed could even be viewed as contradictory.

17. The most egregious example of this is Article 38 which states the rights of the defendant, accused, which are then dealt with again in the remaining provisions of Chapter V and elsewhere in the CPC. Various inconsistencies between the former and the latter are picked up in the examination of provisions in the following section.

18. However, another example can be seen in Chapter II, which enumerates the principles of criminal proceedings that are then elaborated in subsequent Chapters. In the case of the latter, there would be nothing problematic in having an enumeration of principles confined to the headings for the various Articles but their substance would be better used to shape the provisions dealing with the relevant areas of activity that could otherwise be neglected, whether this be those concerned with interrogation, search or the conduct of court proceedings.

19. Secondly, the relationship between either the CPC or individual provisions in it and other legislation might be better handled.

20. As will be seen further in the discussion below, there is a degree of overlap between the CPC and the Operative Investigative Activities Law. There is, of course, nothing inappropriate in having complementary pieces of legislation. However, the Operative Investigative Activities Law detracts from, rather than enhances, the regulation of covert investigative activities. It would be preferable for the all standards governing the conduct of such activities to be confined to the CPC and the Operative Investigative Activities Law to focus just on matters of practical implementation and organisation.in a manner that is consistent with those standards.

21. In addition, where one provision is in some way dependent upon other legislation, it is not particularly helpful to refer to the other legislation in the most general of terms. It would be better to make specific reference to the relevant provision in that piece of legislation so that there is no ambiguity as to what is intended.

22. Thirdly, there is a tendency to use broad concepts without sufficient criteria to guide their application. In some instances, difficulties in this respect may have been overcome through a developed practice of interpretation. However, there is a need to be sure that this is always the case. Moreover, where entirely new concepts are being introduced, these should always be accompanied by an indication of the relevant considerations for their application. This can be in the legislation itself but it could also be addressed by issuing some form of guidance note to assist those who must actually apply the concepts. Such a note would, e.g., be helpful when there is a need to resolve an issue as to the possible incompatibility of a juror’s involvement in a particular case.

23. Fourthly, the terms ‘close relative’ and ‘family member’ are important for many of the provisions in the CPC. As will be seen in the discussion below, there is some uncertainty as to the adequacy of these terms for relationships that are now recognised as falling within the right to respect for family life under Article 8 of the ECHR, notably civil partnerships and de facto relationships. This has been noted in respect of certain provisions but the comments made are generally applicable to the use of these terms. In practice, the difficulty may be resolved through use of analogy but that does not provide sufficient certainty as to the approach that will be followed in all cases.

24. However, it is questionable whether it is really necessary or appropriate to have these two different terms, particularly as ‘spouse’ appears in the lists for both of them and the difference between “a child, a foster child” in ‘close relative’ and “a minor child or a stepchild” is hard to see when looked at from the case law relating to Article 8.

25. Finally, it would be appropriate – insofar as this is linguistically feasible - for the language of the CPC and other legislation concerned with criminal proceedings took account of the fact that those involved in them are women and not just men.

26. *There is thus a need to have regard to the above considerations when undertaking a revision of the CPC and other legislation related to criminal proceedings*.

27. A range of problems relating to the operation of the criminal justice system were identified in the Report of the Round Table Discussion “Ensuring the Right Balance Among the Actors in the Criminal Justice System”. Some of these relate to legislation other than that currently being reviewed and others are not problems that can be fixed by legislative change but rather require training, a change in attitude and, most importantly, leadership that is effective in its determination to ensure that European standards are fully observed when applying provisions that are broadly compatible with those standards.

28. Certainly, without an appreciation and – more importantly - full acceptance of those values which underpin a modern system of criminal justice based upon European expectations there is every risk that those entrusted with the delivery of criminal justice will continue to fail to deliver such expectations. A revised CPC cannot by itself bring about attitudinal change

29. Nonetheless, there are several matters where the approach of the CPC could be improved.

30. Firstly, although some account has begun to be taken of those taking part in criminal proceedings who are vulnerable and some specific suggestions have been made in the examination of individual provisions, it would be desirable for the whole CPC to be reviewed with such persons in mind. This is important not only to facilitate their ability to take part in the proceedings but also to ensure that the experience of having done so does not prove debilitating or off-putting.

31. Some guidance in this respect may be derived from the Victims Directive. However, it should be kept in mind that vulnerable persons will not just be victims; they can be witnesses, jurors, persons in premises being searched and defendants, accused.

Moreover, the need for consideration of vulnerable persons is relevant not just at the trial stage but arises from the very outset of criminal proceedings.

32. Secondly, the arrangements for investigating possible offences could be improved. At present, Article 100 imposes an obligation to initiate an investigation and Article 101 lists the information that provides the grounds for doing so. However, the latter is limited to the information provided to an investigator or a prosecutor, that revealed in the proceedings and that published in the mass media. There is no specific requirement to have regard to past investigations or proceedings in respect of the person who is the subject of an investigation, which could have a bearing on the assessment made about more recent allegations concerning someone. Such an approach is good practice but does not always seem to be being taken into account, especially in cases involving domestic violence,[6] as well as those involving wrongdoing by public officials.

33. The addition to Article 101 of an explicit requirement to check the records of the person who is the subject of the complaint might contribute to a more effective approach to the investigation of allegations concerned with domestic violence and wrongdoing by public officials. Moreover, the obligation to initiate an investigation should not be limited to those instances where an investigator or prosecutor is notified of the commission of a crime.

34. Thirdly, although a victim may appeal a decision to terminate an investigation under Article 106(1)[1], there is no possibility of appealing against the way in which particular conduct is classified. As a consequence, there can be no challenge to an inappropriate response to a serious criminal offence that has objectively been committed through treating it as a less serious crime. This may lead to violations of Articles 2 and 3 of the ECHR. It would, therefore, be appropriate for there to be a possibility for the victim to appeal against the classification of the conduct of which s/he complained.

35. Fourthly, there is provision for special measures of protection being requested by a witness or a victim under Articles 49 and 57. However, a victim may not always appreciate this possibility or may be afraid to request them. Certainly, action to protect apparent victims of domestic violence does not always seem to be taken sufficiently promptly.[7]

36. Moreover, the decision on their adoption is a matter for the prosecutor whereas the possible victim's first contact is likely to be with the police. It could be useful, therefore, for the person receiving the report of a crime under Article 101 to be required to raise the issue of a need for special measures of protection with the prosecutor at the same time as preparing the record of the report.

37. Fifthly, covert investigative activities in respect of criminal matters should preferably be regulated just by the CPC and not dealt with in measures such as the Operative Investigative Activities Law that deal with such activities outside the criminal sphere. Furthermore, account should be taken of the seriousness of the offences involve when

[6] See the applications to the European Court in *A. and B. v. Georgia*, no. 73975/16 and *Gaidukevich v. Georgia*, no. 38650/18, which have been communicated to the Government.
[7] See the application to the European Court in *Tkhelidze v. Georgia*, no. 33056/17, which has been communicated to the Government.

the undertaking such activities and, more generally, the legislative framework governing their use needs to be strengthened.

38. Sixthly, various improvements are required with respect to the use of measures of restraint. In particular, there ought to be a requirement that there is a reasonable suspicion that the defendant, accused has committed the offence before even considering the use of such measures. There should also be greater emphasis on requiring the need for measures to be substantiated, with requirements to consider first whether the less restrictive ones would be sufficient to allay concerns and, where they are continued, to establish that there has been due diligence in the conduct of the proceedings. Moreover, consideration should be given to adding the preservation of public order as a ground for imposing measures of restraint. In addition, there is a need to ensure that the amount of bail set is affordable and its payment should not generally be a precondition for the release of the defendant, accused concerned. Also, there should be more alternatives to the use of detention than the use of bail.

39. Seventhly, the arrangements for plea bargaining need some adjustments. Notably, those adjustments include: precluding any consideration of whether the conclusion of such a bargain is possible at a defendant, accused's initial appearance in court; the making of a prosecutor's offer of a plea bargain in writing; the conclusion of a plea bargain not leading to sentences inconsistent with obligations under Articles 2 and 3 of the ECHR; jurors being made aware of any plea bargain concluded by a witness; and the duty of collaboration in a plea bargain on special collaboration not extending to the giving of testimony against the official or other person whose identity has been established through such a bargain.

40. Eighthly, although the approach required for equality of arms and adversarial proceedings is well-stated in Article 25, there are a number of ways in which its achievement in practice could be better assured.

41. These include ensuring that interrogation does not commence without the presence of the defendant, accused's lawyer and that communication between the lawyer and the defendant, accused remain confidential. In addition, there is a need to enhance the arrangements for evidence gathering on behalf of the defence and the ability of defence lawyers to participate in investigative actions.

42. Furthermore, there should be better protection for witnesses who become recognised as defendants, accused in the course of questioning and the replacement of defence lawyers should not be effected in a manner that leads to the defendant, accused suffering prejudice. There should also be improvements in the ability to examine classified documents and fully confidential case files. Moreover, the regime governing public disclosure of material about a case should be the same for the defence and the prosecution and the substitution of judges should not be possible without a rehearing of evidence unless the defence agrees otherwise.

43. Ninthly, there are various improvements needed for the conduct of trials involving juries. However, the most important one concerns the instructions to be given to jurors as to the performance of their role in the course of the proceedings.

44. Finally, the CPC ought to be framed in a way that enables the conduct of criminal proceedings to take greater advantage of the opportunities afforded by modern technology. There is already some provision for video recording. However, it is noted below that there are circumstances in which this ought to be required rather than left as an option.

45. Moreover, the possibility of using video conferencing arrangements ought to be further developed, subject to ensuring that this is consistent with the fundamental requirement of a fair hearing. In addition, there ought to be greater provision for the electronic exchange and sharing of documentation - which is currently focused on covert investigative activities - as this will not only save costs but will facilitate the speedier processing of cases.

C. THE CRIMINAL PROCEDURE CODE

1. Introduction

46. This section follows the sequence of the Chapters of the CPC and identifies those provisions in them that need some attention.

Chapter I. Criminal Procedure Legislation, its Objectives and Scope

Article 3

47. Although the definition of evidence in paragraph 23 is ostensibly broad in its scope, there appears to be inconsistency in the way in which it is interpreted. In particular, the courts often seem to treat procedural documents, such as arrest records, as inadmissible, notwithstanding that these could have a significant influence on the outcome of the proceedings.[8] At the same time, there is also a tendency to treat the indictment as evidence, transforming what is no more than an allegation into a matter of fact.[9]

48. Both practices put a defendant, accused at an unfair disadvantage in the proceedings, respectively precluding her/him from adducing evidence that could be exculpatory and requiring her/him to disprove what is no more than an assertion.

49. *There is thus a need to amend the definition in paragraph 23 to make it much clearer that procedural documents can be adduced as evidence and that the indictment is not itself to be regarded as evidence.*

Chapter II. Principles of Criminal Proceedings

Article 14

[8] See *Strengthen the principles of equality of arms and adversarial proceedings in the process of evidence collection introduction and examination*, EWMI-PROLOG, 2018, at p. 6 and the study *Evidence in Criminal Proceedings*, https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf, at p. 155.

[9] See East-West Management Institute, *Strengthen the principles of equality of arms and adversarial proceedings in the process of evidence collection introduction and examination*, 2018, at p. 6.

50. The possibility envisaged in paragraph 2 of a party requesting "to personally interrogate a witness" needs to take account of the potential for such interrogation to be inconsistent with the right to psychological integrity that is part of the right to respect for private life under Article 8 of the ECHR,[10] as well as potentially with the requirement in Article 56(g) of the Istanbul Convention that victims of gender-based violence be able to testify without having to see the defendant, accused.

51. *There is thus a need to qualify this possibility by indicating that the granting of any such request by a defendant, accused is subject to the need to protect the rights of the alleged victim of an offence.*

Chapter III. Court

Article 25

52. This provision sets out requirements consistent with the need for adversary proceedings and equality of arms required under Article 6 of the ECHR.

53. However, the use of the power to ask clarifying questions for ensuring a fair trial should not be used in a manner designed to assist the making of the case by the prosecution as it has the burden of proof.

54. *It would thus be appropriate to add to "fair trial" the phrase "for the defendant, accused" so as to make this clear.*

Article 27

55. The first paragraph of this provision provides that juries are to be composed of 12 jurors plus 2 substitute jurors. However, it then provides for different minimum numbers – at least 6, 8 or 10 – depending upon whether the offences involved are respectively less serious, serious or particularly serious.

56. It is clear from Article 224 that every jury trial should start with a jury composed of 12 jurors and at least 2 substitute jurors. The ability to rely on the prescribed minimum numbers presumably arises pursuant to the need to release certain jurors in the course of the trial who are not able to fulfil their duty pursuant to Article 232 but this is not specified.

57. *There is thus a need to specify that a jury with less than 12 members should only be possible where certain of those appointed have not been able to fulfil their duties rather than use the unclear phrase "except for the cases specified in this Code".*

58. There is no European standard as to the specific number of jurors that there should be on a jury but it should be borne in mind that the size of a jury has been recognised by the European Court as one of safeguards where potential problems of impartiality arise.[11]

[10] See, e.g., *Y. v. Slovenia*, no. 41107/10, 28 May 2015.

[11] "In addition, regard must be had to the fact that the tribunal offered a number of important safeguards. It is significant that Mr Forsyth was only one of fifteen jurors, all of whom were selected at random from amongst the local population; *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40. This point was reiterated in *Simsek v. United Kingdom* (dec.), no. 43471/98, 9 July 2002.

59. Moreover, the reduction in the size of a jury as the trial proceeds also has implications for the extent of the majority required for a conviction pursuant to Article 261(4).

60. It should be borne in mind that the significant reduction in the extent of the majority required may run counter to a key objective of the introduction of the jury system, namely, increasing public confidence in the justice system. This will especially be so if there is a wide discrepancy in practice between the majorities required by different juries to convict the persons that they have tried.

61. It is noted that Article 224 provides for the possibility of a presiding judge approving more reserve jurors than the 2 specified in the present provision on account of "the complexity of the case". However, it does not seem appropriate to confine the need for a larger jury only to cases that are "complex", particularly as it may not always be evident at the outset that cases are marked by this characteristic and problems of impartiality will not only be limited to those that do have it.

62. *Although some comments will be made below as to the circumstances in which jurors are replaced and the prescribed number of jurors necessary for a majority verdict,*[12] *there is also a need for consideration to be given to increasing the number of substitute jurors to be appointed in all cases so that it will be rare, if at all, that there is a need to rely upon a minimum-sized jury*.

Article 28

63. There are two aspects of the arrangements made in this provision regarding the social guarantees of jurors that appear potentially problematic.

64. The first arises from the provision in paragraph 2 for employed persons to retain their work, position and wages.

65. This necessarily imposes a burden on the employer but, as jury service, is recognised as a legitimate civic obligation by the European Court,[13] it is unlikely that such a burden would be seen to be a disproportionate one and thus potentially a violation of the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1, at least in cases where jury service does not prove to be unduly long and therefore expensive for the employer who has to pay both the juror and a replacement employee.

66. However, the fact that the provision is made for the economic protection of employees but not those who are self-employed could well be seen to engage the prohibition on discrimination in Protocol No. 12 since the financial position of only the former is being secured even though both are performing an identical public service. It may be that the differential treatment could be seen to have a rational and objective justification in that the position of employees might be more precarious. That might, of course, change in the case of a prolonged trial.

[12] See paras. 486-490 and 542-544 below.

[13] See *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006. However, as in that case, a difference in treatment between groups of persons as to their obligation to perform jury service will be in violation of the prohibition on discrimination in Article 14 when taken in conjunction with Article 4(3)(d) where there has no objective and reasonable justification.

67. Moreover, the potential problems for a business of the absence of its owner on jury service could lead to an expansive application of the ability under Article 31(b), taken in conjunction with paragraph 3 of the present provision, to refuse to act as a juror on account of the potential for any substitution in respect of his or her work to cause substantial damage, particularly if the cost involved might make it impractical to hire someone suitable. As a consequence, juries could be composed exclusively of employees and thus not reflect a good cross-section of society.

68. *There is thus a need for consideration to be given to making arrangements to ensure that the consequences of serving on a jury do not result in an undue burden for self-employed persons or are such as to discourage them from performing this civic obligation.*

69. The second potential problem relates to the provision in paragraph 3 requiring the lawful interests of a juror to be taken into consideration unless those interests are less than the damage to justice or a third person.

70. It is, of course, appropriate to avoid putting a burden on jurors where that is not actually required for the disposal of a case. However, there is insufficient precision in the present provision as to how it is to be judged that the damage to a juror's lawful interests may or may not be greater than the damage to justice or a third person. Furthermore, it is unclear how such a provision is to relate to the more specific provisions in Article 31 as regards refusal to perform the duties of a juror and also as to whether or how it be relevant to the conduct of the proceedings once a trial gets under way.

71. *There is a need, therefore, to clarify how this provision is to be applied and, in particular, as to what it adds to the more concrete provisions in Article 31. In particular, it could be made clear that this provision only become applicable after being appointed as a juror.*

Article 29

72. The provision in clause (d) regarding physical or mental disability for eligibility for jury service does not really indicate what will be the basis for making the assessment that someone is not able to perform the duties of a juror. In particular, it is unclear as whether this is only applicable in respect of disabilities which involve a fundamental impediment to performing jury service or it also applies to ones that might require some practical arrangements to be made (such as wheelchair access or an audio induction loop), which might be costly but are not inherently impossible.

73. A failure to ensure that disabled persons are not inherently incapable of performing jury service would amount to discriminatory treatment contrary to Protocol No. 12 and would also be incompatible with obligations under the Convention on the Rights of Persons with Disabilities.[14]

74. *There is thus a need to ensure that this provision is applied in a manner compatible with Georgia's obligations under Protocol No. 12 and the Convention on the Rights of*

[14] See the Views of the Committee on the Rights of Persons with Disabilities in *Lockrey v. Australia*, Communication No. 13/2013, 1 April 2016.

Persons with Disabilities and, in particular, to ensure that the courts have the necessary resources for any necessary adaptations required to courtrooms to enable disable persons to act as jurors.

Article 31

75. Two of the grounds which this provision allows someone to refuse to perform the duties of a juror seem too imprecise, which may affect the practicality of constituting a jury or lead to possible differences in the treatment of persons in essentially the same situation.

76. Thus, the specification in sub-paragraph (c) that such a refusal may be "due to health status" does not make it clear what this involves. "Health status" is, in fact a concept that can cover persons whose health is good as much as bad. It is clearly appropriate to allow those who are seriously unwell or who are due to undergo a major operation to be excused from performing jury service but the present provision could also allow those who have health problems but are still able to work regularly or who need medical treatment that could be postponed without major consequences also to refuse to serve.

77. *There is thus a need to formulate the health ground in a manner that more clearly links health to a real inability to perform jury service*.

78. The second problematic ground is the intention to go abroad referred to in paragraph (d). This has the potential to allow people to organise their activities in a way to avoid performing their civic obligation. Furthermore, it does not make a distinction between persons with firm plans and ticket bookings, those who have trips which could be readily postponed and those who are only contemplating travel abroad. Only those in the first group would really deserve to be excused.

79. *There is thus a need also to formulate this ground in a more restrictive manner to ensure that the performance of jury service is not inappropriately evaded*. *This might, e.g., be achieved by replacing "intends to go abroad" by "an unavoidable commitment to go abroad".*

80. A further problem in connection with this provision is that there appears to be no procedure for judging whether or not the different grounds in it are fulfilled. Certainly, the provisions on the challenge procedure in Article 223(1)-(6) do not seem to cover it since the concept of "challenge" would seem to relate more to eligibility, incompatibility and exclusion under Articles 29, 30 and 59 respectively.

81. Furthermore, although there is provision for "self-challenge" in Article 223(7), that provision only concerns circumstances preventing a person's fulfilment of the duties of a juror and not his or her refusal to perform them. It may be that this is nonetheless intended also to cover such refusal but the formulation of the provision is not really adequate for this purpose.

82. *There is thus a need for clearer provision governing the determination as to whether a prospective juror is entitled to refuse to perform the duties of a juror, which should be located in Article 223*.

2. Chapter V. The Defendant, Accused, Defence Lawyer

Article 38

83. This provision is headed 'Rights and obligations of the defendant, accused'. However, it deals only with *rights* and it is not clear what 'obligations' exist (other than those supposedly applying to a 'defence lawyer' within the meaning of Article 44.

84. *There is thus a need to delete the reference to 'obligations'.*

85. Paragraphs 1 and 2 refer to the points during a criminal process at which certain fair hearing rights are to be notified to a person who is a defendant, accused sufficient to bring her/him within the scope of Article 3(19) as an 'accused', that is, "a person against whom there is a probable cause suggesting that he/she has committed a crime".

86. This is important since the protection of Article 6 of the ECHR applies from the point that 'the official notification [is] given to an individual by the competent authority of an allegation that he has committed a criminal offence'.[15] The importance of proper notification of rights where the facts indicate that an individual is *suspected* of a crime and thus subject to the protection of Article 6 of the ECHR – rather than formal domestic legal classification or procedure – is also now reflected in EU law.[16]

87. Arrest or official notification of defendant, accused status via service of a document are two such examples of such 'official' notification for the purpose of Article 6 of the ECHR. However, this could also be constituted by e.g., the issue of a search warrant, by the opening of a preliminary investigation, by the requirement to give evidence, or by other official measures carrying the implication of an allegation of suspicion and which similarly substantially affect the situation of the defendant, accused. Moreover, as this 'official notification' is one of fact rather than of formal process, it could also include situations that appear to fall within Articles 113 and 114.

88. *There is thus a need to make it clear that the "recognition" of a person as the defendant, accused can arise in all these situations, including in the course of an interview or examination as a witness.*

89. The requirement in paragraph 1 for information is to be given 'in a language the individual understands' is insufficient to take account of the needs of vulnerable persons. This could be remedied by drawing upon the approach in Article 3 of Directive 2012/13/EU, which requires the information to be given 'in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons'

[15] *Deweer v. Belgium*, no. 6903/75, 27 February 1980, at para 46.

[16] Directive 2012/13/EU on the right to information in criminal proceedings: Art 2(1). This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings.'

90. *There is thus a need to for consideration to be given to redrafting this phrase in paragraph 1 by drawing upon the approach in Article 3 of Directive 2012/13/EU.*

91. Furthermore, following best practice as reflected in Article 4 of Directive 2012/13/EU, it would be highly desirable for there to be a requirement – and not just a practice - to provide a defendant, accused at the outset of the proceedings with a written statement of rights.

92. Such a 'Letter of Rights' – written in simple accessible language and wherever possible in a language that they understand - should specify the information to be given verbally as provided for in Article 38.

93. However, it should also include: more detailed information as to the right of access to the materials of the case; the right to have consular authorities and one person informed; the right of access to urgent medical assistance; the maximum number of hours or days that defendants, accused may be deprived of liberty before being brought before a judicial authority; and basic information about any possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional release. The defendant, accused should have an opportunity to read the Letter of Rights and to keep it with her/him while deprived of liberty.[17]

94. *There is thus a need for consideration to be given to introducing such an explicit requirement regarding a Letter of Rights into Article 38.*

95. The requirement in paragraph 2 that a defendant, accused should be informed that s/he "may use the services of a defence lawyer" is somewhat inadequate to secure effective access as required under Article 6 of the ECHR.

96. This would be better secured by a rewording that required notification of specific rights to have: (a) her/his lawyer informed; (b) access to a lawyer; and (c) the lawyer informed immediately of any change of place of detention following any transfer; and (d) information on any entitlement to free legal advice and the conditions for obtaining such advice. In addition, in cases of mandatory defence, the defendant, accused should be informed that, if s/he does not engage a representative for the purposes of the conduct of his, the court will do so.[18]

97. *There is a need to reword paragraph 2 in line with the suggestion in the preceding paragraph.*

98. In addition, it would be appropriate following best practice – as reflected in Directive 2012/13/EU - to ensure that the occasions when information is provided to the defendant, accused is formally recorded on each occasion.

[17] This would strengthen the existing practice of providing an information sheet, which the CPT has recommended those detained should be allowed to keep with them; *Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2018* (CPT/Inf (2019) 16, at p. 20

[18] This could help address the concern of the CPT that "it appeared that information on the exact meaning and extent of the right of access to a lawyer might have been misunderstood by the persons concerned (e.g. they had thought that they would have no access to ex officio legal assistance)"; ibid., at p. 19.

99. *There is thus a need for Article 38 to include a requirement to record in writing on each occasion when information about her/his rights is provided to the defendant, accused.*

100. Access to a legal adviser during questioning by the police is now generally required in order to address the possibility of a defendant, accused suffering 'irretrievable prejudice'.[19] This latter possibility could be averted by a requirement to allow a reasonable time for the defendant, accused's legal representative to arrive before any interrogation commences and a corresponding duty upon investigating authorities to delay the start of questioning for a reasonable time to allow the legal representative to arrive.

101. *There is thus a need for such a requirement and obligation to be specified in Article 38.*

102. The provision in paragraph 3 for a copy of the decree to prosecute to be handed over to the defendant, accused's defence lawyer if s/he evades appearance before a law enforcement body could be problematic in cases where the defendant, accused has given a particular lawyer a standing mandate to represent her or him and thus does not want a lawyer to be appointed by the investigative authority. Certainly, it is not clear how the authorities are supposed to have notice that the defendant, accused concerned has given an appointment to a particular lawyer. and might appoint one themselves. However, once that is established, the decree should be handed over to that lawyer.

103. *There is thus a need for the qualification suggested in the last sentence of the preceding paragraph – i.e., 'once that is established' - to be added to paragraph 3.*

104. There is an inconsistency between paragraph 5 and Article 43 as regards communication between a defendant, accused and her/his defence lawyer. The former provides that no restrictions on such communication should 'impede the due performance of the defence' whereas the latter states that it should be "unrestricted", apart from visual surveillance. Article 43 is to be preferred as it is well-established that there should be confidential communication between a defendant, accused and her/his lawyer.[20]

105. *There is thus a need for the last sentence of paragraph 5 to be harmonised with Article 43 in the manner suggested in the preceding paragraph.*

106. There is an inconsistency between paragraph 8 and Article 11 as regards the use of the services of an interpreter at the expense of the State. The latter provides that it is obligatory where the relevant linguistic conditions are met but the former is only permissive given the term "may". The formulation of paragraph 8 is not compatible with Article 6(3)(e) of the ECHR, which requires the provision of an interpreter for someone who cannot understand or speak the language of the proceedings, whether on account of linguistic capacity or some impediment that prevents or restricts oral communication. Such interpretation should be provided during interrogation before the

[19] See, e.g., *Blokhin v. Russia* [GC], no. 47152/06, 23 March 2016.
[20] See, e.g., *S v. Switzerland*, no. 12629/87, 28 November 1991, *Brennan v. United Kingdom*, no. 39846/98, 16 October 2001 and *A T v. Luxembourg*, no. 30460/13, 9 April 2015.

person concerned is formally designated as the defendant, accused. The right to have an interpreter should not be subject to the making of a request.[21]

107. Furthermore, the onus lies ultimately with the trial court to ensure that any real difficulties with understanding are addressed, even in the case of apparent waiver of the right by a defendant, accused or his defence lawyer to the services of an interpreter.[22]

108. In addition, it ought to be made explicit that the right to have the services of an interpreter extends to the translation of documents and the interpretation of statements that will allow the defendant, accused "to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events".[23]

109. *There is thus a need to align the language and content of paragraph 8 with the requirements of Article 6(3)(e) of the ECHR in the manner suggested in the preceding paragraph.*

110. Paragraph 10 deals with informing family members and close relatives but it is not entirely consistent with Article 177 as it does not cover informing diplomatic missions and consular offices.

111. *There is thus a need to align paragraph 10 with Article 177 in the manner recommended below[24] for the latter provision*.

112. Article 38 does not deal expressly with the information to be given to an arrested person in the event of her/him being transferred from one place of detention to another. Similarly, it does not deal with the need to notify those originally notified about such a transfer However, it would be appropriate for all the requirements in it relating to the provision of information and notification to be repeated following any such transfer.

113. *There is thus a need for Article 38 to include a provision requiring the repetition of the requirements in it to provide information and to notify family members and others previously notified in the event of an arrested person being transferred from one place of detention to another*.

Article 39

114. Although paragraph 2 provides for the possibility of filing a motion where investigative or other procedural actions required to obtain evidence that the defendant, accused or her/his defence lawyer are not able to carry out alone, it appears that this provision is not capable of being put into effect because of a lack of sufficiently specific rules for requesting evidence and the fact that action to request evidence (seen as a possibility for the defence to obtain it through the court) is not among the investigative or procedural actions listed in the CPC.[25] Under the current rules, the defence can only

[21] *Baytar v. Turkey*, no. 45440/04, 14 October 2014: "an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right", (para. 50). See also *Brozicek v. Italy* [P], no. 10964/84, 19 December 1989.
[22] *Cuscani v. United Kingdom*, no. 32771/96, 24 September 2002, at paras 38–40.
[23] *Kamasinski v. Austria*, no. 9783/82, 19 December 1989, at para 74.
[24] See paras. 352-354 below.
[25] See the ruling of Tbilisi City Court dated February 26, 2015.

request obtaining evidence through the court through the implementation of investigative actions, e.g. search/seizure, which require higher standard of proof.

115. *There is thus a need for a specific provision enabling the court to obtain evidence for the defence in circumstances where an investigative action is not appropriate.*

116. The requirement in the last sentence of paragraph 2 - regarding the judge making sure that the prosecution is not informed about the obtaining of evidence by the defence - does not seem consistent with the powers of the prosecutor under Article 40(3) to take certain initiatives in respect of the 'investigative action' initiated by the defence. Moreover, Article 83(2) provides for the prosecution receiving material from the defence and Article 120(10) provided for the prosecutor having the right to primary examination of an object, item, substance, or document containing information seized upon motion of the defence[26].

117. *There is thus a need to clarify the meaning of the last sentence of paragraph 2.*

Article 42

118. The absolute nature of the prohibition on adjournment in paragraphs 1 and 2 on adjournment where a defence lawyer is replaced or is not able to perform the duties of defence for a long time solely because this would serve or cause prolongation or obstruction of the hearing is likely to lead to a violation of Article 6(3)(b) and (c) of the ECHR as it fails to take account of the ability of the defendant, accused to defend her/himself and to have adequate time for this purpose. Moreover, it is in marked contrast to the possibility envisaged in paragraphs 3 and 4 of the court appointing a lawyer where the defendant, accused's one failed to appear without a valid reason, albeit that this is not itself entirely satisfactory.

119. *There is thus a need to qualify paragraphs 1 and 2 by the stipulation "where it is clearly established that this would not be prejudicial to the defendant, accused" (which would in the case of the situation envisaged in paragraph 1 be improbable if the accused did not have a replacement lawyer with adequate time to prepare her/his defence).*

120. The involuntary change of defence lawyer envisaged in paragraphs 3 and 4 is problematic in that it seems to accept that the court will remain. It may be that the aim is to deal with changes made only for the purpose of delaying the proceedings. However, that is not evident from the formulation of this provision. This is not something that should be assumed and should only be the basis for an involuntary change where there is incontrovertible evidence of such a purpose. Moreover, the fact that a lawyer has been nominated to represent a defendant, accused does not in itself ensure effective assistance since that lawyer may be unwilling or unable to act. In these cases, there will be a positive duty upon the State to replace the nominated lawyer 'or cause him to fulfil his responsibilities'.[27] Furthermore, a defendant, accused's choice of legal representative must be an informed one.[28] These considerations ought to be recognised in these two paragraphs.

[26] However, see paras. 234-236 below.
[27] *Artico v. Italy*, no. 6694/74, 13 May 1980, at para 33
[28] See, e.g., *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015.

121. *There is thus a need for paragraphs 3 and 4 to be revised to take account of all the considerations set out in the preceding paragraph.*

Article 43

122. Paragraph 3 authorises visual surveillance of communication between a defendant, accused and her/his defence lawyer. However, this cannot extend to any documentary materials forming part of the defence in the absence of a reasonable suspicion based on their conduct that the defendant, accused and her/his defence lawyer were abusing the confidentiality of their communications.[29]

123. *There is thus a need to qualify paragraph 3 in the manner suggested in the preceding paragraph.*

Article 44

124. The formulation of the first sentence of paragraph 1 gives an impression that the defence has the onus of proving a defendant, accused's innocence when it is for the prosecutor to prove her/his guilt beyond reasonable doubt. Thus, if this is not proved, the verdict must be not guilty. The defendant accused is under no obligation to do anything. It is entirely appropriate for a client to give instructions to his lawyer not to challenge prosecution witnesses but merely to allow the prosecution to attempt to present its case to the relevant standard. It would be preferable for this sentence just to provide that a defence lawyer should use all lawful means and instruments on behalf of the accused.

125. Furthermore, the second sentence of paragraph 1 also seems slightly inappropriate to include in the CPC since its content is essentially a matter of professional ethics and contract, with Article 41 recognising the latter as regulating the interactions of the defendant, accused and her/his lawyer. The only appropriate point to retain is that in the last sentence.

126. *There is thus a need to revise the first sentence as suggested and to delete the second one*.

Article 45

127. The cases in which this provision requires the defendant, accused to have a defence lawyer are appropriate.

128. However, another situation in which this seems desirable would be where it could be inappropriate to allow the defendant, accused to cross-examine her/his alleged victim, especially in cases of alleged sexual assaults. A prohibition on such cross-examination by the defendant, accused (or its close regulation) might – as already noted[30] - be required to protect the alleged victim from an oppressive and painful experience[31].

[29] See, e.g., *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 5 July 2013, at para. 641.
[30] See paras. 50-51 above.
[31] As was seen in *Y. v. Slovenia*, no. 41107/10, 28 May 2015.

129. *There is thus a need to consider extending the requirement of mandatory defence to such a situation.*

3. Chapter VI. Witnesses and Other Participants in Criminal Proceedings

Article 49

130. Limited or no command of the language of the proceedings is only one of the reasons that may lead a witness to suffer fear or distress in giving evidence. Such vulnerability can also come from lack of familiarity with court procedures, lack of maturity and intellectual limitations, as well as from the effect of seeing the crime committed.

131. However, although the provision of emotional support is addressed elsewhere in the CPC, there is no real recognition that vulnerability may be a factor which inhibits a witness from giving evidence either at all or effectively, thereby putting her/him at a disadvantage when it comes to taking part in the proceedings.

132. This could be addressed by providing that a witness has the right to have account taken of any disadvantage arising from a personal attribute in the application of procedural provisions where this would not prejudice another participant in the proceedings.[32]

133. *There is thus a need to add such a right to those listed in paragraph 1*.

Article 50

134. The restrictions in sub-paragraphs 1(a) and (b) on the compellability of a defendant, accused's defence lawyer or of a lawyer that has provided legal aid before the defendant, accused receives a defence lawyer does not cover all situations in which there will be a relationship between a lawyer and the defendant, accused that is covered by legal professional privilege, which is protected by Article 8 of the ECHR (e.g., a

[32] Cf. these provisions in the *Equal Treatment Judicial Benchbook* of the English and Welsh Judicial College:"20. Fair treatment does not mean treating everyone in the same way: it means treating people equally in comparable situations … 23. Judges should identify a situation in which a person may be at a disadvantage owing to some personal attribute of no direct relevance to the proceedings, and take steps to remedy the disadvantage without prejudicing another party. 24. The sooner the disadvantage is identified, the easier it is to remedy it. Where possible, judges should ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated, eg access to interpreters, signers, large print, audiotape, oath-taking in accordance with different belief systems (including non-religious systems), more frequent breaks and special measures for vulnerable witnesses can and should be considered. Very often the steps that will be required will be obvious and may require little more than pragmatic alterations to normal procedures. 27. People who are socially and economically disadvantaged may assume that they will also be at a disadvantage when they appear in a court or tribunal. 28. Those at a particular disadvantage may include people from minority ethnic communities, those from minority faith communities, those who do not speak or understand the language of the court or tribunal, individuals with disabilities (physical, mental or sensory), women, children, older people, those whose sexual orientation is not heterosexual, transgender people, those who have been trafficked and those who through poverty or any other reason are socially or economically marginalised … 29. It is for judges to ensure that all these can participate fully in the proceedings. It will assist to display an understanding of difference and difficulties with a welltimed and sensitive intervention where appropriate" (available at https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf).

lawyer who gives advice on a commercial transaction that becomes the subject of criminal proceedings but does not represent the client concerned in those proceedings). That protection is not, however, absolute[33] and it would not be appropriate for such a lawyer to be listed in paragraph 1 of Article 50 as non-compellable witness. Rather, such a lawyer should only be able to refuse to give testimony on any matter to which legal professional privilege protected by Article 8 is applicable.

135. *There is thus a need to include the possibility of refusing to give such testimony in paragraph 1.*

136. Paragraph 1 also includes a 'close relative' and a 'cohabitant' of the defendant, accused among the persons who are not compellable witnesses. However, the definition of the former term in Article 3(2) does not extend to someone who has lawfully entered into a civil partnership with the defendant, accused elsewhere than Georgia and it is unclear whether s/he or someone who is the defendant, accused's *de facto* partner would be regarded as a cohabitant. The failure to accord such partners the same protection as others treated as close relatives or cohabitants would be inconsistent with Articles 6 and 8 of the ECHR when read with the prohibition on discrimination in Article 14.

137. *There is thus a need to clarify the compellability of civil partners and to amend paragraph 1, insofar as they are not already covered by its scope.*

138. In in most adversarial legal systems, the spouse or civil partner of the defendant, accused is traditionally regarded as a competent and compellable witness for the defence but may not be compellable as a witness for the prosecution. However, many systems now regard this as inappropriate in relation to an allegation of an assault on, or injury or a threat of injury to the spouse or civil partner, or a person under the age of 16 years at the time of the offence (or involving an alleged sexual offence against a victim who was under 16), or attempting, conspiring or aiding and abetting, etc to commit such an offence. This is because of the positive obligation upon State authorities to ensure adequate protection against domestic violence.

139. *There is thus a need for consideration to be given to removing the restriction on a close relative or family member from giving evidence against a defendant, accused in such cases.*

140. The restriction on competence to testify in terms of capacity in paragraph 2 sets a very high threshold as any witnesses may well not be able "to properly…memorise and recollect" the circumstances that are essential to the case. Moreover, it must be incorrect to require a witness to understand all the questions put and for all answers to be understood. Furthermore, the issue of capacity to testify should be addressed and determined by a judge and not an investigator, with account being taken of the effect of the individual's performance as a whole and of whether there was a common and comprehensible thread in responses to the questions.

[33] See, e.g., *Michaud v. France*, no. 12323/11, 6 December 2012.

141. *There is thus a need to revise paragraph 2 to take account of these points, drawing upon the examples in the footnote below*.[34]

Article 51

142. The stipulation in paragraph 2 that experts shall be impartial seems inappropriate since it is inevitable that they will be summoned by a party rather than the court and the other and the objective appearance of some element of partiality will, therefore, be difficult to cast aside.

143. What will be important is that they give an honest opinion based on their particular competence. There should, therefore, be a possibility of challenging the reliability of an expert, such as by demonstrating the falsity of the qualifications, skills or experience claimed by an individual said to be an 'expert'.

144. *There is thus a need to clarify whether such a challenge to the reliability of an expert is possible and, if not, for this possibility to be included in the present provision*.

Article 54

145. This provision allows an interpreter to clarify the details of the interpretation and to make remarks. However, the role of an interpreter should be to interpret only what is said and everything that is said. As a result, it is essential that any clarification sought

[34] For possible approaches in this regard, see that in section 53(3) and 54 in the Youth Justice and Criminal Evidence Act 1999 and Crown Prosecution Service's Code for Public Prosecutors in England and Wales ("(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence unless *it appears to the court that they are unable to understand questions put to them as a witness and give answers to them which can be understood*. (2) Those who are competent to give evidence may be assisted to do so by an intermediary trained to assist an individual who by reason of physical, mental or intellectual disability requires such assistance to understand questions put to them and *give answers to them which can be understood*. (3) *The* competence of a witness can be raised by a party to the proceedings or by the Court of its own motion. The party calling the witness must satisfy the court on the balance of probabilities that the witness is competent, and in doing so treat the witness as having the benefit of any special measures directions which the Court has given or proposes to give in relation to the witness. (4) Questions of competency must be decided before the witness is sworn or starts to give evidence and ideally prior to the start of the trial unless the issue of competency only become apparent after the witness has begun to give evidence or during cross-examination in which case if the court rules the witness incompetent at cross-examination stage, the witness's evidence must be ignored.") or in section 13 of Victoria's Evidence Act 2008 ("(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) (a) the person does not have the capacity to understand a question about the fact; or (b) the person does not have the capacity to give an answer that can be understood to a question about the fact and that incapacity cannot be overcome. (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts. (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact. (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person (a) that it is important to tell the truth; and (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue. (6) For the purpose of determining a question arising under this section, the **court** may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience. (7) A person is not compellable to give evidence on a particular matter if the court is satisfied that (a) substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and (b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.").

should be done openly and that any remarks made should be confined to whether the interpreter can understand and be understood.

146. *There is thus a need to qualify sub-paragraphs 1(b) and (c) in the manner suggested in the preceding paragraph*.

147. Sub-paragraph 2(c) provides for the interpreter to confirm the authenticity of a translation made during an investigative action. However, there is no provision for the statement by someone who has difficulty speaking or understanding the official language being recorded in the language actually used by her/him, which would be vital in the event of a dispute about the translation. It is essential, therefore, that a witness statement by such a person needing interpretation must be her/his statement and not a translation of what was said by the interpreter, even though that should also be recorded. Where the interpretation is for a person who is blind, deaf or speech impaired, her/his statement should be video recorded.

148. *There is thus a need for this requirement to be included in this provision*.

149. The interpreter used in the course of investigations should not normally be engaged to interpret in the courtroom for the same case in view of the possibility that s/he might become a witness where there is a challenge at the trial to the veracity of what was said during interrogation. Where it proves impossible to find another interpreter, all the parties should be notified of the intention to use her/him.

150. *There is thus a need for this requirement to be included in this provision*.

151. The possibility envisaged in sub-paragraph 2(d) of an interpreter disclosing "information concerning the personal life of citizens with official permission of an investigator or prosecutor" would be inconsistent with the right to respect to private life under Article 8 of the ECHR since the interpreter does not act for the prosecution or the investigator and such disclosure could not be relevant to the function performed by her/him.

152. *There is thus a need to delete the reference to information concerning the personal life of citizens from sub-paragraph 2(d).*

Article 55

153. There is a lack of precision as to what might be covered by the written opinions that this provision allows to be submitted in a case to assist it in "appropriately evaluating the issue under review".

154. Such an issue is primarily one relating to the facts and it is the prosecution that has the burden of establishing both that they existed and that they constitute an offence committed by the defendant, accused. It would not be appropriate for anyone else other than the victim – whose position is addressed in Article 57 – to submit evidence regarding these matters. It is possible that there could be a legal issue of foreign or international law where outside expertise could help the court but this would be more relevant at the appellate stage.

155. Moreover, it seems inappropriate for it to be possible for such opinions to be submitted without the prior authorisation of the court. At the moment, the burden is put on the court to ignore opinions that have been submitted.

156. Furthermore, the stipulation that such an opinion can be submitted up to 5 days before the hearing of the case "on the merits" might in some cases mean that, even if rejected by the court, it could still have some influence on its view of the case without ever being tested. As a result, there could be a violation of the right to adversarial proceedings under Article 6 of the ECHR since the defence would not have had an opportunity to have knowledge of and comment upon all evidence adduced or observations filed with a view to influencing the court's decision.[35] This could be avoided by only allowing opinions to be submitted with the approval of the court, which all the parties would then be in a position to comment on in the course of the proceedings.

157. *There is thus a need to limit the submission of written opinions to those for which prior authorisation has been given by the court and for consideration to be given to limit such submissions to appellate proceedings.*

4. Chapter VII. Victim

Article 56

158. This provision gives rise to certain problems regarding the definition of 'victim'.

159. Firstly, although Article 3(22) includes 'the State' in the definition of victim, this seems inappropriate in the context of the present Chapter as it is already a party to the proceedings as the prosecutor.

160. Secondly, the restriction in paragraph 3 of the successor of victim whose death was caused by the crime to one of her/his close relatives of the same level chosen by lot does not indicate how their conflicting interests might be resolved, particularly in a matter that could involve issues linked to the State's responsibility for investigating the circumstances giving rise to the loss of life.

161. Thirdly, the use of lottery for the selection of this representative is also potentially inconsistent with the need for the next of kin to be involved in an investigation into loss of life to the extent necessary to safeguard their legitimate interests under the procedural aspect of Article of the ECHR, even if this does not necessarily mean access to files or documents or to be consulted at every step of the investigation.[36] Moreover, a determination of the representative by the drawing of lots is at odds with being 'treated in a respectful, sensitive, tailored, professional and non-discriminatory manner'.[37],

162. Fourthly, it is unclear – as already seen[38] – whether the terms 'close relative' and 'family member' are capable of covering civil partners or de facto ones.

[35] *Zahirović v. Croatia*, no. 58590/11, 25 April 2013, at para 46 and *Lonić v. Croatia,* no. 8067/12, 4 December 2014, at para 84 (filing of reasoned opinions on the merits of an appeal aiming to influence the Supreme Court's decision).
[36] See e.g., *Ilhan v. Turkey* [GC], no. 22277/93, 27 June 2000.
[37] Article 1 of the Victims Directive.
[38] See para. 136 above.

163. Finally, there is no account taken of the situation of a victim who is a child, whose best interests should be the primary consideration in all matters concerning the recognition and enjoyment of her/his rights.[39]

164. *There is thus a need for paragraphs 1-4 to be revised to take account of these concerns and, in particular, as regards the definition of victim*[40]*and the adoption of a procedure less reliant upon pure chance*[41].

165. This provision also gives rise to certain problems regarding the issue of actually recognising someone as a victim, for which the prosecution has a gatekeeping role.

166. Firstly, a refusal to recognise 'victim' status - or a decision that 'victim' status should be removed - is, in almost all cases initially made by a superior prosecutor, subject to a right of appeal to the district court. The exception is where the case involves a particularly serious crime,[42] or one which under the jurisdiction of the State Inspector's Office. However, any oral hearing is at the judge's discretion. Furthermore, there is no appeal at all where the selection of the victim is by lottery. These limitations run counter to the growing trend in Europe to accord victims more rights in respect of the criminal process since they place significant hurdles to the rights of victims of crime or their families to access to justice.

167. Secondly, the requirement to have 'appropriate grounds' to recognize a person as a victim allows for a broad interpretation and in the absence of foreseeable and objective conditions, this test appears often to be applied arbitrarily to the detriment of persons who ought to be recognised as victims.[43] This may lead to violations of Articles 2 and 3 of the ECHR.

168. Thirdly, the application of the test of 'moral, physical or material damage [having been incurred] directly as a result of a crime' appears to take place at a comparatively early stage of the criminal process when the extent of any moral, physical or material

[39] Article 1 of the Victims Directive.

[40] In this connection, there may be significant benefit in attempting to replicate the definition with that found in the Victims Directive. This limits the definition of a 'victim' to (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; and (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. 'Family members' are defined as: the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim.

[41] Thus, e.g., Article 2 of the Victims Directive provides: "Member States may establish procedures: (a) to limit the number of family members who may benefit from the rights set out in this Directive taking into account the individual circumstances of each case; and (b) in relation to paragraph (1)(a)(ii), to determine which family members have priority in relation to the exercise of the rights set out in this Directive".

[42] The exclusion from this right of appeal of less serious and serious offences was held by the Constitutional Court to be an unjustified differential treatment contrary to Articles 14 and 42(1) of the Constitution; *Khvicha Khirmizashili, Gia Patsuria and Gvantsa Gagniashvili and "Llc Nikani" v. the Parliament of Georgia*, 14 December 2018.

[43] See the cases discussed in GYLA, *Rights of Victims in Georgian in Criminal Proceedings*, Tbilisi, 2016; available at https://gyla.ge/files/news/2016%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%90/dazaralebulis%20uflebebi.pdf

damage' may not be obvious. However, even when it is clear that injury has been suffered, there may be a refusal to recognise someone as a victim on the basis that it has not been established that a crime has been committed.[44] Moreover, knowledge of the case to be met is restricted as there is no access to the documentation that has been relied upon by the prosecutor to arrive at a particular conclusion. This has the effect of negating the right of a person who asserts s/he meets the legal criteria to engage in any meaningful review or appeal against refusal to so recognise

169. Fourthly, it is not clear why the formal requirement of recognition of 'victim' status is in any case necessary to restrict the rights to be informed, to be supported, to participate in criminal proceedings and to protection (such as the right to avoid contact with the alleged perpetrator, and to privacy).

170. Many of these 'rights' may in any event be more properly categorised as responsibilities upon the State, e.g., to provide protection against identifiable risks of harm from identifiable perpetrators, or to carry out an effective investigation into certain alleged crimes by properly investigating all the facts. Such responsibilities should not be conditional upon formal recognition of the status of 'victim' by the prosecutor. The inappropriateness of the present approach is all the more problematic as there has been much concern about victims not being properly involved in investigations into allegations of ill-treatment by State officials.[45]

171. A better approach would be to start from the presumption that a person who has suffered harm, including physical, mental or emotional harm or economic loss, is likely to have done so directly on account of a criminal offence if this is alleged or the facts so suggest. Such a presumption should also apply to a close relative of such a person, particularly where the latter's death or injury prevents her/him from pursuing a complaint about an alleged crime.

172. Furthermore, insofar as the prosecutor retains a gatekeeping role, there needs to be greater elaboration as to the factors a prosecutor (or court determining an appeal) must satisfy himself about before the presumption is rebutted. This may also require the inclusion of a specific responsibility upon the prosecutor to obtain a report from a relevant qualified healthcare professional[46] reflecting upon any explanation of inflicted injuries given by the alleged victim where the extent of any physical or psychological harm is not clear. Moreover, an alleged victim should also have the possibility to conduct an independent forensic expertise and have the report attached to the case file.

173. In addition, for the statutory test is to be meaningful and meet expectations of impartiality and objectivity, adequate participation by the person making the allegation

[44] See, e.g., the refusal of the Tbilisi District Court to refuse victim status to certain persons injured during demonstrations on 20-21 June 2019; https://civil.ge/archives/324431.

[45] *Gharibashvili v. Georgia*, no. 11830/03, 29 July 2008; the applicant had never been interviewed into allegations of ill-treatment during preliminary enquiries, proceedings that had been terminated by the courts sitting *in camera* without holding oral hearings. The execution of this case was, however, closed in the light of the provisions introduced into the CPC regarding the involvement of victims in the investigation procedure and access to certain material in the case file.

[46] E.g., where torture or ill-treatment has been alleged, a forensic or medical expert specifically trained in the techniques required to detect the relevant signs.

is needed, particularly in cases of physical harm to the person.[47] As a consequence, the formal status of 'victim' should only be recognised after all reasonable possibilities of gathering evidence have been exhausted so that a decision to close an investigation is not peremptory but is based only upon 'credible evidence'.

174. *There is thus a need for paragraphs 5, 6 and 7 to be revised in the light of the above considerations. In particular, persons complaining about the commission of an offence and family members of a person who allegedly died as a result of an alleged offence should be treated as victims until it is established that no offence was committed or that they had not suffered any harm from the offence established.*

175. The formulation of paragraph 5^1 is generally appropriate. However, it could be strengthened by following more closely the language of the Victims Directive. In particular. Instead of the duty just to 'familiarise' the victim, there could be a requirement for this to be done

> using simple and accessible language, orally or in writing, and taking into account the personal characteristics of the victim including any disability which may affect the ability to understand or to be understood.[48]

176. In addition, it could be provided that:

> unless contrary to the interests of the victim or unless the course of proceedings would be prejudiced, victims may be accompanied by a person of their choice in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood.[49]

177. *There is thus a need for consideration to be given to strengthening paragraph 5^1 in manner suggested in the preceding paragraphs.*

Article 57

178. In addition, the provisions regarding the rights of victims could also be strengthened in a number of other ways.

179. Firstly, it could be made clear that the right to protection in sub-paragraph 1(g) covers measures of protection from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, as well as protection for the dignity of victims during questioning and when testifying.[50]

180. Secondly, the provision in sub-paragraph 1(h) on reviewing materials of the criminal case could be strengthened by requiring (i) any refusal "in the interests of the

[47] *Cf. Gharibashvili v. Georgia*, no. 11830/03, 29 July 2008: "The Court further deplores that the termination of the above investigation was upheld by the domestic courts sitting *in camera*, without holding oral hearings. Nor could it be inferred from the case file that a transparent and adversarial procedure in writing took place instead.... The Court observes in this connection that a public and adversarial judicial review, even if the court in question is not competent to pursue an independent investigation or make any findings of fact, has the benefit of providing a forum guaranteeing the due process of law in contentious proceedings involving an ill-treatment case, to which the applicant and the prosecution authority are both parties …" (para. 74).

[48] Article 3(2).

[49] Article 1.

[50] As in Article 18 of the Victims Directive.

investigation" to be based on specific and foreseeable conditions so as to minimise arbitrary decisions by prosecutor[51] and (ii) by allowing victims to make copies of the case file.[52]

181. Thirdly, the prosecutor could be made responsible for providing a victim with

> a timely and individual assessment… to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.[53]

Indeed, this would be a necessary preliminary to any decision to involve the coordinator under Article 58[1].

182. Fourthly, it could be provided that victims have a right of access to legal aid in connection with their participation in the proceedings against the defendant, accused.[54]

183. *There is thus a need for consideration to be given to strengthening the rights of victims in the manner suggested in the preceding paragraphs.*

5. Chapter VII. Coordinator of Witness and Victim

Articles 58[1] and 58[2]

184. The two provisions in this Chapter appear to be of recent origin. They provide that a prosecutor can decide whether (or not) to involve a 'coordinator' to "simplify the participation of the witness and the victim in the proceedings, mitigate the stress caused as a result of the crime, prevent re-victimisation and secondary victimisation, and to ensure their awareness at the investigation and court hearing stages". Whether to appoint a coordinator is to be determined in light of "the interests of the witness and the victim", but the appointment can be rejected by the victim. On the face of it, the Chapter – which seems to be based upon the Victims' Directive - is a positive development. However, there are certain concerns that need to be addressed

185. First, the reference to 'witness and victim' is not only clumsy but inappropriate. The aim should be to provide support to those who have been victims of crime irrespective of the formal status of 'victim', as previously discussed. The requirement to qualify (in domestic law) both as a 'victim' and also as a 'witness' could significantly weaken access to the service; the service could indeed be considered as providing assistance to a victim of crime whom the prosecutor has not deemed a 'victim' in domestic law. Indeed, in light of the peculiarities of Georgian law, the support which a victim may well need is precisely that to allow him to be recognised as a 'victim' in formal terms where a prosecutor has denied this. The thrust of Art 58.1 is contrary to the spirit of

[51] As to which see, *Human Rights and Freedoms in Georgia, Report of the Public Defender of Georgia*, 2014, pp. 351-352.
[52] Indeed, the current preclusion of obtaining a copy of materials in the file has now been held to be contrary to the right of access to public information in Article 18(2) of the Constitution; decision of the Constitutional Court in complaint no. 1312, *Kpnstantine Gamsakhurdia v. Parliament of Georgia*, 18 December 2020.
[53] Article 22 of the Victims Directive.
[54] As in Article 13 of the Victims Directive.

Article 8(2) of the Victims Directive, which provides for the *facilitation* of the referral of victims by the prosecutor, etc. (i.e., 'by the competent authority that received the complaint and by other relevant entities') to victim support services. The prosecutor should not be a gatekeeper but an enabler.

186. Secondly, Art 8(1) of the Victims Directive also recognises that "family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim". This is not reflected in these provisions and yet family members of victims may also require support.

187. Thirdly, the decision to permit access to the services is triggered by a decision taken within the discretion of the prosecutor, rather than upon the instigation of the victim. This is again contrary to Art 8 of the Victims Directive; victims have the right 'to have access' to services rather than the right to reject a referral which they may not need or welcome. It is a victim who is better placed to determine whether access is in their interests.

188. Fourthly, the link between prosecutor and victim and family members is inappropriate in other respects. Article 8 of the Victims Directive states that those providing the support services are to act "in the interests of the victims before, during and for an appropriate time after criminal proceedings" and that such access "is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority". A victim may indeed not wish to make a formal complaint, but nevertheless may need support (e.g., in respect of domestic violence). Linking access specifically to the investigating and prosecuting agency is contrary to the Victims Directive.

189. While Art 61^1 prohibits the 'participation' of a coordinator in criminal proceedings in certain cases, this provision itself suggests that the possible link between coordinators and prosecutors or investigators could indeed be much tighter than is appropriate as prohibition in participation covers inter alia cases in which the coordinator "is or was involved in this case as an investigator [or] a prosecutor".

190. Fifthly, determination of the level of support to be provided seems to be determined by the prosecutor rather than the victim in light of Art 58^1(4), but this may be a fault in translation. The "appropriateness of the involvement of the coordinator" should not mean that the prosecutor decide what support is necessary. This must be on the basis of actual need; Article 9(2) of the Victims Directive refers to the *minimum* services to be provided, but it also explicitly relates these to the severity of the crimes.

191. Sixthly, information of a potentially highly sensitive nature is to be disclosed by the prosecutor to the coordinator immediately following upon the appointment (leaving the victim thereafter to decide whether or not to cooperate). While there is a confidentiality requirement imposed by Art 58^2(3), the situation remains that personal details will have been disclosed by the prosecutor in cases in which a victim's decision not to cooperate renders that disclosure entirely unnecessary and thus disproportionate. Disclosure should follow the victim's approval of the appointment.

192. Seventhly, the aim of the coordinator's involvement – "to simplify the participation of the witness and the victim in the proceedings, mitigate the stress caused as a result of

the crime, prevent re-victimisation and secondary victimisation, and to ensure their awareness at the investigation and court hearing stages" – should also include a reference to compensation and expenses incurred, perhaps by amending the text to read "mitigate the physical, emotional and financial stress…".

193. *There is thus a need to take account of these concerns and to strengthen these provisions in this way by drawing upon those found in the Victims Directive.* [55]

6. Chapter VIII. Circumstances Excluding Participation in Criminal Proceedings; Recusal

Article 59

194. The grounds specified in this provision for exclusion from participation of judges, jurors and others from participation in a criminal trial are generally appropriate ones. Nonetheless, the meaning of the ground in sub-paragraph (d) is unclear as to what is entailed by being "members of one family, or close relatives" insofar as this is presumably not a matter of a connection to some of the participants in the trial since that is covered by sub-paragraph (c). Furthermore, the latter provision does not seem to be drawn broadly enough as being related to any judge or prosecutor counsel involved in the case would be a good reason to doubt the impartiality of a juror. This situation could, of course, be caught by the catch-all provision in sub-paragraph (e).

195. *There is thus a need for the scope of sub-paragraph (d) to be made clearer and for the scope of sub-paragraph (c) to be extended to family members and close relatives of all participants in the trial.*

[55] "*Article 8* **Right to access victim support services** 1. Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings. Family members shall have access to victim support services in accordance with their needs and the degree of harm suffered as a result of the criminal offence committed against the victim. 2. Member States shall facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services. 3. Member States shall take measures to establish free of charge and confidential specialist support services in addition to, or as an integrated part of, general victim support services, or to enable victim support organisations to call on existing specialised entities providing such specialist support. Victims, in accordance with their specific needs, shall have access to such services and family members shall have access in accordance with their specific needs and the degree of harm suffered as a result of the criminal offence committed against the victim. 4. Victim support services and any specialist support services may be set up as public or non-governmental organisations and may be organised on a professional or voluntary basis. 5. Member States shall ensure that access to any victim support services is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority. *Article 9* **Support from victim support services** 1. Victim support services, as referred to in Article 8(1), shall, as a minimum, provide: (a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial; (b) information about or direct referral to any relevant specialist support services in place; (c) emotional and, where available, psychological support; (d) advice relating to financial and practical issues arising from the crime; (e) unless otherwise provided by other public or private services, advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation. 2. Member States shall encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime. 3. Unless otherwise provided by other public or private services, specialist support services referred to in Article 8(3), shall, as a minimum, develop and provide: (a) shelters or any other appropriate interim accommodation for victims in need of a safe place due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation; (b) targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling."

196. In addition, it would be useful to elaborate in some form of guidance note - to accompany sub-paragraph 1(e) - the sort of circumstances that might question the objectivity and impartiality of a judge, juror, prosecutor, etc., which is tailored to their particular role in the proceedings.

197. *There is thus a need to elaborate such a guidance note, drawing upon the example in the footnote below*.[56]

Article 61

198. This provision – which aims is to guarantee the integrity of the interpretation rather than the independence or impartiality of the interpreter – is well-intentioned but nonetheless problematic for two reasons.

199. Firstly, the term "essentially depends" in respect of a participant is imprecise as to what that covers since it would not necessarily be limited to financial dependency.

200. Secondly, the absolute nature of the prohibition in connection with being related to a participant could give rise to practical difficulties as a result of the width of the latter term under Chapters III-VII[1] of the CPC. There could well be situations in which there is no alternative to using an interpreter who is related to a 'participant', such as where specific linguistic needs may mean that there is no one else able to so act.

201. Whether this is genuinely a problem will depend upon the context. Certainly, evidence from a witness via the interpreter which is not the sole or decisive evidence necessary for a conviction is of a different character to evidence from a defendant, accused via a relative acting as qualified interpreter. In case of necessity, the use of an interpreter who is related to a participant would not lead to a violation of Article 6 of the ECHR if this was the subject of a waiver by both the defence and the prosecution and the court was still able to draw inferences as to the reliability of the (interpreted) evidence.

[56] See, e.g., the guidelines in the *Guide to Judicial Conduct* issued by the Courts and Tribunals Judiciary of England and Wales: "1. A judicial officeholder should not sit on a case in which he or she has a close family relationship with a party or the spouse or domestic partner of a party. 2 Friendship with, or personal animosity towards a party is also a compelling reason for disqualification. Friendship may be distinguished from acquaintanceship which may or may not be a sufficient reason for disqualification, depending on the nature and extent of such acquaintanceship. 3 A current or recent business association with a party will usually mean that an officeholder should not sit on a case. A business association would not normally include that of insurer and insured, banker and customer or council taxpayer and council. Members of the judiciary should also disqualify themselves from a case in which their solicitor, accountant, doctor, dentist or other professional adviser is a party in the case. 4 Friendship or past professional association with counsel or solicitor acting for a party is not generally to be regarded as a sufficient reason for disqualification. 5 The fact that a relative of the judicial officeholder is a partner in, or employee of, a firm of solicitors engaged in a case before the individual officeholder does not necessarily require disqualification. It is a matter of considering all the circumstances, including the extent of the involvement in the case of the person in question. 6. Past professional association with a party as a client need not of itself be a reason for disqualification but the officeholder must assess whether the particular circumstances could create an appearance of bias. 7 Where a witness (including an expert witness) is personally well known to the officeholder all the circumstances should be considered including whether the credibility of the witness is in issue, the nature of the issue to be decided and the closeness of the friendship. 8 A judicial officeholder should not sit on a case in which a member of his or her family (as defined in paragraph 3 above) appears as advocate"; available at https://www.judiciary.uk/wp-content/uploads/2018/03/Amended-Guide-to-Judicial-Conduct-revision-Final-v002.-March-2020-pdf.pdf.

202. *There is thus a need to replace "essentially depends" by is financially dependent" and to enable the prohibition on being 'related' to be waived in the circumstances specified in the preceding paragraph.*

Article 62

203. This provision requires judges, jurors, etc. to disclose any circumstances that would exclude her/his participation in the court session and to do so "immediately".

204. However, in the case of jurors, it is not clear from when this immediacy is to be determined. Is it on being summoned to the jury selection session or when s/he becomes aware of those circumstances? The latter would be more appropriate since the circumstances will not always be evident until the case gets under way and the juror learns of the witness testimony or other evidence being relied upon.

205. Moreover, the issue of whether or not certain circumstances will necessarily exclude someone from participation in the court session is not necessarily something which the person concerned can conclusively assess since some perceived problems may be more apparent than real. Nonetheless, it would be appropriate for the court's attention to be drawn to a potential problem so that it can determine whether or not exclusion from participation is really necessary.

206. *There is thus a need for this provision to be amended to provide that the disclosure obligation arises when the person concerned actually becomes aware of any circumstances that might exclude her/him from participation in the court session*.

207. Paragraph 4 provides that defence lawyers, coordinators of a witness and a victim, interpreters and experts are to declare about self-recusal to a prosecutor. In a system of adversarial justice, the prosecutor has no appropriate status to determine such cases (particularly in relation to the supposed incompetence of an expert). It is more appropriate that this issue be determined by a court as a preliminary matter.

208. *There is thus a need to amend paragraph 4 so that declarations about self-recusal in this provision are all made in the court.*

7. Chapter IX. Procedure for Applying Special Measures of Protection of Participants in Criminal Proceedings

Article 67

209. The special measures of protection envisaged in this Chapter extend to a participant's close relatives. However, as already seen[57] – it is uncertain whether the terms 'close relative' is capable of covering civil partners and, as there is no reference to 'family member', it is unlikely that *de facto* partners are covered. The exclusion of these partners from protection could lead to violations of the positive obligations under Articles 2 and 3 of the ECHR.

[57] See para. 136 above.

210. *There is thus a need to extend sub-paragraph (b) to cover* de facto *partners*.

Article 68

211. There seems are a plethora of agencies involved in any decision-making with respect to the application of special measures of protection. The key determination of whether to apply such measures is - under paragraph 2 - on the prosecutor. However, paragraph 3 requires the Ministry of Internal Affairs to implement them and paragraph 4 provides that the procedures for including a participant in a special protection programme and implementing specific measures of protection is to be jointly determined by the Minister of Justice and the Minister of Internal Affairs. This scheme hardly encourages the idea that a change of identity, etc., will take place in conditions favouring confidentiality.

212. *There is thus a need for consideration to be given to a process that is more likely to maintain confidentiality*.

8. Chapter X. Evidence, Subject of Proof and Procedure

Article 72

213. Paragraph 1 provides for the inadmissibility and lack of legal effect of evidence obtained "as a result of the substantial violation" and other evidence lawfully obtained based on such evidence where it worsens the legal status of the defendant, accused. Such a provision is generally positive in that it is not limited to substantial violations but extends to anything tainted by them, while allowing for reliance on all such evidence that is favourable to a defendant, accused.

214. However, the concept of "substantial violation" is itself one that lacks precision and, as a consequence there is scope for judges to take different approaches as to whether a particular failure amounts to such a violation.

215. At the same time, it is unclear whether the concept is intended to relate only to those provisions of the Code that expressly provide for the admissibility of evidence obtained in breach of their requirements, namely, Articles 40(2), 75(3), 83(3), 131(6), 143^{3}(14), 144(3^{1}), 169(9), 174(1), 214, 244(2), 247(1). It may be that this group of provisions would also extend to the stipulation in Article 4(2) as to the inadmissibility of exerting influence through torture, etc. and of using threats, etc. but that provision does not expressly refer to its impact on the use of evidence obtained through such actions.

216. In any event, it would seem inappropriate for substantial violation to be limited to the matters covered in the preceding paragraph as it would then not cover situations such as manifest disregard of the requirements for presenting a person and object for identification under Article 131.[58]

217. Furthermore, although paragraph 2 rightly provides for the inadmissibility of evidence where there are reasonable doubts as to it being replaced, substantially changed or traces on it having disappeared, there is also a separate stipulation in Articles 77 and

[58] Something that occurred in respect of the similar provision in the earlier Code; see *Mindadze and Nemsitsveridze v. Georgia*, no. 21571/05, 1 June 2017.

248 as to the inadmissibility of evidence where its authenticity cannot be proved. These provisions undoubtedly overlap but are not identical. There is thus a risk of incoherence in the approach to the admissibility of evidence that should be regarded for compelling reasons as unreliable.

218. No rules as to admissibility of evidence are prescribed in the ECHR. The European Court thus regards this issue as primarily one for regulation under national law. Its concern is rather with the question of whether the proceedings as a whole, including the way in which the evidence was obtained, can be regarded as fair.[59]

219. However, the European Court does require that all evidence obtained by torture must be inadmissible[60] regardless of against whom such torture has been used[61] or in which country where that torture actually occurred[62].

220. It is not evident that the present rules on admissibility extend to evidence obtained by torture in all circumstances. Moreover, the uncertainty as to the understanding of "substantial violation" and the relationship of this concept to other provisions dealing with inadmissibility of evidence, as well as to the extent that unreliable evidence is to be excluded, could result in proceedings in particular cases being found by the European Court to be unfair and thus in violation of Article 6.

221. The difficulty regarding the term "substantial violation" would be resolved by adding the same note that is understood is now being proposed for the same term in Article 142 of the Criminal Code, namely, "substantial violation means the creation of such conditions, when […] a person is unable to enjoy the rights granted under the legislation of Georgia".

222. *There is thus a need to revise this provision to ensure that (a) it renders inadmissible all evidence obtained by torture in all circumstances, regardless of the victim or place where it occurs, and (b) there is no ambiguity regarding the meaning of "substantial violation" – which could be achieved through a similar note to that being proposed for Article 142 of the Criminal Code - or the exclusion of unreliable evidence.*

Article 76(3)

223. This only allows for the admissibility of indirect testimony that can be "proved" by testimony not having this character. There is no requirement under European standards for indirect evidence to be even admissible.

224. However, while the European Court is clear that such testimony – where admitted - should be regarded as having less weight than first-hand testimony given under oath[63], its main concern is that there should be a careful assessment of any such testimony relied upon given that it will be obtained from a witness under conditions in which the

[59] *Schenk v. Switzerland*, no. 10862/84, 12 July 1988, at para. 46 and *Garcia Ruiz v. Spain* [GC], no. 30544/96, 21 January 1999, at para. 28.
[60] *Harutyunyan v. Armenia*, 36549/03, 28 June 2007, at para. 66.
[61] *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, 17 January 2012, at para. 282.
[62] *El Haski v. Belgium*, no. 649/08, 25 September 2012, at para. 85.
[63] See, e.g., *Pichugin v. Russia*, no. 38623/03, 23 October 2012, at para. 198.

rights of the defence cannot be secured to the extent normally required by the ECHR.[64] Indeed, where there has been no such assessment, the European Court has found the proceedings to have been unfair.[65]

225. The use of the present formulation "proved" does not provide sufficient direction to courts to undertake such an assessment or the basis for regarding the indirect testimony as "proved". This is not a pressing issue at present as a result of the ruling by the Constitutional Court that declared invalid the normative content of the second sentence of Article 13(2) providing for the possibility of passing a judgment of conviction based on indirect testimony determined pursuant to Article 76.[66]

226. *There is, however, a need for indirect testimony – in the event of its use becoming possible - to be regarded as having less weight than direct testimony and for such testimony not to be regarded as proved without the careful assessment of it that the European Court considers necessary*.

Article 77

227. Paragraph 3 allows for the possibility for the unsealing of material evidence and its repeated examination without specifying any conditions as to the circumstances in which this could occur, such as those who must be present when this occurs and who can authorise it. This omission raises the prospect of the reliability of such evidence becoming either compromised or considered as such because of the absence of appropriate safeguards.

228. *There is thus a need for this provision to regulate the circumstances in which material evidence can be unsealed and examined*.

Article 79

229. This provision is rightly concerned about the arrangements for storing material evidence. As such, it is a necessary counterpart to the stipulation in Article 72(2) regarding the inadmissibility of evidence that has been replaced, changed, etc. However, there is no specific requirement in the provisions concerned with investigative actions to ensure that the manner in which material evidence is gathered occurs in circumstances designed to maintain its integrity.

230. *There is thus a need to include a requirement either in this provision or in the ones concerned with investigative actions that material evidence must be gathered in circumstances designed to maintain its integrity.*

Article 83

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[64] See, e.g., *Baybasin v. Germany* (dec.), no. 36892/05, 3 February 2009 and *Dzelili v. Germany* (dec.), no. 15065/05, 29 September 2009.

[65] See *Vetrenko v. Moldova*, no. 36552/02, 18 May 2010 ("the investigators and the courts did not question T. again in this respect during her interview on 5 June 1997 to dispel any doubts, but simply preferred to rely on S. P.'s hearsay evidence, to the detriment of that provided by the original witness" (para. 57)) and *Ajdaric v. Croatia*, no. 20883/09, 13 December 2011 (in which discrepancies of a witness giving hearsay evidence were not addressed).

[66] Decision No. 1/1/548 of 22 January 2015. See also the ruling of the Constitutional Court that the testimony of a police officer which substantially relies upon and reiterates information provided by a confident should not constitute the basis for rendering a guilty verdict; *Giorgi Kebuaria v. Parliament of Georgia*, Complaint No. 1276, 25 December 2020

231. The disclosure obligations for the prosecution under this provision are generally consistent with the requirements under Article 6(1) of the ECHR. The latter does not impose an obligation on the defence as to disclosure, although it can lead to better use of court time.

232. However, paragraph 1 does not regulate the procedure for the examination by the defence of classified documents or case files that are fully confidential, which can create significant difficulties for the defence. In practice, access to those materials is only allowed at investigative premises and this can affect its ability to prepare properly for the trial through reading them there, especially in cases with voluminous documentation.

233. *There is thus a need to facilitate fairer access for the defence to such material, which might be achieved through the use of electronic transfer of the relevant files with security controls governing access to them.*

234. In addition, what is not clear from paragraph 2 is whether the defendant, accused must, or is entitled, to disclose information in advance of the trial to the prosecutor. The formulation in this paragraph in the English translation uses "may receive" which suggests discretion. However, it is understood that the Georgian original actually uses "shall". . Such an obligation to disclose is incompatible with an adversarial system. There should be no *responsibility* for the defence to disclose in advance material to the prosecutor.

235. Nonetheless, it is not incompatible with an adversarial system to require that fair notice be given to the prosecutor of the intention to rely upon certain defences such as alibi. In many adversarial systems, it is also considered that there may be some benefit in providing for a procedure allowing an individual to disclose in advance of the trial certain information of relevance to his defence and which may relate either to factual or legal dispute which gives similar fair warning to the prosecutor of issues that may require further investigation by the prosecutor (and thus which may exculpate the defendant, accused in advance of the trial).[67]

[67] An example of a possible approach - adapted from sections 5-6D of the Criminal Procedure and Investigations Act 1996, ss 5-6D in England and Wales - is as follows: Voluntary disclosure by accused. (1) This section applies where the prosecutor complies with the mandatory duty to disclose information or purports to comply with it. (2) The accused may give a defence statement to the prosecutor, and if he does so, this defence statement must also be given to the court. (3) For the purposes of this Article, a defence statement is a written statement— (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely, (b) indicating the matters of fact on which he takes issue with the prosecution, (c) setting out, in the case of each such matter, why he takes issue with the prosecution, (d) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, (e) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose. (4) A defence statement that discloses an alibi must give particulars of it, including— (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given; (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given. (5) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. (6) Where the accused has given a defence statement, he must before the start of the trial give to the

236. *There is thus a need to make it clear in paragraph 2 that it is indeed a matter of discretion for the defence to disclose material to the prosecution, as well as a need to bring Article 14 into alignment with this position. At the same time, consideration could be given to introducing a requirement to indicate to the prosecution the nature of its defence so that court time is not unnecessarily wasted.*

237. Furthermore, the requirement for the defence to provide, at its expense, copies of documents being relied upon could, in some instances, impose an undue financial burden on a defendant, accused. This would not arise where exchange of material was by electronic means.

238. *Consideration should thus be given to using electronic exchange of evidential material by the prosecution and the defence. Insofar as that does not occur, the cost of the defence providing paper copies of information should be at public expense, at least where the defendant, accused is entitled to the provision of a publicly funded lawyer.*

9. Chapter XI. Procedural Liability for Non-Performance of Procedural Duties and for Disrupting Order in a Courtroom

Article 85

239. The possibility envisaged in paragraph 4 of removing a disruptive defendant, accused from the courtroom and thus preventing him or her from – but not his or her lawyer - being present when witnesses are being examined is not necessarily incompatible with the rights under Article 6(1) and 6(3)(d) of the ECHR. However, the present provision seems to envisage this as being a once and for all decision, excluding her/him until the final decision is announced, unless a motion is submitted on behalf of the defendant, accused pursuant to paragraph 5.

240. Although both the warning and the possibility of seeking to be allowed to return to the trial are welcome, the European Court also considers it important that – after removal – the court should itself make inquiries as to whether the defendant, accused would agree to conduct her/himself in an orderly manner so as to permit her/his return to the trial.[68]

241. *There is thus a need to provide a requirement in paragraph 4 to make such inquiries as to the defendant, accused's agreement to conduct her/himself in an orderly manner.*

242. Paragraph 7, 8 and 13 provide for the arrest and punishment of a person on account of an intention to disrupt the trial or to show gross disrespect to the court. However, it is not clear whether the proceedings attract all the rights of a defendant, accused person under Article 38 and related provisions, as more limited rights are provided for in paragraph 15.

court and the prosecutor either— (a) a defence statement under this section (an "updated defence statement"), or (b) a written statement stating that the accused has no changes to make to the defence statement.

[68] See *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, at para. 178.

243. *There is thus a need to make it clear that the rights of a defendant, accused are applicable in proceedings against person on account of their intention to disrupt the trial or to show gross disrespect to the court.*

10. Chapter XIII. Motion, Appeal and General Rules for their Review

Article 94

244. Paragraph 1 provides for a motion "intended to delay or interfere with a criminal proceeding" not to be granted. However, there is no indication as to how that is to be established and such a formulation opens up the possibility that a motion will be too readily refused, without consideration of its merits, on the basis that it might lead to the proceeding taking longer. As reasons must – according to paragraph 2 - be provided for a motion, the test in the first sentence is more than adequate to determine whether to grant or refuse a motion without the need to rely on the vague test in the second sentence.

245. *There is thus a need to delete the second sentence of paragraph 1.*

11. Chapter XIV. Grounds for Investigation

Article 100

246. Although this provision appropriately establishes an obligation to initiate an investigation when notified of the commission of a crime, the approach to the conduct of investigations has been found by the European Court to be inadequate in many cases where there are allegations of the breaches of the right to life and the prohibition of torture and other forms of ill-treatment imputable to state agents.[69] It remains to be seen whether the establishment of the State Inspectors' Service will resolve this problem.

247. However, it is inappropriate to restrict the duty of initiating an investigation to those instances where an investigator or prosecutor is notified of the commission of a crime, particularly as Article 101 provides for other grounds for initiating an investigation, which would encourage a more proactive approach.

248. *There is thus a need to amend the duty of initiation by adding after "crime" the phrase "or otherwise learns of information concerning the commission of a crime".*

Article 101

249. This provision lists the information that provides grounds for initiating an investigation. However, there is no requirement to have regard to past investigations or proceedings in respect of the person subject to the investigation. Such an approach is good practice but does not always seem to be being taken into account, especially in cases involving domestic violence.[70]

[69] See, e.g. *Tsintsabadze v. Georgia*, no. 35403/06, 15 February 2011 and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015, the leading cases in two groups of cases whose execution is pending before the Committee of Ministers.

[70] See the applications to the European Court in *A. and B. v. Georgia*, no. 73975/16 and *Gaidukevich v. Georgia*, no. 38650/18, which have been communicated to the Government.

250. *There is thus a need to add an explicit requirement in this provision to check the records of the person who is the subject of the investigation*.

Article 104

251. Although there can be good reasons for ensuring information as to the progress of an investigation is not disclosed, notably where such disclosure might prejudice or be contrary to the right of someone to a fair trial – and in particular the presumption of innocence - or the right to respect for private life, such disclosure may also be a legitimate exercise of the right to freedom of expression and contribute to ensuring the accountability of police and prosecution services.

252. As the formulation of the present provision species no criteria for the imposition of the obligation of non-disclosure by either a prosecutor or a court, there is a risk that the use of these powers would be inconsistent with Article 10 of the ECHR, as well as the public interest in the proper administration of justice.

253. Moreover, in practice the restriction on disclosure is applied only to the defence as a decision by a prosecutor to warn it about disclosure cannot be appealed and, if disregarded, entails liability under Article 374 of the Criminal Code. There is no similar constraint on the prosecution disclosing case details supposedly because of the high interest of the public, with such disclosure tending to form the public's preliminary opinion regarding the case.[71] Indeed, the European Court has found in *Batiashvili v. Georgia*[72] that the investigating authorities involvement in the manipulation and subsequent dissemination of an audio recording to the media contributed to the applicant being perceived as guilty before his guilt was proved in court, thus violating the presumption of innocence required by Article 6(2) of the ECHR.

254. *There is thus a need to introduce into both paragraphs of this provision a stipulation that disclosures regarding the progress of investigations can only be prohibited where there is a well-founded basis for concluding that these would be prejudicial to their conduct or to the legitimate interests of particular persons, including victims. In addition, both prosecution and defence should be able – through a court ruling - to warn all other participants in the process that any such prejudicial material should not be disclosed, thereby contributing to the execution of the judgment in Batiashvili v. Georgia.*

Article 105

255. The stipulation in sub-paragraph 1(l) that an investigation shall be terminated and a prosecution not initiated or terminated simply because "the situation has changed" provides no real criteria for such action and is in marked contrast to the similar possibility in paragraph 3 regarding a prosecution that is "contradicts the guidelines of criminal policy".

256. As such, this a ground that not only leaves much scope for corrupt decision-making but also would allow decisions inconsistent with the legitimate interests of victims,

[71] See, e.g. 'Cyanide case', Priest Suspected in Murder Plot, available at: https://civil.ge/archives/126237. See also, Report of the Public Defender of Georgia, 2016, p. 392. Available at: http://www.ombudsman.ge/uploads/other/4/4494.pdf

[72] No. 8284/07, 10 October 2019. An action plan or report for execution of this judgment is awaited by the Committee of Ministers.

particularly where prosecution is an appropriate response to activity that is contrary to rights such as those under Articles 2, 3 and 8 of the ECHR.

257. It is understood that this provision is supposed to be referring to Article 70 of the Criminal Code that allows for release from criminal liability due to changed circumstances but for which real criteria are also not specified.

258. *There is thus a need either to delete the ground specified in sub-paragraph 1(l) or to provide clarification as to its applicability.*

259. Paragraph 3 is not really consistent with Article 16. The latter provides for discretion and consideration of the public interest when making a decision to initiate or terminate a prosecution but neither factor is enumerated in paragraph 3. The principle embodied in Article 16 is entirely appropriate. However, the manner in which discretion is exercised and the public interest defined ought to be elaborated and be publicly accessible. These are not the matters that have to be in the CPC, but this should nonetheless contain an obligation about their adoption and publication.[73]

260. *There is thus a need for paragraph 3 to be aligned with Article 16 and to have a requirement to adopt and publish the approach that will be followed in exercising discretion and understanding the public interest*.

Article 106

261. Paragraph 1 allows a prosecutor to terminate an investigation or a criminal prosecution.

262. However, although a victim must be notified of such a decision on termination, paragraph 1^1 only provides for the possibility of appealing to a superior prosecutor against it, the latter's ruling can only be appealed to a court in the case of a particularly serious crime or of a crime which is under jurisdiction of the State Inspector's Office, has been committed.

263. Such a stipulation takes no account of the way in which particular conduct has been categorised so that what might actually have constituted a very serious offence might only have been treated as something relatively minor. The issue of classification goes to the heart of whether conduct that is potentially in violation of rights such as those under Articles 2 and 3 of the ECHR is being properly investigated[74] and has been found to be problematic in cases against Georgia.[75]

264. *There is thus a need for the limitation in paragraph 1^1 on the possibility of appealing against a superior prosecutor's decision to a court to be removed.*

Articles 109 and 110

[73] *Cf. The Code for Crown Prosecutors* in England and Wales; available at https://www.cps.gov.uk/publication/code-crown-prosecutors-2018-downloadable-version-and-translations.

[74] See, e.g., *Macovei and Others v. Romania*, no. 5048/02, 21 June 2007.

[75] See, e.g., *Tsintsabadze v. Georgia*, no. 35403/06, 15 February 2011 and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015. The issue of an appropriate approach to classification is an issue currently receiving attention in the process of execution of the judgments in these and other cases in proceedings before the Committee of Ministers. An ability to challenge classification as part of a challenge to termination could contribute to remedying inappropriate classification of conduct.

265. It is not inappropriate to make provision for the joinder and separation of cases. However, the present provisions have no criteria with respect to taking such a decision.

266. As regards joinder, it would be relevant to do this where several persons are charged with offences that are interconnected and the evidence pertaining to them is generally the same. Similarly, cases might be separated notwithstanding such a connection, particularly where there are complications involving some defendants, accused which might lead to undue delay in the trial of others.

267. In either case, it will be important to consider whether a decision to join or separate proceedings is likely to affect the fairness of the proceedings against any or all of the defendant, accused concerned. This could include the possibility that the testimony of one defendant, accused would not be admissible against another and, especially in jury cases, a collective prosecution could lead to a failure to distinguish the individual culpability of the various defendants, accused.

268. *There is thus a need to introduce into these provisions a requirement that the implications of joining and separating cases for the fairness of the proceedings are fully taken into account before any decision in this regard is taken.*

12. Chapter XV. Investigative Actions

Article 111

269. The need for a search to take place at night, as envisaged in paragraph 5, might well be necessary in certain cases. However, the specification that this can occur "in the case of urgent necessity" does not provide any criteria for determining that such a search is required, the existence of which is necessary to preclude any risk of abuse.[76] and might be contrasted with the detailed considerations in this respect found in Article 112(5).

270. *There is thus a need to qualify the term "urgent necessity" in this provision by the relevant considerations that would make the conducting of a search at night imperative, namely, that the evidence being sought would be damaged, destroyed or lost*.

271. The possibility envisaged in paragraph 8 of carrying out on someone surgical and medical examinations that may cause severe pain in exceptional cases and with her or his consent or with a court ruling in the case of a person that has not attained the age of 16 or is mentally ill. It also does not provide any criteria as to what makes a case "exceptional" and also does not afford any guarantee that the consent might be procured by undue pressure leading to self-incrimination.

272. The envisaged procedure is in marked contrast to the view of the European Court that, while there is nothing problematic in a minor interference with a person's physical integrity being passively endured (such as when blood or hair samples or bodily tissue are taken) or where any active participation required on his or her part only concerns

[76] *Cf*. the situations examined in *Mastepan v. Russia*, no. 3708/03, 14 January 2010 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013 and see the finding in *Kobiashvili v. Georgia*, no. 36416/06, 14 March 2019 that there was no substantiation for a search for which urgent necessity had been asserted. See also the conclusion of the Constitutional Court that the outcome of a search was not relevant in assessing how well-founded was its urgency; *Giorgi Kebuaria v. Parliament of Georgia*, Complaint No. 1276, 25 December 2020.

material produced by the normal functioning of the body (such as, for example, breath, urine or voice samples),[77] more forcible intrusions without consent to obtain evidence rather than to safeguard the health of a defendant, accused[78] will be contrary to the prohibitions on inhuman and degrading treatment under Article 3 and on self-incrimination under Article 6(1). Furthermore, the use of such a procedure is unlikely to be particular urgent and so the provision of greater safeguards would not impede the conduct of the investigation.

273. *There is thus a need to provide criteria as to what would make a case "exceptional" and the use of any envisaged procedure causing pain should always be subject to prior judicial authorisation and not just as regard persons who are under 16 or are mentally ill.*

Article 112

274. The specification in paragraph 1 that the motion for an investigative action restricting private property, etc. should be accompanied by "the information required for its review" is too vague as to what should be provided to the court. The information to be provided should relate to the ongoing investigation and the purpose of conducting the measure for which authorisation is sought or why it was believed that it would enable evidence of any offence to be obtained.[79]

275. Moreover, any such authorisation must be based on a reasonable suspicion that an offence has been committed by the person under investigation.[80] Furthermore, the offence in connection with which the search is to be undertaken should be of sufficient gravity to justify the interference with the right guaranteed by Article 8.[81] In addition, account ought to be taken of the real need for a search, including whether its objectives could be met through some other means.[82]

276. These requirements are only partly addressed in Article 119(1).

277. *There is thus a need to introduce the foregoing requirements into the procedure for authorising investigative actions under this provision*.

Article 113

278. This provision appears to cover interviews with anyone who may have information about an offence, including "the defendant, accused". However, its content is not entirely appropriate for such a person who has the rights provided in Article 38.

279. *There is thus a need for an entirely separate provision to cover the questioning of "the defendant, accused" consistent with the rights provided by Article 38*.

280. Furthermore, after a person has been charged under Article 169, the protection of the adversarial nature of the criminal process requires that s/he should normally only be interviewed in the most exceptional of circumstances. To ensure that this is the case,

[77] See, e.g., *Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006.
[78] As in *Bogumil v. Portugal*, no. 35228/03, 7 October 2008.
[79] See, e.g., *Ratushna v. Ukraine*, no. 17318/06, 2 December 2010.
[80] See, e.g. *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008.
[81] See, e.g., *Buck v. Germany*, no. 41604/98, 28 April 2005
[82] See, e.g., *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003.

there ought to be a requirement that such an interview can only take place with judicial authorisation and with specific cause being shown.

281. *There is thus a need for the introduction into the CPC of a provision having that effect*.[83]

282. In addition, this provision does not take account of the possibility that a person who is not "the defendant, accused" may, in the course of the interview, become recognised as such for the purpose of Article 38 and should thus be notified of her/his rights under this provision and interviewed thereafter in accordance with the procedure appropriate for "the defendant, accused".

283. *There is thus a need for this provision also to be amended to require the notification of the rights of a defendant, accused who becomes recognised as such in the course of an interview*.

Article 114

284. The procedure for examining a person as a witness during an investigation is generally appropriate.[84]

285. However, to increase the possibility that the testimony thereby gained could be used in a subsequent trial – something envisaged in Articles 118(3) and 243 - without rendering that unfair because the person could not be confronted at it, a video recording of the examination should be made.[85] This may be the practice – Article 243(1) refers to the possibility of there being an audio or video recording - but it is not specifically required.

286. *There is thus a need to include a requirement that examinations under this provision should be video recorded*.

287. In addition, this provision – like Article 113 - does not take account of the possibility that a witness who is not "the defendant, accused" may, in the course of the examination, become recognised as such for the purpose of Article 38 and should thus be notified of her/his rights under this provision and interviewed thereafter in accordance with the procedure appropriate for "the defendant, accused".

[83] See, e.g., the requirement in section 35 of the Criminal Justice (Scotland) Act 2016: "(1) The court may authorise [an investigator] to question a person about an offence after the person has been officially accused of committing the offence, but the court may grant authorisation only if it is satisfied that allowing the person to be questioned about the offence is necessary in the interests of justice. (2) In deciding whether to grant authorisation, the court must take into account (a)the seriousness of the offence, (b) the extent to which the person could have been questioned earlier in relation to the information which may be elicited by the proposed questioning, and (c) where the person could have been questioned earlier in relation to that information, whether it could reasonably have been foreseen at that time that the information might be important to proving or disproving that the person has committed an offence. (3) Where granting authorisation, the court (a)must specify the period for which questioning is authorised, and (b) may specify such other conditions as the court considers necessary to ensure that allowing the proposed questioning is not unfair to the person".

[84] Apart from paragraph 2, which gave the prosecution but not the defence the possibility of examining a witness before a magistrate and which the Constitutional Court rightly held to be void with effect from 31 March 2020 for giving the prosecution a significant procedural advantage over the defence in that it had an opportunity to prepare for the hearing on the merits; *Vasil Saganelidze v. the Parliament of Georgia*, judgment no. 2/12/1237, 24 October 2019.

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

288. *There is thus a need for this provision to be amended to require the notification of the rights of a defendant, accused who becomes recognised as such in the course of an interview .*

Article 115

289. The provisions on the examination of witnesses are generally appropriate.

290. However, they do not take account of the need to protect vulnerable witnesses, including the possibility that a particular manner of questioning or its conduct by a defendant, accused would be inappropriate.[86]

291. *There is thus a need to amend these provisions to make allowance for the need to protect vulnerable witnesses as regards the manner of questioning and its conduct by a defendant, accused.*

Article 119

292. The effect of paragraph 3 is unclear as its terms suggests that the seizure might take place outside the procedure governing search and seizure, i.e., without court authorisation other in cases where there is urgent necessity. This does not make sense as there would still be a need to enter the premises regarding the place where there is probable cause that it is being kept. A seizure outside of the general requirements would not be appropriate. It ought to be clarified that this provision is only concerned with seizures in the course of an authorised search.

293. *There is thus a need to amend paragraph 3 accordingly.*

Article 120

294. The need for a search to take place without the prior authorisation by a court, as envisaged in paragraph 1, might well be necessary in certain cases. However, the specification that this can occur "in the case of urgent necessity" does not provide any criteria for determining that such a search is required when their existence is necessary to preclude any risk of abuse.[87] Furthermore, the formulation of this provision might be contrasted with the detailed considerations in this respect found in Article 112(5).

295. *There is thus a need to qualify the term "urgent necessity" in this provision by the relevant considerations that would make the conducting of a search at night imperative, namely, that the evidence being sought would be damaged, destroyed or lost.*

296. There is no account in this provision of the need for appropriate consideration to be given to the potential impact of searches affecting lawyers on the right to a fair trial. In such cases, the concern of the European Court will be with the potential for a search to lead to the disclosure of documents covered by lawyer-client privilege.[88]

[86] See, e.g., *S.N. v. Sweden*, no. 34209/96, 2 July 2002 and *Y v. Slovenia*, no. 41107/10, 28 May 2015.
[87] *Cf.* the situations examined in *Mastepan v. Russia*, no. 3708/03, 14 January 2010 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013.
[88] See *Niemietz v. Germany*, no. 13710/88, 16 December 1992 and *Mancevschi v. Moldova*, no. 33066/04, 7 October 2008.

297. In particular, there ought to be adequate safeguards against interference with professional secrecy, such as the need for special authorisation,[89] a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege,[90] a sifting procedure in respect of electronic data[91] and suitable safeguards to ensure that any later examination of material removed does not infringe this privilege[92].

298. As regards the independent observer, the European Court has emphasised that s/he should have the requisite legal qualification in order to effectively participate in the procedure, be bound by the lawyer-client privilege to guarantee the protection of the privileged material and the rights of the third persons and be vested with the requisite powers to be able to prevent, in the course of the sifting procedure, any possible interference with the lawyer's professional secrecy.[93]

299. *There is thus a need for this provision to be revised to take account of the requirements in the preceding two paragraphs*.

300. A search should not be carried out in a manner that is intimidating,[94] involve the use of excessive force[95], fail to take account of the presence of others than the defendant, accused[96] or go beyond what is necessary[97].

301. These considerations are not reflected in this provision.

302. *There is thus a need for this provision to be revised to take account of the requirements in the preceding two paragraphs.*

Article 123

303. Although this provision provides some safeguards for the conduct of searches in relation to media, the ground for this protection is only the expectation of the public dissemination of an item or document and a non-specific reference to freedom of speech.

304. Thus, it does not address the potential of a search to lead to the identification of a journalist's sources[98] - even if already known to the authorities[99] - which would generally be contrary to the right to freedom of expression. Moreover, there are no similar safeguards to those already discussed in the context of searches affecting

[89] See *Taner Kılıç v. T*urkey, no. 70845/01, 24 October 2006, at para. 42.
[90] See, e.g., *Elci and Others v. Turkey*, no. 23145/93, 13 November 2003 and *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008.
[91] 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.
[92] See, e.g., *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portuga*l, no. 27013/10, 3 September 2015.
[93] See, e.g., *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008, at para. 43 and *Lindstrand Partners Advokatbyrå AB v. Sweden*, no. 18700/09, 20 December 2016, at paras. 98 and 99.
[94] See, e.g., *Koval and Others v. Ukraine*, no. 22429/05, 15 November 2012.
[95] See, e.g., *Rachwalski and Ferenc v.* Poland, no. 44709/99, 28 July 2009.
[96] See, e.g., *Gutsanovi v. Bulgaria*, no. 34529/10, 15 October 2013.
[97] See, e.g., *Panteleyenko v. Ukraine*, no. 11901/02, 29 June 2006.
[98] See, e.g., *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25 February 2003.
[99] See, e.g., *Nagla v. Latvia*, no. 73469/10, 16 July 2013, at para. 95.

lawyers, which are also seen by the European Court as a necessary protection for the right to freedom of expression.

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

Article 127

306. Paragraph 3 requires the inspection of a crime scene to be carried out pursuant to article 112(5) in case of an urgent necessity. However, unlike the latter provision, paragraph 3 does define what constitutes an urgent necessity. It would be inappropriate for the approach in respect of these two provisions to differ.

307. *There is thus a need to qualify the term "urgent necessity" in paragraph 3 by the relevant considerations that would make the inspection of a crime scene not subject to the requirements in paragraphs 1 and 2, namely, that the evidence would be damaged, destroyed or lost.*

Article 131

308. There is no mention in this provision that the conduct of the identification of a person should not take place in the absence of a defendant, accused's lawyer if s/he is the person to be identified. The absence of a defendant, accused's lawyer from such a process may render the criminal proceedings unfair.[100]

13. Chapter XVI. Investigative Actions Related to Computer Data

309. The conducting of investigative actions related to computer data under this Chapter is subject to the requirements of Articles 143^{2}-143^{10}. The changes required for the latter provisions – discussed below – are equally applicable to investigative actions related to computer data.

310. *There is thus a need to apply those Articles to investigative actions related to computer data subject to the modifications suggested below*.

311. In addition, it is to be noted that the Constitutional Court has held invalid the normative content of Article 136(1) and (4).[101] These provisions had authorised the prosecution, but not the defence, to request and receive information from any electronic data carrier through the court, with the named information being requested through operative search action. Having regard to the increased volume of digital information, the Constitutional Court concluded that a huge spectrum of information was beyond the access of a defendant, accused, which may not only be necessary for reasoning of her/his position, but it could also be the decisive evidence in her/his favour. In the view of the Constitutional Court, this violated the principles of the right to defence and of adversarial proceedings.

[100] See, e.g., *Laska and Lika v. Albania*, no. 12315/04, 20 April 2010.

[101] In its decision N1/1/650,699 dated January 27, 2017. The same issue had been raised by the NGO Georgian Democracy Initiative and Association of Legal Firms of Georgia (http://www.gdi.ge/uploads/other/0/252.pdf, at pp. 13-14).

312. This ruling removes an inequality between the defence and the prosecution but does not address the need for the defence, as much as the prosecution, to have access to digital information.

313. *There is thus a need to introduce a provision into Article 136 equipping both the defence and the prosecution with equal authority to obtain data from a computer system. In addition, provision for the implementation of such an investigative action should be included in Article 112.*

14. Chapter XVI[1]. Covert Investigative Actions

Article 143[1]

314. The listing of the types of covert investigative actions does not include the use of undercover operations involving law enforcement officers (such as controlled delivery and purchase), although they are dealt with in the Operative Investigative Activities Law.

315. Such operations are a legitimate device since they are something that those engaging in criminal activities should expect to be employed by law enforcement bodies.[102] However, there is a risk that, in the course of such operations, persons will be incited to commit an offence which they would not otherwise have committed it, otherwise known as entrapment. A conviction based on such incitement will be regarded as unfair and thus a violation of Article 6(1) of the ECHR.[103]

316. An important factor for the European Court in determining whether there was incitement will be whether there was a procedure for authorising an undercover operation and the safeguards that this provides, with judicial authorisation being considered most appropriate and the parameters for its use also being clearly defined.[104] This would include consideration having been given to the reasons for mounting the operation – including the seriousness of the offences concerned - and also to the background and conduct of the person who is to be the subject of it. As a result, the European Court has emphasised the need for a clear and foreseeable procedure for authorising investigative measures of this kind, as well as for their proper supervision.[105]

317. Although the European Court recognised in *Tchokonelidze v. Georgia*[106] that the Operative Investigative Activities Law outlawed an investigative technique involving the infiltration of an undercover agent being implemented with methods based on

[102] *Lüdi v. Switzerland*, no. 12433/86, 15 June 1992.
[103] *Teixeira de Castro v. Portugal*, no. 25829/94, 9 June 1998.
[104] *Ibid.*
[105] See, e.g., *Vanyan v. Russia*, no. 53203/99, 15 December 2005 and *Khudobin v. Russia*, no. 59696/00, 26 October 2006. See also *Tchokhonelidze v. Georgia*, no. 31536/07, 28 June 2018, in which the European Court found a violation of Article 6(1) of the ECHR on account of the inadequate legal framework and the failure to examine a defence of incitement.
[106] No. 31536/07, 28 September 2018. The authorities have informed the Committee of Ministers that the legislation was being analysed with a view to plan further necessary measures.

"deceit" and "inducement", it found that a sufficient legislative framework for the mounting of an undercover operation in accordance with the preceding paragraph was absent.

318. It is not evident that this particular form of investigative action should not be covered by the CPC when others are dealt with both in it and the Operative Investigative Activities Law, particularly as the latter does not have the safeguards required by the European Court. By comparison, the Criminal Procedure Code of Slovakia, only allows controlled delivery and test purchasing to be used to detect corruption offenses and sets out in detail the scope and grounds for deploying such measures.

319. *There is thus a need for provision to be included in this or another Chapter to regulate the use of undercover operations in a manner consistent with the requirements of the ECHR and thereby implement the judgment in Tchokonelidze v. Georgia that is currently pending before the Committee of Ministers for the purpose of execution*.

Article 143[2]

320. The statement of principles in this provision – with the exception of the one in paragraph 5 - is essentially repeated in paragraph 2 of Article 143[3] - but in a more concrete manner - and, as a result, it does not seem to serve any useful purpose.

321. The principle in paragraph 5 is relevant to the terms of Article 143[7] and would be better incorporated into that provision.

322. *There is thus a need to delete this Article and address the issue covered by paragraph 5 in Article 143[7]*.

Article 143[3]

323. Whereas sub-paragraphs 2(a), (b) and (d) are both clear and consistent with the requirements of the ECHR, sub-paragraph (c) is vague and also inaccurate.

324. It is vague because the reference to the list of terms beginning with "national security" lacks precision in contrast to the enumeration of the offences in sub-paragraph (b) and this is likely to obfuscate the understanding as to when covert investigative actions are permissible, contrary to the approach considered necessary by the European Court.[107] It is inaccurate as the undertaking of these actions is not limited to "urgent necessity", given that that is something governed by an exceptional arrangement in paragraph 6.

325. *It would thus be appropriate to delete sub-paragraph 2(c).*

326. There is considerable, appropriate detail in paragraph 10 as to the basis on which a judge should authorise covert investigative actions. However, there should also be included in it a requirement for the judge to ensure that that legal professional privilege and communications between lawyers and their clients will be respected in the authorisation being given, which should be additional to the requirement in Article 143[7](12) and (3) for those carrying out these actions.[108]

[107] See *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 46.
[108] See, e.g., *Kopp v. Switzerland*, no. 23224/94, 25 March 1998, at para. 73 and *Khodorkovskiy and Lebedev v. Russia*, no. 11082/06, 25 July 2013, at para. 627.

327. *There is thus a need to specify such a requirement in paragraph 10 for the judge making a decision to authorise covert investigative actions*.

Article 143[7]

328. As already indicated, the requirement in Article 143[1](5) for the extent of covert investigative actions to be proportionate to their legitimate goal is something that would be better specified in this provision.

329. *There is thus a need to integrate this requirement into paragraph 1*.

15. Chapter XVII. Other Procedural Actions

Article 147

330. The possibility under paragraph 5 of taking samples that cause severe pain in "exceptional circumstances" is, like the related provision in Article 111(8) lacking criteria as to what would constitute those circumstances.

331. *There is thus a need to provide criteria as to what would make a case "exceptional" for the purpose of paragraph 5*.

Article 151

332. In paragraph 1, unlike in paragraphs 2 and 3, there is no qualification of the word "information" by "sufficient". As a result, there would be the potential for a seizure of property without any objective basis for concluding that the property concerned would be concealed or destroyed or had been obtained in a criminal way. Although the taking of property for the reasons specified would serve a legitimate aim for the purpose of Article 1 of Protocol No. 1, it would still be in violation of this provision if there was not a well-founded basis for to occur.[109]

333. *There is thus a need to introduce the word "sufficient" before "information" in paragraph 1*.

16. Chapter XVIII. Grounds for Criminal Prosecution; Arrest; Recognising as the Defendant, Accused

Article 168[2]

334. The possibility of diversion from prosecution is a widely used feature of criminal justice systems, reducing the burden on the courts and leading to the speedier disposal of cases. Although it does not lead to a conviction, it does entail at least implicit acceptance of wrongdoing. It is important, therefore, that a person's decision to accept that proceedings be handled by way of diversion should be an informed one and, in particular, that s/he has been advised by a lawyer before any such acceptance.

335. The observance of these requirements might be achieved as a consequence of the obligation under paragraph 2 to inform a person (subject of diversion) that "he/she enjoys all the rights of a defendant, accused". However, it cannot be assumed that such

[109] See, e.g., *Raimondo v. Italy*, no. 12954/87, 22 February 1994.

a person would actually appreciate that these rights include the right to the assistance of a lawyer. It would, therefore, be more appropriate not only for her/him to be told expressly that s/he has the right to such assistance but also that no discussion about diversion occurs until s/he has a lawyer with her/him to provide the necessary advice.

336. *There is thus a need to introduce such requirements concerning legal assistance into this provision.*

Article 169

337. Paragraph 3 specifies what should be included in the indictment. However, the case of *Batiashvili v. Georgia*[110] shows how the inclusion of some material in it can lead to a violation of the presumption of innocence. In that case, the indictment had referred to a charge that had already been dropped even though the prosecuting authorities must have been well aware of the falseness of the evidence underlying that charge.

338. *There is thus a need for this provision to include a prohibition on including any material relating to charges that are not the subject of an indictment*.

Article 170

339. The deeming of someone to be "arrested" from the moment "when her/his liberty of movement is restricted" is likely to cause confusion with situations where a person is stopped for a purpose such a check on identity or baggage or for a border control, which are not regarded as a deprivation of liberty for the purpose of Article 5 of the ECHR.[111] It might be better to deem a person to be arrested where s/he is under the control of the police or other law enforcement officials and is not free to leave, regardless of whether any form of restraint is actually used.[112]

340. *There is thus a need to revise paragraph 2 in accordance with the preceding sentence*.

Article 171

341. The grounds for arrest are generally consistent with Article 5(1) of the ECHR.

342. However, the formulation of paragraph 1 appears to make probable cause of committing a crime as an alternative to probable cause that the person will flee, destroy information, etc. when probable cause of committing a crime is always a prerequisite for an arrest and the possibility of flight, destruction of information, etc. are considerations that can justify the continuation of a deprivation of liberty by a court following its occurrence. Although it is not problematic to mention those considerations in this paragraph as the arrest is pursuant to a court order, it ought to be made clear in the text that flight and so

[110] No. 8284/07, 10 October 2019. An action plan or report for execution of this judgment is awaited by the Committee of Ministers.
[111] See, e.g., *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, 15 October 2013.
[112] See, e.g., *Kotiy v. Ukraine*, no. 28718/09, 5 March 2015 and *Kasparov v. Russia*, no. 53659/07, 11 October 2016.

on are additional and not alternative requirements to probable cause of committing a crime.

343. *There is thus a need to replace the first "or" in the second line of the English text by "and probable cause that*".

Article 175

344. Paragraph 3 deals with the situation of an arrested person being taken to a police station or any other law enforcement body. However, it does not address the possibility of an arrested person being transferred from one station or body to another. In such a case, there should not only be the observance of the recording requirements in this Article but there should also be provision for the receiving station or body to once again inform of the rights set out in Article 174(1) and to notify the person's legal representative about the transfer.

345. *There is thus a need to include such requirements in a new paragraph to be added to this provision.*

346. Paragraph 4 deals with a ground for releasing an arrested person and, as such, would be more appropriately located in Article 176. However, it is unclear what is understood by the ground "if a record of arrest has been prepared with a substantial violation that worsen the person's legal status".

347. *It would thus be appropriate to locate paragraph 4 at the beginning of Article 176. There is also a need to clarify the meaning of the ground "if a record of arrest has been prepared with a substantial violation that worsen the person's legal status" through a note similar to that being suggested above*[113] *for Article 72.*

Article 176

348. The grounds for release in this provision are generally appropriate but, as in other provisions, the meaning in sub-paragraph 1(e) of "the criminal procedure law was substantially violated during the arrest" is unclear.

349. *There is thus a need to clarify the meaning of "substantially violated" in sub-paragraph 1(e) through a note similar to that being suggested above for Article 72.*

350. In addition, in view of the obligation in Article 56(1)(b) to inform victims about the release of a perpetrator, it would be appropriate in cases involving alleged violence against women for this provision to include a requirement to notify the alleged victim of such violence about any release of the defendant, accused.

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

Article 177

352. In view of the defendant, accused's right to respect for private life under Article 8 of the ECHR, it would be inappropriate for families, diplomatic missions and consular offices, as well as places of employment, to be notified without her/his consent unless

[113] See paras. 221-222 above.

s/he is not legally competent to make such a decision or there is some other compelling justification.[114]

353. Furthermore, it is important to keep in mind that the obligations in the two paragraphs are discrete and not alternatives. This is something that could be reinforced by inserting "also" at the beginning of paragraph 2 and "additionally" after "shall" in its second line.

354. *There is thus a need to modify this provision in accordance with the suggestion in the preceding sentence.*

Article 180

355. It is consistent with Article 5(1) of the ECHR to detain a defendant, accused person in a medical facility rather than pursue criminal proceedings in those cases where s/he is believed to be of unsound mind. Nonetheless, the European Court would not accept that such a person should be detained in the absence of an assessment by a psychiatrist and of there being an emergency situation.[115] However, there is no provision for such an assessment in paragraph 1, which only refers to "a reasonable belief" regarding the defendant, accused's mental state and a motion for detention by the prosecutor or defence lawyer. It may be that the court ordering the detention would not form this reasonable belief in the absence of an assessment by a psychiatrist. Nonetheless, this is something for which express provision should be made.

356. *There is thus a need to provide that the reasonable belief in paragraph must be based upon a psychiatric assessment unless there is an urgent need for the person's detention, whether to protect her/him or other persons from serious harm.*

17. Chapter XIX. General Provisions on Court Hearing

Article 182

357. Paragraph 3 allows for sessions to be partially or fully closed for reasons that include the application of a special measure of protection under Chapter IX. However, there is no provision for a lesser measure than closure, such as according anonymity to a witness.

358. The need for anonymity is, according to the European Court, a matter to be determined by the court within the context of the proceedings before it.[116] It should not, therefore, be an automatic consequence of the application of special measures of protection, which is a matter – under Article 68(2) – for a prosecutor to determine with the consent of the General Prosecutor of Georgia or deputy.

359. Any decision to protect the anonymity of a witness must be justified by reasons which are both relevant and also sufficient in each case to ensure that the interests of a witness properly outweighs those of the defendant, accused. It cannot, therefore, be just the test

[114] As stipulated in Rules 27 and 32(2) in the Appendix to Recommendation Rec(2006)13.
[115] See, e.g., *Varbanov v. Bulgaria*, no. 31365/96, 5 October 2000.
[116] *Visser v. Netherlands,* no. 26668/95, 14 February 2002.

used for special measures of protection, namely, the risk to life or physical or psychological wellbeing.

360. Moreover, although special measures of protection may be applied to police officers, the European Court has made it clear that, as the "position of a police officer is to some extent different from that of a disinterested witness or a victim" on account of her/his close link with the prosecution, the use of an anonymous police witness 'should be resorted to only in exceptional circumstances'.[117]

361. Furthermore, not even anonymity may be necessary in some cases where there are arrangements to screen witnesses from the public - and even the defendant, accused - while they are giving evidence.

362. Both anonymity and screening may also be an appropriate means of safeguarding the interests of vulnerable witnesses.

363. *There is thus a need for this provision to include the possibility of conferring anonymity on witnesses and of screening them while they give evidence. However, this should not follow automatically from the application of special measures of protection or be dependent upon them being applied.*

364. Moreover, the use of measures such as anonymity or screening must still be subject to the fundamental right to a fair trial under Article 6 of the ECHR. In particular, while Article 6 does not preclude reliance on information given by anonymous witnesses at the investigation stage, any subsequent use of anonymous statements as a basis for a conviction would be subject to the same requirements for considering the testimony of witnesses who do not appear at the trial.[118]

Article 184

365. This provision allows for a case to be heard by a substitute judge appointed by the presiding judge without there being any need for there to be a rehearing of evidence heard in the absence of that substitute judge. As such, this derogates from the general requirement in Article 183 that evidence be reheard where is a replacement for a judge who cannot participate in the case.

366. The failure to rehear evidence in the case of a substitution was held by the European Court in *Svanidze v. Georgia*[119] to be in breach of the principle of immediacy in the trial and thus in violation of Article 6(1) of the ECHR. This was because the judge had not heard the statements of the applicant's co-accused, the witnesses, and the experts which constituted key evidence for the applicant's conviction.

367. This ruling was based on the similar provision in the previous CPC, except that that provision did give a discretion to rehear evidence – albeit not exercised in the *Svanidze* case – but there is no such discretion in the present provision. As a result, there is even greater likelihood that there will be breaches of the principle of immediacy in future cases.

[117] *Van Mechelen and Others v.* Netherlands, no. 21363/93. 23 April 1997, at para 56.
[118] As to which, see paras. 508-513 below.
[119] No. 37809/08, 25 July 2019. An action plan or report for execution of this judgment is awaited by the Committee of Ministers.

368. *There is thus a need to qualify the power of substitution by a requirement that the defendant, accused consents to the appointment of the substitute judge on the basis that she/he is satisfied that this will not lead to her/him suffering any prejudice.*

Article 189

369. This provision envisages the possibility of the trial being held in the absence of the defendant, accused. A conviction on this basis is not necessarily incompatible with Article 6 of the ECHR. This will only be the case if the person tried *in absentia* is not able subsequently to obtain from a court which has heard her/him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that s/he waived her/his right to appear and to defend her/himself.[120]

370. Moreover, there must have been diligent efforts to give the defence, accused notice of the hearing concerned (e.g., requiring judges to make contact to the police and request legal assistance from foreign authorities to ascertain the applicant's whereabouts*)*, even though these might have proved unsuccessful[121] unless he or she had made him or herself unavailable to be informed[122].

371. However, this provision does not contain any arrangements regarding such efforts or any requirement for the court to be satisfied that these have been carried out.

372. *There is thus a need for these deficiencies noted in the preceding two paragraphs to be remedied in this provision.*

Article 191

373. Paragraphs 2-4 refer to a person's insanity or mental disorder being "established" but do not indicate how this is to be done. Insofar as the establishment of such a state leads to the deprivation of liberty of the person concerned, this is something that must be based on objective medical evidence. [123] It may be implicit that the provisions in Articles 181 and 182 are to be applied but this is not evident.

374. *There is thus a need to clarify that this is the approach to be followed under these provisions and, to the extent that it is not effected through reliance on Articles 181 and 182, to introduce such a requirement in them*.

18. Chapter XX. Initial Appearance of the Defendant, Accused in Court; Measures of Restraint

Article 197

375. The list of action to be taken by the judge does not include ensuring that the accused is legally represented and, where not, ensuring that the necessary arrangements for this are made. Although there is provision for establishing whether the defendant, accused understands the language of the proceedings, there is no corresponding obligation to provide for interpretation in the event of her/him not doing so. Moreover, this provision

[120] See, e.g., *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, at para. 82.
[121] See, e.g., *Colozza v. Italy*, no. 9024/80, 12 February 1985.
[122] See, e.g., *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008 and *Gakharia v. Georgia*, no. 30459/13, 17 January 2017 (a civil case).
[123] See, e.g., *Varbanov v. Bulgaria*, no. 31365/96, 5 October 2000.

does not also make a similar requirement regarding the position of a defendant, accused who has some impediment that prevents or restricts oral communication.

376. *There is thus a need to rectify the above omissions from this provision*.

377. The list does include – in sub-paragraph 1(e) - finding out if it is possible to conclude a plea bargain and, if so, making a decision in this respect. Such action seems far too premature and could well lead to undue pressure on a defendant, accused to conclude such a bargain. In this respect, it is recalled that the defendant, accused will, at most, have been aware of the charge for 72 hours, may not have had the assistance of a lawyer and certainly may not have had full disclosure of the evidence of her/his alleged involvement in the commission of the offence concerned.

378. Furthermore, the object of the first appearance before a court of someone who has been apprehended is, pursuant to Article 5(3) of the ECHR, to determine whether her/his deprivation of liberty should be continued. It would be appropriate to retain this question, together with the check as to the possibility of her/his having been subjected to any treatment contrary to Article 3 of the ECHR, as the sole focus of the proceedings under this provision.

379. *There is thus a need to delete sub-paragraph 1(e*).

Article 198

380. There is a serious omission from this provision, namely, there is no requirement to establish that there is a reasonable suspicion that the defendant, accused committed the alleged offence, which is a prerequisite for the imposition of any measure of restraint consistent with Article 5(3) of the ECHR.[124] The court must be satisfied on this matter before considering any issues relating to the imposition of a measure of restraint.

381. Moreover, while the grounds for imposing a measure of restraint are consistent with the requirements under Article 5(3) of the ECHR, there is a need for the prosecutor to establish that they are strongly substantiated.[125] Insofar as the court is not satisfied on this point, it should order the release of the defendant, accused. The formulation of paragraph 2 – with its use of the phrase "reasonable assumption" – does not really convey the need for substantiating the existence of one or more grounds, whereas this is required in paragraph 3 in respect of the risk being addressed by a particular measure of restraint.[126] In addition, while there is a requirement in paragraph 4 to consider

[124] See, e.g., *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014 and *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.

[125] See, e.g., *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

[126] *Cf*. also the formulation in Article 206(6) as to the substantiation for a change in a measure of restraint. See also *Patsuria v. Georgia*, no. 30779/04, 6 November 2007 in which the European Court found a violation of Article 5(3) in part because of the failure to justify a ground relied upon for detention by reference to the specific circumstances of the case. See also the finding of the European Court in *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017: "34. In its subsequent decision, of 7 October 2013, the Kutaisi City Court briefly noted that the applicant had not pointed to any new facts or evidence, but had merely referred to the reasons set out in the initial decision to place the applicant in pre-trial detention. It thus entirely disregarded the passage of time and made it clear that it was for the applicant to show that his detention was no longer justified (see paragraph 51 above). However, under Article 5 § 3 of the Convention it is incumbent on the authorities, rather than the detainee, to establish the persistence of reasons justifying continued pre-trial detention (see *Ilijkov*, cited above, § 85, and *Bykov v. Russia* [GC], no. 4378/02, § 64 *in fine*, 10 March 2009). As already noted, even if

whether a less severe measure of restraint might be appropriate, there is no specific requirement for the court to satisfy itself that the ground for imposing any measure of restraint actually exists.

382. *There is thus a need to revise this provision so that (a) the court must be satisfied that (i) there is a reasonable suspicion that the defendant, accused committed the alleged offence and (ii) one or more of the grounds for imposing a measure of restraint have been substantiated and (b) the prosecutor has the burden of establishing both such a reasonable suspicion and the substantiation of the grounds necessitating a measure of restraint to be applied.*

383. Furthermore, the formulation of the last ground referred to in paragraph 2 – "will commit a new crime" – could give the impression that any crime is intended rather than one of a similar nature to the one alleged.[127]

384. *There is thus a need to modify this phrase so that it reads "a further crime similar to the one alleged".*

Article 199

385. This provision distinguishes between the measures of restraint listed in paragraph 1 and the other measures that can be applied alongside them – listed in paragraph 2 - when the latter are recognised in other jurisdictions as a potentially sufficient means to prevent the occurrence of the grounds referred to in Article 198(2).[128] This structure is an unnecessary limitation on the capacity of the courts to determine the measures that will be sufficient for this purpose in a particular case after having made a proper evaluation of the risks concerned.

386. *There is thus a need to eliminate the distinction between the two sets of measures and authorise the courts to use those of them considered appropriate for the circumstances of a particular case, as well as to require them to have regard to this possibility before resort to any measure of restraint involving deprivation of liberty*.

387. It is, of course, appropriate to be concerned about the risks of firearms being used by a defendant, accused, as is suggested in paragraph 3. However, the limitation on taking action on this account to cases of violence against women and/or domestic violence or domestic crime is not compatible with the positive obligations under Articles 2 and 3 of the ECHR.

388. Where there is evidence of a risk that a defendant, accused might use a firearm against identified persons, the seizure of it to protect them from harm would always be an

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such reasons exist when that detention is first imposed, they can by their very nature change over time. The reasons given by the Kutaisi City Court on 7 October 2013 did not therefore suffice to justify the continuation of the applicant's detention. 235. In view of the above, the Court concludes that, at least from 25 September 2013 onwards, the applicant's pre-trial detention ceased to be based on sufficient grounds, in breach of Article 5 § 3 of the Convention".

[127] See, e.g., *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009.

[128] See e.g., *Ciancimino v. Italy*, no. 12541/86, 27 May 1991 (compulsory residence order), *Poninski v. Poland* (dec.), no. 28046/95, 10 February 2000 (police supervision) and *Scmid v. Austria*, no. 10670/83, 9 July 1985 (surrender of passports).

appropriate response.[129] Moreover, the language of paragraph 2 is, in this respect, rather tentative – "shall consider the issue of" – and it would be more appropriate for seizure to follow automatically once the risk has been established.

389. *There is thus a need to revise paragraph 3 accordingly*.

Article 200

390. Paragraph 5 entitles a prosecutor to seek a more severe measure of restraint than bail if the defendant, accused fails, within the specified period, to deposit the bail amount to the deposit account of the National Bureau of Enforcement, or to deposit immovable property. However, there is no requirement for the court to investigate the reasons for the failure and, in particular, whether this was a deliberate act or due to the lack of the defendant, accused's means. In the absence of regard to these considerations, the court will not be fulfilling the requirement under Article 5(3) to conduct the proceedings with "special diligence". [130]

391. *There is thus a need to specify in paragraph 5 that the court considering such a motion must investigate the reasons for the failure to deposit the bail amount*.

392. The possibility envisaged in paragraph 6 of imposing detention until a deposit of at least 50% of the amount required where bail is selected as a measure of restraint has the potential to lead to a violation of Article 5(3). This is because of the likelihood that this requirement reflects a situation in which the amount requested for bail might have been too high on account of the necessary care not having been taken in selecting it.

393. This will certainly be the case where there is a prolonged period of detention after bail has been granted,[131] which seems to be a not infrequent occurrence in Georgia.

394. Although it is not necessarily inappropriate to refuse releasing someone until bail is deposited, particularly where – as the Court of Appeal has indicated[132] – there is good reason to believe that the defendant, accused, once released, will not deposit the bail or commit such an act that necessitates detention before the bail is paid. However, the refusal of release tends to be used without such circumstances being present,[133] and also seems to be being increasingly used[134].

395. Furthermore, the present practice seems to lead to too high an amount being sought, possibly encouraged by the reference to the possibility of paying less than the full amount.

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[129] See, e.g., *Bljakaj and Others v. Croatia*, no. 74448/12, 18 September 2014.
[130] See, e.g., *Gafà v. Malta*, no. 54335/14, 22 May 2018**.**
[131] *Ibid***.**
[132] Tbilisi Court of Appeals, Judgment #1ბ/577–17 (2017–04–25).
[133] Thus, in an interview with the Georgian Young Lawyers' Association, it was stated: "Unconditional release of a detainee should be based on legal grounds. When we see that the grounds for the detention are neglected, we immediately release the detainee, but when we lack the legal mechanism for unconditional release, the accused has to be remanded in custody until the bail is secured. In this way, the legislator wished to provide some leverage to ensure the payment of the bail. I cannot see a particular problem with it ..."; *Application of Pre-trial Detention Measures*, GYLA, 2020, pp. 36-37.
[134] Thus, bail was secured with detention in 34% of cases in 2017 and in 40% of them in 2018; reply №P-740-19 of the Supreme Court of Georgia of 16 April 2019.

396. It would be more appropriate to provide simply that a defendant, accused is to be released upon receipt of the amount of bail selected and for that amount to be genuinely within the means of her/him.

397. In addition, there should be presumption in favour of the defendant, accused's statement as to her/his disposable income which can only rebutted through the prosecution adducing evidence to the contrary.

398. *Paragraph 6 should be revised in line with the suggestions in the preceding two paragraphs.*

Article 202

399. Although it is undoubtedly the case that an agreement not to leave or to behave properly would not be appropriate in respect of all alleged offences, the fact that it is limited to crimes carrying imprisonment of not more than one year seems unduly restrictive and certainly precludes full account of the factors enumerated in Article 200(11).

400. *There is thus a need to consider extending the applicability of this measure of restraint*.

Article 205

401. As previously noted,[135] the formulation of the ground referred to in sub-paragraph 1(c) – "committing a new crime" - could give the impression that any crime is intended rather than one of a similar nature to the one alleged.

402. *There is thus a need to modify this phrase so that it reads "a further crime similar to the one alleged to have been committed".*

403. Notwithstanding the approach of the European Court,[136] this provision does not recognise the possibility of 'preservation of public order' as a relevant ground for the application of detention as a measure of restraint. This ground can, however, be regarded as relevant and sufficient only if it is based on facts capable of showing that the defendant, accused's release would threaten public order. In addition, detention would continue to be legitimate only if public order remained threatened; its continuation cannot be used to anticipate a custodial sentence

404. This omission is potentially problematic since, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying the need for the defendant, accused's pre-trial detention.

405. *Consideration should thus be given to introducing preservation of public order as a ground for applying detention as a measure of restraint.*

Article 206

[135] See paras. 383-384 above.

[136] The protection of public order was seen as particularly pertinent in a case involving charges of grave breaches of fundamental human rights, such as war crimes against civilian population; *Milanković and Bošnjak v. Croatia*, no. 37762/12, 26 April 2016.

406. Although there is an overall limit of nine months on the length of detention under Article 205(2), this is a period which in the particular circumstances of a case could be regarded by the European Court as unreasonable and thus contrary to Article 5(3) of the ECHR. It is important that, where detention is continued, there should be special diligence on the part of the prosecution in dealing with the case and scrutiny as to whether this exists ought to be a factor to be considered when dealing with a motion to annul detention as a measure of restraint.[137] Insofar as it is not satisfied that such diligence is being shown, the court ought to annul detention as a measure of restraint. It cannot be assumed that a court will look for such diligence simply because there is a periodic obligation to review detention.

407. *There is thus a need to introduce into this provision a requirement as to the need for special diligence in the conduct of the proceedings to have been established where a motion to annul detention as a measure of restraint is being considered.*

408. It is also important that a decision concerned with applying or continuing a measure of restraint should not be in a template form containing pre-printed reasoning couched in abstract terms.[138] Nor should a measure be continued for the same reasons that it was initially imposed without demonstrating why those reasons are really still applicable.[139]

409. This is especially crucial given that in recent years there has been a significant increase in the use of detention as a measure of restraint[140] and that the monitoring of the imposition of detention has suggested that the rulings can be vague, unreasoned and lacking references to the specific factual circumstances of the case[141].

410. *There is thus a need for the reference to a "reasoned ruling" in paragraph 5 be amplified by a phrase such as "that takes account of the specific circumstances of the case, including the extent that these may have changed since a previous decision".*

19. Chapter XXI. Plea Bargain

Article 210

411. There is no provision in paragraph 1^1 as to the form in which a plea bargain might be offered, notwithstanding that paragraph 1 requires that the preliminary agreement be in writing. It seems that, in practice the defendant, accused is not guaranteed that the terms which previously offered verbally by the prosecution will be the ones in that agreement.

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[137] See, e.g., *Patsuria v. Georgia*, no. 30779/04, 6 November 2007 and *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, 13 January 2009, in which such diligence was found not to exist.

[138] See, e.g., *Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010, *Janiashvili v. Georgia*, no. 35887/05, 27 November 2012 and *Mindadze and Nemsitsveridze v. Georgia*, no. 21571/05, 1 June 2017, in which such reasoning contributed to the finding of a violation of Article 5(3) of the ECHR.

[139] As was found not to have happened in *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

[140] Thus, in 2016 detention was used in 29% of cases but in 2017, 2018 and 2019 the respective percentages were 34%, 43% and 47.2%; statistics published by the Supreme Court of Georgia on the imposition of preventive measures available on its website - http://www.supremecourt.ge).

[141] See, *Application of Pre-trial Detention Measures*, report of the Georgian Young Lawyers' Association, 2020, p. 20.

412. Moreover, in practice the terms of the agreement may be set by the prosecutor before a lawyer is assigned to the defence so that there is really no scope for negotiation as to the terms of the agreement.[142]

413. *There is thus a need for paragraph 1^1 to require that the offer is in writing so that there is a clear record of the process and nothing can be effectively settled before the defendant, accused has the assistance of a lawyer.*

414. The possibility of release from civil liabilities in exceptional cases envisaged by paragraph 1^3 would not be prejudicial to the rights of the victim as any such liability would thereafter be borne by the State. However, there are no criteria to guide what should be regarded as "exceptional circumstances" and this could lead to situations in which the gravity of an offence that has been committed is not taken sufficiently seriously.[143] The risk of such a perception would be averted by articulating the nature of the circumstances that are to be regarded as "exceptional".

415. *There is thus a need to identify the criteria for treating circumstances as "exceptional".*

416. Although it is appropriate for paragraph 3 to require account to be taken of the public interest when deciding whether to request a plea bargain, it would also be appropriate for a prosecutor to have regard to the rights of the victim as well as the positive obligations arising from the right to life and the prohibition on torture and inhuman and degrading treatment. This is because the conclusion of a plea bargain could be inconsistent with these obligations if the sanction imposed did not reflect the gravity of the conduct concerned.[144]

417. Moreover, in view of the stipulation in Article 212(2)(a) that a judge must be satisfied that a plea bargain has not been entered into without torture, inhuman or degrading treatment, etc., it would also be appropriate for the prosecutor to be satisfied that the apparent willingness of a defendant, accused to enter a plea bargain has not been influenced by such conduct.

418. *There is thus a need for paragraph 3 to be revised to address these concerns by requiring that the prosecutor be satisfied that the punishment to be imposed reflects the gravity of the conduct concerned and that the defendant, accused has not entered into the plea bargain as a result of torture or inhuman or degrading treatment or punishment.*

419. The stipulation in paragraph 4 that a plea bargain may not be entered into without the direct involvement of the defence lawyer does not make it clear that that involvement should be from the outset of any discussions about concluding such a bargain. This is crucial to the acceptability of plea bargains.[145] Not making this clear could be problematic as a belated involvement might restrict the extent of the advice that a defendant, accused receives and the willingness of the lawyer to suggest that the

[142] See E. Tsimakuridze, *Refusal of an Accused on the Right of Hearing a Case on the Merits*, 2019, at p. 42.
[143] See, e.g., *Gafgen v. Germany* [GC], no. 22978/05, 1 June 2010 and *Austrianu v. Romania*, no. 16117/02, 12 February 2013.
[144] See, e.g., *Dimitrova and Others v. Bulgaria*, no. 44862/04, 27 January 2011, *Enukidze and Girgvliani v. Georgia*, no. 25091/07, 26 April 2011 and *Eremia v. Republic of Moldova*, no. 3564/11, 28 May 2013.
[145] See *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014.

defendant, accused is unwise to maintain the consent to conclude a bargain that s/he has already given. The specification in Article 45 that it shall be mandatory to have a defence lawyer "if negotiations on the conclusion of a plea bargain with the defendant, accused are in progress" as that does not really cover suggestions made by the prosecution, as discussed above.[146]

420. *There is thus a need for paragraph 5 to provide for the involvement of the defence lawyer from the outset of any discussions about a plea bargain*.

421. It is not unusual for an element in the conclusion of plea bargains to concern, in addition to the sentence to be imposed, ancillary matters such as the circumstances in which it is to be served. These ancillary matters are not necessarily entered into the plea bargain record and fulfilment of them may be a matter of dispute subsequently.[147]

422. *There is thus a need for it to be required that all such ancillary matters be included in the record of the plea bargain and paragraph 6 should be amended accordingly*.

Articles 212 and 213

423. The considerations set out in paragraph 2 about which the court must be sure before approving a plea bargain are all relevant. However, these only deal with the issue from the perspective of the rights of the defendant, accused. They do not involve any consideration of the rights of the victim or of the public interest factors referred to in Article 210(3), which are inextricably linked to the appropriate approach to be taken in a sentencing decision. Similarly, there is no requirement in Article 213 for the decision to approve a bargain to take into account any of these factors but only to decide whether the proposed sentence is "lawful and fair".

424. However, Article 6(1) of the ECHR is applicable throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed.[148] It is thus inappropriate for matters clearly relevant to a sentencing decision to be settled by the prosecutor and not the judge.

425. *There is thus a need for Article 213 to provide that any approval by a court of a plea bargain must be based on its assessment of its appropriateness in the light of the rights of the victim and the public interest as defined in Article 210(3).*

426. Although it is appropriate for paragraphs 4 and 5 to provide for the annulment of a plea bargain where its terms have been violated by the defendant, accused, there should also be a possibility for the defendant, accused to be able to seek redress where the authorities have not complied with all the terms on which a plea bargain was concluded.[149]

427. *There is thus a need for this possibility also to be included in Article 213*.

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[146] See paras. 411-413.
[147] See, e.g., *Jashi v. Georgia* (dec.), no. 10799/06, 9 December 2008 and *D.F. v. Latvia*, no. 11160/07, 29 October 2013.
[148] See, e.g., *Phillips v. United Kingdom*, no. 41087/98, 5 July 2001, at para. 39.
[149] See para. 421 above.

Article 218

428. The provision for full release of a defendant, accused from liability or sentence or a revision of the sentence of the convicted person as a result of her/his collaboration with investigative authorities establishing the identity of an official who has committed a crime and/or of a person who has committed a serious or particularly serious crime is problematic in two respects.

429. In the first place, although there cannot be full release from a sentence for crimes provided for by Articles 144 [1]-144[3] of the Criminal Code, there is no requirement to have regard to the rights of the victim or to consider whether the release in respect of sentence for other crimes would be inconsistent with the gravity of the conduct of the defendant, accused or convicted person concerned.

430. Secondly, the specification in paragraph 4 that a plea bargain on special collaboration is to indicate that, if the defendant, accused/convicted person does not collaborate with investigative authorities, the agreement shall be considered void has the potential to lead to a violation of Article 6(1) in respect of official or other person whose identity was established through the collaboration. This is because this would give the impression that any testimony given by the defendant, accused/convicted person would have been manipulated.[150]

431. *There is thus a need to amend Article 218 so as (a) to require that there be no decision on full release without considering whether this would be inconsistent with the rights of the victim and the gravity of the conduct of the defendant, accused or convicted person concerned and (b) to specify the duty of collaboration does not extend to the giving of testimony in any proceedings against the official or other person whose identity has been established.*

Article 219

432. Paragraph 7 provides for the possibility of the recognition of evidence as inadmissible to be appealed but there is no similar possibility of appealing against the recognition of evidence as admissible (i.e., where a motion that evidence should be inadmissible has not been upheld). As a result, there is effectively an advantage for the prosecution over the defence as regards the evidence that may be considered.

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[150] See *Navalnyy and Ofitserov v. Russia*, no. 46632/14, 23 February 2016, in which the European Court stated that "the separation of the cases, particularly X's conviction with the use of plea-bargaining and accelerated proceedings, compromised his competence as a witness in the applicants' case. As noted above, his conviction was based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it was not required that that account be verified or corroborated by other evidence. Standing later as a witness, X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of events. Everything above confirms the applicants' argument that the procedure in which evidence had been obtained from X and used in their trial had been suggestive of manipulation incompatible with the notion of a fair hearing" (para. 109). See the similar finding in *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, no. 75734/12, 19 November 2019. *Cf. Topaloglu v. Georgia* (dec.), no. 25406/08, 11 December 2018, in which no lack of fairness was found where the applicant had an opportunity to effectively challenge the evidence of a co-accused who had not been granted complete immunity, but only a reduction in his prison term, in exchange for cooperation and their cases had not been separated so that no issue arose as to whether the principle of *res judicata* applied to facts admitted in a case to which the applicant was not a party.

433. *There is thus a need to provide in paragraph 7 that the right of appeal in it applies to the recognition of evidence as admissible or inadmissible.*

20. Chapter XXII. Preliminary Hearing

Article 221

434. The conferment by paragraph 1 of the responsibility for compiling a list of prospective jurors on the judge – as opposed to that of conducting the selection of jurors and substitute jurors from that list - which is envisaged by this provision seems to be imposing an administrative task on members of the judiciary that detracts from their prime role of adjudication both as regards its character and the time that it will involve.

435. *There is thus a need for consideration to be given to entrusting this particular responsibility to an administrative office working under the supervision of the relevant court.*

436. Paragraph 1 also provides that that this list "shall include not more than 300 candidates", which seems rather imprecise in at least the English text since that could mean any figure from 1 to 299. This is obviously not what is intended. However, there is no basis for determining what number of candidates is actually required, particularly as there does not seem any reason why 300 possible candidates could not be identified from amongst those on the unified list of citizens.

437. *A precise number of candidates should thus be a specified in this provision.*

438. The specific function of the questionnaire that is to be sent to prospective jurors that is to be "approved by the judge after consultation with the parties" is not identified in paragraph 1 or in other provisions. Given the involvement of the parties in its formulation, it might be thought to relate to issues such as incompatibility and circumstances excluding participation pursuant to Articles 30 and 59 respectively but it might also usefully address the issue of eligibility under Article 29 and whether or not there exist reasons entitling the person concerned to refuse to act as a juror.

439. However, it is to be noted that paragraph 6 provides that a prospective juror is only to inform the court about reasons for challenge within 2 days after the receipt of the court notice", i.e., after the process of completing the questionnaire has already occurred. Furthermore, there is no comparable obligation regarding eligibility and circumstances excluding participation and no indication of any possibility of indicating the existence of grounds for refusal to act as a juror.

440. In the absence of a specified function there is no basis on which a judge can determine the appropriateness of particular questions and thereby determine whether or not they should be approved. Moreover, there is no indication as to whether there are any sorts of questions that may not be asked, such as the partial prohibition regarding personal details and professional and commercial secrets found in paragraph 5 of Article 223. It may be that these details and secrets may not be relevant or necessary at this stage of the process but it ought to be clarified as to whether there are any matters that should not be addressed in the questionnaire.

441. *There is thus a need to specify the exact function of the questionnaire that is to be completed by prospective jurors, so as to indicate that it is to cover eligibility and refusal to act as a juror and to identify what sort of issues, if any, may not be addressed in it. However, the most relevant issues to address would be concerned with whether the prospective jurors: (a) know the defendant, accused or others who might be involved in the proceedings; (b) have any specific familiarity with circumstances relating to the alleged offence(s); (c) have formed a definitive view about the responsibility of the defendant, accused in respect of the alleged offence(s) and, if so, what has led to this view being reached; and (d) are affected by any factors that might affect their ability to serve as a juror during the expected duration of the trial?*

442. *Furthermore, there is also a need to consider whether the duty to inform the court under paragraph 6 should extend beyond matters concerning incompatibility. In particular, it would be appropriate for a prospective juror to be required to specify at this point any grounds on which s/he might be entitled to refuse to act as a juror. It might be found useful for the questionnaire to draw upon the model set out in The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up.*[151]

443. The second and third sentences of paragraph 3 are concerned with challenging an "unlawful decision or action of the presiding judge of the jury selection trial". However, such a decision or action is more likely to be concerned with decisions or actions pursuant to Articles 222-224 than ones taken under Article 221. The location of these two sentences would, therefore, be more appropriately located after those provisions.

444. *There is thus a need to change the location of these two sentences accordingly*.

445. Paragraph 4 provides for the list of those selected as prospective jurors to be sent to the parties, which is appropriate given their subsequent role in the jury selection session. The importance of this role would suggest that this requirement should be regarded as mandatory so that non-compliance with it will render invalid the jury selected except where neither party has objected to not receiving this list. However, there is no provision specifying that this would be the consequence of such non-compliance.

446. *There is thus a need to confirm that this is the correct understanding of this requirement*.

447. Paragraph 5 provides for a notice to attend the jury selection session to be sent to not more than 150 prospective jurors out of the total number of those on the list. The use of "not more than" is once again rather imprecise. The potentially high number that may be summoned is presumably based on the assumption that not all will attend[152] and that a good proportion might be subject to the incompatibility requirements, excluded from participation or entitled to refuse to serve.

448. Actual experience with jury selection may, of course, lead to the conclusion that such a high number could be unnecessary and that the administrative burden involved in

[151] At chapter 23-2; https://www.judiciary.uk/wp-content/uploads/2020/07/Crown-Court-Compendium-Part-I-July-2020-09.10.20.pdf.

[152] Article 222(2) specifically refers to the possibility of less than 50 prospective jurors appearing at the jury selection session.

contacting so many prospective jurors could be alleviated by summoning considerably less than 150. However, there are no criteria determining the actual number to be summoned and there is the unnecessary risk that the summoning of less than 150 will be challenged as constituting an unlawful jury selection decision.

449. *There is thus a need either to specify a precise number or to indicate that the court is entitled to summon the number of prospective jurors considered appropriate in the circumstances of the particular case. Furthermore, the experience of summoning prospective jurors should be monitored so as to guide this process should the discretion to summon less than 150 be retained.*

450. Liability may be incurred by a prospective juror under Article 236(3) if s/he does not attend the jury selection session as is required by paragraph 5 but there is no indication in this provision as to what, if any, grounds might be relied up to provide an excuse for non-attendance – thereby avoiding such liability - and how the existence of any such excuse is to be communicated. Certainly, illness or a family death, as well as apprehension by the police should be considered as legitimate excuses for non-attendance and there ought to be appropriate provision to that effect.

451. *There is thus a need to specify either what excuses for non-attendance there may be, together with the manner in which these are to be communicated to the court, or which existing provisions can be relied upon for this purpose.*

452. This provision does not require any information about serving on a jury to be sent to prospective jurors with the questionnaire that – pursuant to paragraph 1 - they are required to complete. Sending some sort of guide to prospective jurors – covering issues such as eligibility to serve on a jury, incompatibility, circumstances excluding participation, the right not to serve, what to expect at the jury selection session, how to prepare for jury service, the trial process, the rights of jurors, a glossary of terms used in the trial process that might be helpful and how their social guarantees are to be obtained[153] – would help them understand what is expected of them and thereby make them better equipped to undertake jury service or, if appropriate, to indicate why they should not be expected to serve as a juror in the particular case for which they have been summoned.

453. *There is thus a need to require a guide for prospective jurors to be sent to them with the questionnaire to be completed at the beginning of the jury selection process.*

Article 222

454. The authorisation in paragraph 2 to start the jury selection process "even if less than 50 prospective jurors appear" is problematic in that this formulation is again imprecise since it could mean any number between 1 and 49. The former number would render the process pointless and nothing less than 30 would be the minimum needed in those cases where the charges involved stipulate life imprisonment and so at least 20 peremptory challenges could be made under Article 223(10).

[153] See, e.g. the one used in Scotland at: http://www.scotcourts.gov.uk/docs/scs---court-users/guide_to_jury_service_in_the_high_court_and_sheriff_court.pdf?sfvrsn=2. N.B. this guide covers service on juries in civil as well as criminal cases.

455. *There is thus a need to be more specific in this provision as to the minimum number of prospective jurors that would be required in order for a jury selection session to proceed. A requirement of at least 50 would seem necessary for the selection process to have some chance of having a successful outcome and should be so specified*.

456. Paragraphs 3(d) and 4 both provide for the prospective jurors to be informed about the applicable law to be used during the case hearing, with the latter adding that the instruction concerning this is to be prepared with the participation of the parties.

457. Such a requirement does not seem necessary or appropriate at this early stage of the proceedings as the purpose of the jury selection process is limited to the selection of jurors and substitute jurors and should not be entering into the substance of the trial process. Moreover, it would be more relevant for the issue of instructions to the jury about the applicable law to be used during the case hearing to be addressed once this has actually been selected and this is dealt with in Article 231.

458. *There is thus no need to retain paragraphs 3(d) and 4 and they should be deleted.*

459. However, there is no specific indication that the presiding judge should address prospective jurors as to the requirements concerning eligibility, incompatibility, circumstances excluding participation and the right to refuse to act as a juror. This is unfortunate as making these requirements clearer during the jury selection session could lead to any problems regarding the first three issues being resolved at any early stage and could also ensure that unjustified claims to refuse to act are not made or pursued.

460. *Paragraph 3 should thus require the presiding judge to address prospective jurors on these four issues.*

Article 223

461. The arrangements in this provision regarding challenge and self-challenge of prospective jurors are, as has already been noted,[154] somewhat unsatisfactory in that these concepts might cover eligibility, incompatibility and circumstances excluding participation pursuant to Articles 29, 30 and 59 but this is not definite in view of the formulation used. Moreover, these two concepts are quite inappropriate to deal with the refusal to act as a juror.

462. *There is thus a need to specify that "challenge" and "self-challenge" is concerned with Articles 29, 30 and 59. Furthermore, there is a need to introduce a provision that deals specifically with the validity of any claim be a prospective juror that s/he is entitled to refuse to act as a juror.*

463. Although the possibility of a peremptory challenge to prospective jurors envisaged in paragraphs 1 and 10 is a feature of many criminal justice systems using juries, it should be noted that this possibility was abolished in England on account of this being

[154] See paras. 194-197, 438-441 and 459-460 above.

incompatible with the notion of random selection of jurors, the fundamental importance of which has been emphasised by the European Court.[155]

464. Moreover, the need for it is questionable given the provision for both asking prospective jurors to complete a questionnaire and questioning them in the jury selection session. Furthermore, the ability to make peremptory challenges means that it is not possible to prevent selection being to some extent based on the grounds supposedly prohibited in paragraph 6.

465. *There is thus a need for consideration to be given to the need to retain peremptory challenges in the light of experience regarding their use following the wider use of jury trials.*

466. Paragraph 9 provides for an adjournment of no more than 10 days for the purpose of inviting other prospective jurors where those first summoned have proved insufficient on account of challenges to select "all jurors" or "the number of prospective jurors on the list is less than 14". In the first situation those summoned will be the remainder of those on the initial batch of "no more than 300 candidates" whereas the latter situation concerns the possibility that a jury cannot be constituted from even them and so a further 100 candidates have to be identified.

467. An adjournment of 10 days might, when taken with the notice effected through being sent the questionnaire envisaged in Article 221(1), be enough to allow those concerned to rearrange valid commitments such as hospital appointments or to seek a determination as to whether they have the right to refuse to act as a juror.

468. However, such an adjournment would not really allow for compliance with the provisions on the prospective jurors sending and returning the questionnaire and the responses being forwarded to the parties. This is because it does not take account of the need for at least a day to elapse between the questionnaire being sent to and received by the prospective jurors and at least another day between them returning it to and being received by the judge before s/he forwards it to the parties within 5 days of its receipt. In the circumstances, a minimum adjournment of 12 days seems necessary and, in practice, only a longer one is likely to be sufficient for the purpose of this process.

469. *The period prescribed for an adjournment where a further 100 candidates have to be summoned should thus be modified to reflect the practicalities involved*.

21. Chapter XXIII. Hearing on the Merits

Article 226

470. The stipulation in paragraph 3 that the "composition of the jury shall ensure its independence and impartiality" is entirely appropriate. However, the location of this statement would be more appropriate at the beginning of Article 223.

[155] See, e.g., *Pullar v. United Kingdom*, no. 22399/93, 10 June 1996, at para. 40. Such a procedure will not, however, preclude the exercise of some discretion as regards the acceptance or refusal of excuses by persons included in the jurors' lists; *Kremzow v. Austria* (dec.), no. 12350/86, 5 September 1990, at para. 1.

471. *This paragraph should thus be re-located accordingly.*

Article 231

472. The content of this provision is not generally problematic but the manner in which the particular requirements set out in the *Jury Instructions* for instructing jurors has been elaborated does require further attention.

473. The final instructions set out the offences regarding which the guilt of the defendant, accused is to be determined and the elements required to constitute those offences, as well as the considerations that would change one matter alleged from premeditated murder to murder committed under sudden, extreme emotional excitement. In addition, there is a reminder as to the approach required for the evaluation of the evidence and the burden of proof and the various responsibilities of jurors and an explanation as to the form of the verdict.

474. The way in which these issues are addressed is not inappropriate but, undoubtedly influenced by the requirement to be brief in Article 231 of the Criminal Procedure of Georgia, the matters requiring attention are not sufficiently addressed.

475. Thus, these instructions do not give any indication as to what evidence has been adduced by the prosecution as to the particular elements of each offence being fulfilled – including what facts might demonstrate that there was the necessary intent for premeditated murder or allow this to be inferred - and how the defence would dispute that that is the case with some or all. Yet this something that is crucial for the determination of any criminal charge.

476. Furthermore, while the issue of possible mitigation of one offence – premeditated murder - is discussed, there is no indication as to the basis on which the sudden, extreme emotional excitement is considered to be established in the circumstances of this case nor any consideration as to what defences might exist for the other offences alleged to have been committed and the evidential basis for them.

477. As a result, in the case used in this model, it would not really be possible to identify why the jurors would have reached any "Guilty" verdicts in respect of the offences charged, as is required under Article 6(1) of the European Convention.[156]

478. *There is thus a need to introduce into the model of instructions a discussion of the evidence that might support or negate the existence of liability for the different offences. Furthermore, for each offence, it would be appropriate to itemise each of the elements involved and ask the jurors whether they are satisfied that each of them has been fulfilled, indicating that only if they all have can they return a "Guilty" verdict.*

479. In addition, the model of instructions only deals with certain offences and a particular set of facts and there will obviously cases involving other offences and other factual situations. It has already been noted that there is a need to develop guidance as to the discrete elements required to constitute the other offences for which jury trial is available.

[156] See *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010 and *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016.

480. However, in addition it is likely that jurors will also need guidance on issues such as:

- what constitutes self-defence and any other defences to an offence that might be recognised under the law, as well as what circumstances relevant to a particular defendant, accused would need to be taken into account in establishing them;
- how to determine the respective liability of several defendants, accused who may be involved in the commission of one or more offences but whose degree of culpability may differ, in particular as regards the specific conduct which can be ascribed to each of the defendants, accused for this purpose;
- how to deal with evidence that is circumstantial rather than direct and, in particular, what weight can be attached to it in the particular circumstances of the case;
- how to determine whether or not certain evidence can be regarded as corroborating other evidence and the importance of this where there might be concerns about the latter, such as the motive of the person giving it (e.g., personal animosity or the requirement to testify pursuant to a plea bargain[157]) or the fact that it was not possible for the witness concerned to be cross-examined by the defence;
- how to evaluate any evidence given by children and other vulnerable witnesses, given that they may have found some questions difficult to understand or to answer and that they may blame themselves for what occurred or be afraid or embarrassed to talk about certain matters relevant to the case;
- how to deal with inconsistencies between evidence given in court and statements made in the course of the investigation, indicating what considerations might make a change in position credible (such as allegations of ill-treatment or being in a stressful situation);
- how to consider whether the passage of time might have affected the reliability of the way in which witnesses may recall events about which they have testified, as well as how this might be a factor in the inability of the accused to remember particular details or to produce documents and other material evidence relevant to his or her defence;
- how to take account of a defendant, accused's confession which he or she has subsequently disputed as untrue or unreliable, albeit not for reasons that would have rendered it inadmissible;
- how to take account of a defendant, accused's good character (i.e., the absence of any previous convictions) and a witness's bad character (i.e., the existence of previous convictions), particularly as regards the credibility of any testimony he or she may have given;
- how to deal with expert evidence and, in particular, the factors to be considered in weighing such evidence (such as experience and standing), the need for caution for science and techniques still in their infancy or being called into question, the existence of factors that call into question an expert's impartiality and the points of dispute between two or more experts; and

[157] It should be noted that the *Jury Instructions* do not currently mention plea bargaining at all despite the specific duty to inform jurors about this in Article 237 of the Criminal Procedure Code of Georgia.

- how to take account of the limits in being able to identify someone from the use of fingerprints and other impressions, voice, DNA, visual images, facial mapping and other such techniques.

481. *There is thus a need to address these issues in a reformulation and development of the Jury Instructions*.

482. In addition, the restriction in paragraph 2 on making a cassation appeal in respect of the instructions if the right to submit a motion for making amendments and additions to the instructions is unduly restrictive since it assumes a high quality of legal representation.

483. *There is thus a need to allow a cassation appeal, regardless of whether such a motion has been submitted, in respect of a dispute as to whether the judge has properly directed the jury on a matter of law.*

484. Moreover, the reference in paragraph 3 to the presiding judge providing jurors with information as to the procedure for assessing all pieces of evidence only "briefly" seems inapt insofar as it concerns instructions to be given before a jury retires to deliberate on its verdict. This is because such evaluation may not only be a complex matter in the sort of cases that will be tried by a jury but its use in this context does not match the importance of this aspect of giving instructions to the jury.

485. *There is thus a need to limit the application of the word "briefly" in paragraph 3 to the giving of preliminary instructions to jurors.*

Article 232

486. The stipulations regarding the replacement by a juror with a substitute juror are generally appropriate.

487. In addition, this provision fails to take account of the possibility that, where there is a need to replace a juror on account of grounds for his or her challenge having been revealed or because s/he has violated the requirements of the CPC, the relevant failing may have resulted in a risk that this led to the other members of the jury becoming prejudiced. Such a risk either might be capable of being satisfactorily addressed by the presiding judge giving them specific directions or would require – where the circumstances suggest that these would not be sufficient – the entire jury to be discharged and a new one to be constituted.[158]

488. *There should thus be the addition to this provision of an express requirement for the presiding judge to advert to such a risk and to respond to it accordingly.*

489. Furthermore, there is a need for some provision that enables the presiding judge to carry out an inquiry as to whether there is actually a basis for concluding that grounds for a juror's challenge actually exist or that a violation by a juror of the requirements of the CPC has actually occurred.[159]

[158] This is a necessary conclusion from its finding that insufficient steps were taken to address a problem in *Sander v. United Kingdom*, no. 34129/96, 9 May 2000 and *Kristiansen v. Norway*, no. 1176/10, 17 December 2015.
[159] *Ibid*.

490. *There is thus a need for such a power to be introduced into this provision.*

Article 233

491. The stipulation that the initial appointment of the jury foreperson, as well as of any subsequent replacement, through the drawing of lots is not entirely inappropriate. However, this does not guarantee that the person so selected will be suitable or willing to perform this task. It might be better to allow the jury to retire and try to choose its foreperson, leaving the drawing of lots as a reserve possibility should this not be possible.

492. *There is thus a need to modify this provision so that the jury has itself a chance to choose its foreperson before resorting to the drawing of lots*.

493. Moreover, paragraph 3 refers to the need for a replacement "if the jury foreperson is dismissed" without indicating how such dismissal is to occur and the relevant grounds on which this should be based. Moreover, the reference to being "dismissed" does not seem to take account of the possibility of the jury foreperson chosen by lots wishing to stand down from this position and whether or not this would even be possible.

494. *There is thus a need to clarify what the notion of being "dismissed" covers and, if necessary, to introduce the possibility of a jury foreperson being able to resign. Furthermore, the grounds on which any dismissal can occur should be specified in this provision.*

Article 234

495. The terms of the oath to be taken by jurors seems to embody a contradiction in that it refers to the need to "take into consideration all lawful evidence" but at the same time suggests that the decision should be made on the juror's "inner belief as befits a fair person". The latter opens up the possibility that the decision will be based upon the juror's beliefs as to what is the right outcome rather than being directed only by the evidence and the applicable law.[160]

496. *There is thus a need to reformulate this provision to provide that each juror swears to fulfil the duty honestly and impartially and to determine the case on the basis of only the lawful evidence and the applicable law.*

497. Furthermore, it does not seem sufficient that each juror merely "affirms" in response to the reading out of the oath by the presiding judge. The individual responsibility of all the jurors would be underlined more if each juror and substitute juror actually had personally to take the full oath.

498. *There is thus a need for consideration to be given to requiring each juror and substitute juror to give the oath in full.*

Article 236

499. The duties of jurors that are prescribed in this provision are generally suitable. However, it would be more appropriate if the prohibition in sub-paragraph 1(d) referred

[160] The stipulation that decision-making by judges should be based on their inner beliefs, which is in the Organic Law of Georgia on Common Courts, is similarly inappropriate.

to both "seeking" and "obtaining" information related to the case outside of the trial as the latter could be just involuntary.

500. *There is thus a need for sub-paragraph 1(d) to amended accordingly.*

501. The use of mobile phones, particularly those providing access to the internet, provide the possibility of seeking information about a case that has not been presented in the trial. In addition, such phones can be a source of distraction during the proceedings and also provide an opportunity for one or more persons to seek to threaten or to otherwise exercise improper influence over jurors.

502. *There is thus a need for consideration to be given to the addition of a duty for jurors to surrender their mobile phones while they are taking part in the proceedings.*

503. The list of duties do not include any requirement for a juror or substitute juror to inform the presiding judge of any attempt by one or more persons to threaten them or otherwise exercise any improper influence over them, as well as about a possible breach by another juror of either the requirement to act impartially or of the other duties set out in this provision.

504. Without the presiding judge being so informed it is unlikely that some problems that might affect the proper functioning of the jury will be brought to his or her attention. Such duty is found in the second sentence of Article 256(4) but it would be more appropriate for it to be included with the list of a juror's other duties so that the presiding judge draws the attention of jurors to all their duties when, as required by paragraph 4 of the present provision, warning them of the applicable penalties.

505. *There is thus a need for this duty to be moved from the second sentence Article 256(4) to paragraph 1 of this provision.*

Article 237

506. The duty to inform jurors about the existence of a plea bargain "on issues that are essentially related to the case under consideration" is entirely appropriate. However, it is important that this duty is understood to extend not only to such a bargain involving any of the defendants, accused in the case but also to ones concluded by any witnesses where the plea bargain concerned involved an undertaking to testify in the case under consideration.[161]

507. *There is thus a need to modify the formulation this provision in order to ensure that there is no doubt that it expressly covers plea bargains involving witnesses as well as the defendant, accused.*

508. Paragraph 1 provides that the testimony of an absent witness should not be the sole basis of a person's conviction. However, that is not a complete rendering of the requirement regarding the use of such testimony under Article 6(1) and (3)(d) of the

[161] See fn. 157 above. See also *X. v. United Kingdom* (dec.), no. 7306/75, 6 October 1976, in which no appearance of a violation of Article 6(1) was found where evidence was given by the applicant's accomplice after having been given an immunity from prosecution but the manner in which the evidence given by him was obtained had been openly discussed with counsel for the defence and before the jury.

ECHR. The European Court has made it clear that a conviction will be unfair where the evidence of an absent witness was the sole or decisive basis for the conviction or, even if not, its weight significant or its admission was such that it may have handicapped the defence and there were not sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.[162]

509. These counterbalancing factors could include the video recording to which paragraph 1 refers.

510. In addition, they could also corroborative evidence for the witness's statement, an opportunity for the defendant, accused to have questioned the witness at the investigative stage and the defendant, accused has been afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness, pointing out any incoherence or inconsistency with the statements of other witnesses.

511. Moreover, an indication should be given in any judgment as to the weight given to the testimony of any absent witness as this is a matter which the European Court will consider when evaluating the adequacy of any counterbalancing factors in the case concerned.

512. Furthermore, it is not enough that the court had regard to what was necessary by way of ensuring that adequate safeguards existed; it will also be essential that the court in its judgment demonstrates that such regard actually occurred and what were its reasons for considering the particular safeguards relied upon to be adequate.

513. *There is thus a need to revise paragraph 1 to take account of all these requirements*.

Article 245

514. The provision for cross-examination is generally appropriate. However, it does not take account of the need, already discussed,[163] to protect vulnerable witnesses, including the possibility that a particular manner of questioning or its conduct by a defendant, accused would be inappropriate.

515. *There is thus a need to amend these provisions to make allowance for the need to protect vulnerable witnesses as regards the manner of questioning and its conduct by or on behalf of a defendant, accused*.

Article 253

516. Although it is appropriate to allow the defendant, accused to make a final statement, the fact that the burden of proof lies on the prosecution means that there should be no obligation for her/him to do so and, as a result, no inference should be drawn from her/him having chosen not to do so.

517. *There is thus a need to add a requirement to paragraph 2 to specify that no inference is to be drawn from the failure to make a final statement and that the presiding judge should so instruct jurors in a case tried by jury*.

[162] See *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015.
[163] See paras. 290-291 above.

Article 256

518. As already noted,[164] the duty prescribed in the second sentence of paragraph 4 would be more appropriately located in the list of duties for jurors in Article 236(1).

519. *There is thus a need to re-locate the second sentence of paragraph 4 in Article 236(1).*

520. Furthermore, it is improbable that the proposed warning to a juror who has demonstrated "clear bias" or has otherwise clearly violated the law would be regarded by the European Court as sufficient to allay concerns as to a lack of impartiality in the functioning of a jury.[165]

521. A more appropriate course of action than that proposed in paragraph 4 would be for the presiding judge to remove the juror concerned and then to determine whether or not the remaining jurors might have been influenced by the conduct of the juror who has been removed.

522. If there is a sound basis for concluding that there has been no such influence – and the fact that the presiding judge has been informed by them about the conduct of this juror would be supporting evidence in this regard – then it would be possible for the deliberations to continue so long the minimum number of jurors remain. However, if such a conclusion cannot be reached or if the required minimum number of jurors do not remain following the removal of the juror concerned, then the entire panel of jurors should be dismissed and a new jury should be constituted.

523. *There is thus a need to replace the third, fourth and fifth sentences of paragraph 4 by ones that give effect to the procedure suggested in the preceding paragraph.*

524. There is no obligation for jurors to keep their deliberations secret. However, the European Court has emphasised that a rule governing the secrecy of jury deliberations served

> to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard[166].

525. *There is thus a need to introduce a requirement for jurors to keep secret their deliberations. This could best be done by amending Article 236(1)(b) so that the prohibition on disclosing information obtained during the case hearing or expressing their opinion on the case applied both before <u>and after</u> delivering the verdict.*

Article 257

526. The possibility for providing additional clarifications to jurors made by this provision is generally appropriate. However, the stipulation in its last sentence that the ability of a juror to make such a request may be restricted by the presiding judge upon a motion of a party is deficient in that it provides no criteria governing any decision to accede to

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[164] See paras. 504-505 above.

[165] See para. 487 above.

[166] *Gregory v. United Kingdom*, no. 22292/93, 25 February 1997, at para. 44. See also *Miah v. United Kingdom* (dec.), no. 37401/97, 1 July 1998. The failure to keep such deliberations secret is the subject of the application to the European Court that has been communicated to the Government; *Okropiridze v. Georgia*, no. 43627/16.

such a motion. A restriction on submitting requests might, e.g., be possibly justified where a particular juror has previously asked a succession of frivolous or clearly irrelevant questions but, in the absence of such or comparable criteria, decision-making in this regard could be arbitrary and frustrate the ability of a jury to reach its verdict in a case.

527. *There is thus a need to introduce some criteria for the decision to restrict the submission of requests by a juror into this provision.*

22. Chapter XXIV. Rendering and Enforcing Court Judgments

Article 259

528. Paragraph 1 requires that a court judgment be "legitimate, reasoned and fair". However, the definitions of these concepts in paragraphs 2 and 4 are too narrow and that in paragraph 3 does not explain the reasoning process

529. Thus, paragraph 2 does not take account of the duties of judges under international law (e.g., complying with the general accepted basic principles of criminal law and the relevant European and international legal instruments); paragraph 3 does not explain that a reasoned judgment must state the facts and legal provisions on which particular conclusions are reached (including why particular arguments have not been accepted), as well as why particular evidence has not been accepted; and paragraph 4 does not take account of the considerations relevant to sentencing in the Criminal Code.

530. In addition, it would be more appropriate for paragraph 3 than Article 269(2) to provide that "an assumption may not serve as grounds for a judgment of conviction".

531. The importance of giving a clear indication as to what is entailed in a reasoned judgment was underlined by the case of *Rostomashvili v. Georgia*[167], in which the European Court found that inadequate reasons had been given for the applicant's conviction for murder.

532. In particular, two arguments raised by the applicant relating to the core of the criminal case against him had not been given a specific and explicit reply. The European Court emphasised that the generic response given by the domestic courts that "all the evidence available in the case file" was sufficient to convict the applicant could not be regarded as such a reply to those arguments.

533. *There is thus a need to revise these definitions to take account of these points, although paragraph 3 could equally just refer to the requirements in Articles 272-276.*

Article 260

534. This provision refers to various factors – notably, the gravity of the criminal act, the confiscation of objects and the costs of the proceedings – that must be taken into

[167] No. 13185/07, 8 November 2018.An action plan or report for execution of this judgment is awaited by the Committee of Ministers.

account during the court's final deliberation. However, it makes no reference to other relevant factors that should be mentioned: the applicable legal provisions; the defendant, accused's further detention; mitigating and aggravating circumstances; and victims' rights (e.g., whether the victim should be allowed to file a civil claim to restore her/his rights and/or compensate her/his loss).

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

Article 261

536. There is an element of duplication in the first and second sentences of paragraph 1, with the second sentence providing a more accurate statement of the approach required of a jury in reaching its verdict.

537. *There is thus a need to delete the first sentence of paragraph 1*.

538. It is inappropriate for paragraph 2 to specify that the jurors shall decide whether the person in question is guilty or innocent with respect to each charge. Their task, as that of the judge, is solely to decide whether the prosecution has proved its case and, if not, the verdict returned on each charge should then be "not guilty".

539. *There is thus a need to reword paragraph 2 to state that the jurors shall decide whether the prosecution has proved its case and, if not, the verdict to be returned on each charge is "not guilty".*

540. The time periods specified in paragraphs 4 and 6, if taken literally could entail deliberations running for a continuous period of 15 hours or more, which may or may not follow several hours hearing evidence, closing submissions and instructions by the presiding judge. No provision is made for breaks, meals or sleep during this period and the possibility of fatigue or impatience may lead to a willingness to reach a verdict that does reflect the evidence, particularly given the relatively low number of jurors required by paragraph 4 in order for majority verdicts to be returned. This may result in particular cases a finding that the manner in which the deliberations were conducted rendered the trial unfair.[168]

541. *There is thus a need to specify that the continuation of deliberations does not occur in a manner that could undermine the fairness of the approach to reaching a verdict.*

542. However, regardless of the lack of provision for breaks, meals or sleep, the relatively low number of jurors required to support majority verdicts that is provided for in

[168] Cf. the view of the European Court in *Makhfi v. France*, no. 59335/00, 19 October 2004 that it was essential that not only those charged with a criminal offence but also their counsel should be able to follow the proceedings, answer questions and make their submissions without suffering from excessive tiredness and that, similarly, that judges and jurors should be in full control of their faculties of concentration and attention in order to follow the proceedings and to be able to give an informed judgment. In this case the trial had begun at 9.15 a.m. on 3 December 1998 at 9.15 a.m. and ended at 8.30 a.m. on 5 December 1998. After the second day of the trial had ended at 12.30 a.m., counsel for the defendant had applied unsuccessfully for an adjournment. The proceedings had then resumed at 1 a.m. and had lasted until 4 a.m. Counsel for the defendant had given his address when the hearing resumed at 4.25 a.m., by which time the sitting had lasted for a total of 15 hours and 45 minutes. The judge and jury, who held their deliberations between 6.15 and 8.15 a.m. on 5 December, found the applicant guilty and sentenced him to eight years' imprisonment. The European Court found that the rights of the defence and the principle of equality of arms had not been observed, contrary to Article 6(3) taken together with Article 6(1).

paragraph 4 – 8 out of 11 jurors, 7 out of 10, 6 out of 9, 5 out of 8 and 4 out of 7 or 6 – is considerably at variance with practice in most other countries where majority verdicts are possible.[169] The exception is Scotland where it is possible to have a verdict which is supported by 8 out of the 15 jurors but this is a country where the jury system is longstanding and well-understood by the population.

543. It cannot be suggested that the possible majorities authorised in paragraph 4 are necessarily inconsistent with European standards and the European Court does not appear to have commented on the fairness of convictions in which these are based on such verdicts.[170] Nonetheless, it might well be that the number of jurors required for a majority verdict in particular cases could, when taken with other considerations such as doubts as to whether a risk of impartiality has been adequately addressed, lead to the conviction being secured in breach of the requirement to a fair trial, as required by Article 6(1). Furthermore, as already noted,[171] such majority verdicts could undermine public confidence in the jury system.

544. *There is thus a need for consideration to be given to increasing the number of supporting jurors required for the return of a majority verdict where a unanimous verdict is not possible.*

Article 264

545. This provides both for inadmissible evidence to be taken into account in the sentencing of a convicted person and for the jury to be involved in the hearing on this aspect of the proceedings. Both are problematic.

546. The possibility envisaged in the last sentence of paragraph 1 of inadmissible evidence being taken into account in sentencing is dependent upon the motion of just one party and the decision of the presiding judge.

547. The presumption of innocence under Article 6(2) of the ECHR does not preclude regard being had to a person's personality or previous record for the purpose of sentencing.[172] However, consideration of inadmissible evidence could lead to a conclusion that either a more serious offence was committed than the one of which the defendant, accused had been convicted or that entirely different offences had been committed and the sentencing then being based on that conclusion. This could lead to the defendant, accused being sentenced for an offence for which s/he had not been convicted, which would be inconsistent with the presumption of innocence. As a result, sentencing based on inadmissible evidence would be entirely inappropriate unless the evidence concerned was favourable to the defendant, accused.

548. *There is thus a need to replace "Upon motion of a party" in the last sentence of paragraph 1 by "Upon motion on behalf of the defence".*

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[169] E.g., 1 out of 12 in New Zealand, 2 out of 10 in England and Wales and Oregon and Louisiana in the United States.

[170] There appear to have only been three such cases in which such verdicts are mentioned in the facts: *Mellors v. United Kingdom*, no. 57836/00, 17 July 2003, *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Beggs v. United Kingdom*, no. 25233/06, 6 November 2012.

[171] See paras. 59-62 above.

[172] See, e.g., *Engel v. Netherlands*, no. 5100/71, 8 June 1976.

549. The involvement of the jury in sentencing envisaged in paragraphs 2-4 must be agreed by both parties and would enable it to recommend – by a majority of votes - either the mitigation or aggravation of the sentence. However, there is no indication that there would be any form of instruction given to the jury – whose members are unlikely to have any legal background - as to factors relevant to making either recommendation. In these circumstances, there could be no compliance with the requirement under Article 6(1) of the ECHR that the defendant, accused and the public should be able to understand the verdict that has been given.[173]

550. *There is thus a need for the jury to be given a clear set of instructions by the presiding judge regarding both the principles governing mitigation/aggravation and the facts in the case relevant to them if its involvement in sentencing is to be retained*.

Article 265

551. It is appropriate for it to be stipulated in paragraph 3 that the presiding judge shall not provide grounds for the verdict since that is a matter for the jury's determination.

552. However, this underlines the importance of the instructions given by the presiding judge to the jury for the purpose of complying with the requirement under Article 6(1) of the ECHR that the defendant, accused and the public should be able to understand the verdict that has been given.[174]

Article 267

553. Paragraph 3 provides that the votes of judges shall be combined where they disagree as to whether the defendant, accused should be acquitted or sentenced. In particular, it is not indicated what kind of vote is needed to form a majority opinion (e.g., requiring a two-third vote to go ahead with a decision which is less favourable for the defendant, accused).[175] This seems questionable because it could have the effect of precluding a dissenting opinion, which could be important for the preparation of an appeal.

554. *There is thus a need to make it clear in paragraph 3 that the combining of votes of judges does not preclude a dissenting judgment by a judge requesting the acquittal of the defendant, accused*.

Article 269

555. As already noted,[176] it would be more appropriate for paragraph 2 to be included in the text of Article 259(3).

556. *There is thus a need to relocate this provision accordingly*.

557. Paragraph 5 lists the circumstances in which a convicted person is to be released from serving the sentence. In doing so, it refers to some but not all, of the relevant provisions of the Criminal Code. It would be more appropriate for the relevant provision to be cited in each of the clauses.

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[173] See *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010 and *Lhermitte v. Belgium* [GC], no. 34238/09, 29 November 2016.

[174] *Ibid*. This is an issue raised in an application to the European Court that has been communicated to the Government; *Okropiridze v. Georgia*, no. 43627/16.

[175] E.g., section 263(1) of German Code of Criminal Procedure.

[176] See para. 530 above.

558. *There is thus a need to revise this provision accordingly*.

Article 277

559. Paragraph 1 provides that the public pronouncement of the court's judgment is to be limited to its operative part and Article 278 provides for the service of a copy of the judgment and any dissenting opinion on the convicted or acquitted person concerned.

560. However, the limited public pronouncement would not satisfy the requirement in Article 6(1) of the ECHR that a judgment (including any dissenting opinion) be "pronounced publicly" as even the limited qualifications on the scope of the pronouncement - such as respecting the rights of children, victims, etc. [177] – would not justify keeping from the public all of a judgment.

561. The European Court does accept that other means of rendering a judgment public could satisfy the requirement of publicity under Article 6(1).[178] However, there is no indication in this provision either as to how this is to be achieved or as to the possibility of keeping certain parts confidential to protect the rights of others.

562. *There is thus a need to clarify how a judgment (including any dissenting opinion) is to be made public and the scope for limiting this in respect of certain elements in it and, insofar as this is not covered in other legislation, addressing this in the present provision.*

563. Paragraph 2 rightly provides for the translation of the judgment for a defendant, accused who does not have command of the language of the criminal proceedings, or this is inadequate. However, similar provision should be made for other persons who might not understand what is being said, such as on account of a hearing problem or some mental incapacity.

564. *There is thus a need for this provision also to provide for the explanation of the judgment to a defendant, accused who for some reason other than command of the language of the criminal proceedings has difficulties in understanding it.*

Article 284

565. Paragraph 3 provides for the possibility of the early release of a convicted person due to her/him having attained an "elderly age" regardless of whether they are in good health. Apart from the requirement of attaining the specified ages, prisoners can seek release if they have served at least half of the sentence imposed.

566. Although other considerations relating to the grant of release are specified in paragraph 4, there is no specific reference to the need to take account of the rights of the victim under the ECHR and, more generally, the rule of law, which ought also to be considered.

567. *There is thus a need for paragraph 4 to be revised to require account to be taken of these considerations in any decision on early release on account of a convicted person's age*.

[177] See, e.g., section 268(2)(2) of German Code of Criminal Procedure.
[178] *Welke and Białek v. Poland*, no. 15924/05, 1 March 2011, at para. 83.

Article 285

568. This provision deals with the possibility of convicted persons being granted early release on a conditional basis where it is considered that serving the full term "is no longer required for her/his correction". This provision is problematic in two respects.

569. Firstly, there is no account to be taken of the need for the serving of the full term to be necessary for the punishment of the convicted person. As a result, there is the possibility that the release of the convicted person could lead to the rights of the victim under the ECHR and, more generally, the rule of law not being taken sufficiently seriously.[179]

570. Secondly, the provision does not address arrangements for the convicted person and her/his defence having an opportunity either to submit a statement before any decision on conditional release (except under paragraph 5 in the case of release from deprivation of the right to hold any office or to carry out certain activities) or to challenge a recommendation or decision by way of judicial review (e.g., where a case was not reviewed correctly or the decision was unreasonable).

571. *There is thus a need to revise this provision so that these shortcomings are addressed*.

Article 285[1]

572. Although releasing a convicted person from serving life imprisonment may often be appropriate, the reasons given for doing so are vague since there is no basis for judging why it should be considered that her/his continuing to serve such a sentence "is no longer required", as paragraph 1 provides. This could be on account of the view that s/he has been sufficiently punished or is no longer a risk to the community or some other reason.

573. In addition, the considerations specified in paragraph 5 do not require account to be taken of the rights of the victim under the ECHR and, more generally, the rule of law, which ought also to be considered.

574. *There is thus a need to revise this provision so that these shortcomings are addressed*.

Article 287

575. This provision allows the court, without holding an oral hearing, to eliminate ambiguities or inaccuracies in a judgment after it has been rendered. The items listed as ones with respect to which ambiguities or inaccuracies can be eliminated include "issues relating to evidence". These might – whatever the view of the court – be regarded by the convicted person as affecting the basis of her/his conviction and thus be relevant for an appeal on the basis that the change rendered the judgment "unlawful and/or unreasonable". For the purpose of such an appeal, it would be important that changes made to the judgment – with the reasons for them - should be clearly marked in the corrected judgment.

576. *There is thus a need for this provision also to require that changes to the judgment – with the reasons for them – be clearly marked in the corrected judgment*.

[179] See further paras. 619-620.

577. Furthermore, as seen in *Kereselidze v. Georgia*[180], the absence of an oral hearing may result in a violation of Article 6(1) where a rectification of a person's conviction in respect of the starting date of his cumulative sentence had an impact on the applicant's release date. Such a rectification was made in that case pursuant to an equivalent provision to sub-clause (f) – which authorises "other clarifications that shall not affect the court's opinion as to the qualification of the act committed by the convicted person, on the sentence imposed" – and there was no possibility of considering arguments that the rectified appellate decision had amounted to a worsening of his legal situation in breach of what is now Article 298(3).[181]

578. *There is thus a need for this provision to require the consideration of submissions in respect of a proposed ruling before it becomes final by, or on behalf of, the person whose sentence is being rectified pursuant to sub-clause (f).*

Article 288

579. The object of this provision – which concerns the removal of a served conviction – is unclear as there is no reference to such an action in the CPC or to Article 79 of the Criminal Code which does mention a conviction being removed but does not specify the circumstances in which that is to occur.

580. *There is thus a need to clarify what exactly this provision is seeking to do, as well as the basis on which any removal of a conviction can occur*.

Article 289

581. This provision appears to be intended to give effect to the provisions of treaties such as the Council of Europe's Convention on the Transfer of Sentenced Prisoners. However, there is no specific requirement that the conditions governing such a transfer – which include the consent of the sentenced person – have been fulfilled and it is difficult to see how this can be accomplished without the possibility of receiving submissions on behalf of that person, whether orally or in writing.

582. Furthermore, there should be a requirement for the court to satisfy itself that the conviction of the person to be transferred to serve her/his sentence in Georgia was not the result of a flagrant denial of justice since then her/his imprisonment would be in violation of Article 5(1) of the ECHR.[182] For this purpose, there would also have to be an opportunity for submissions to be made to the court concerned on behalf of the convicted person.

583. *There is thus a need for this provision to be revised to take account of the above considerations*.

23. Chapter XXV. Appeals

[180] No. 39717/09, 26 March 2019.

[181] The case concerned a previous version of the CPC but the relevant provisions have been retained in the present one.

[182] See *Drozd and Janousek v. France and Spain*, no. 12747/87, 26 June 1992

Article 292

584. Paragraph 4 precludes an appeal being "filed against a judgment rendered based on a jury verdict". There is, however, no exception made for cases involving juries with respect to the right of appeal in criminal matters in Article 2 of Protocol No. 7 and this provision has not been the subject of any reservation by Georgia.

585. *There is thus a need to delete paragraph 4*.

Article 293

586. The requirement that appeals must be filed within a month of the judgment being announced is likely to make it impossible for many persons convicted *in absentia* to appeal – even if this is technically possible under Article 292(1) – as s/he may not even know about the conviction for the same reasons that s/he did not attend the trial, namely, that s/he was not duly informed of its occurrence.

587. In such cases, the effective absence of a right of appeal would mean that the conviction would be in violation of Article 6 and any imprisonment imposed would be in violation of the right to liberty and security under Article 5(1) of the ECHR.[183]

588. *There is thus a need for an exception to the deadline in paragraph 1 to be made in respect of convictions* in absentia.

Article 296

589. Paragraph 1 provides that the court reviewing the appeal is to determine whether to grant a convicted person's request to participate in the proceedings. However, no criteria are specified for making such a determination whereas under Article 6(1) of the ECHR, this ought to be based on considerations such as whether the appeal is only on points of law and concerns disputed facts, as well as what was at stake for the convicted person.[184]

590. *There is thus a need for the criteria in the preceding sentence to be specified in paragraph 1*.

Article 298

591. The terms of this provision are ostensibly appropriate.

592. However, in the case of *Gelenidze v. Georgia*[185], the European Court found a violation of Article 6(1) and (3)(a) and (b) of the ECHR where it requalified the offence of which the applicant was convicted without considering the evident differences in the definitions of the two offences and without affording the applicant the possibility of adjusting her defence to the new charges.

[183] See, e.g., *Stoichkov v. Bulgaria*, no. 9808/02, 24 March 2005.
[184] See, e.g., *Botten v. Norway*, no. 16206/90, 19 February 1996 and *Lazu v. Republic of Moldova*, no. 46182/08, 5 July 2016.
[185] No. 72916/10, 7 November 2019. An action plan or report for execution of this judgment is awaited by the Committee of Ministers.

593. *There is thus a need for this provision to specifically require that a convicted person be given an adequate opportunity to defend her/himself against any requalification of the offence of which she/he had been convicted.*

24. Chapter XXVI. Cassation

Article 300

594. One of the grounds provided in paragraph 1 for deeming a judgment to be illegal is that the CPC was "substantially violated". However, as previously noted,[186] this is a concept that lacks precision.

595. *There is thus a need for the term "substantially violated" to be clarified through a note similar to that being suggested above for Article 72*.

Article 303

596. Paragraph 3(e) also uses the term "substantial violation" and the concern about its lack of precision is equally applicable to its use here.

597. *There is thus a need for the term "substantial violation" also to be clarified in paragraph 3(e) through a note similar to that being suggested above*[187] *for Article 72.*

Article 305

598. Paragraph 2 allows for the dismissal of an appeal if the appellant fails to appear without "a valid reason". This is also a concept for which some elaboration should be made in order to guide decision-making by the court and thereby diminish the risk of dismissals of appeals being made arbitrarily.

599. *There is thus a need for some criteria to be specified in paragraph 2 as to what constitutes "a valid reason".*

25. Chapter XXVII. Procedure for Reviewing Judgments Due to Newly Revealed Circumstances

Article 313

600. This provision governs the examination of the admissibility and "reasonableness" of a motion for reviewing a judgment due to newly revealed circumstances.

601. While the requirements for admissibility are clearly specified in Articles 311 and 312, the notion of "reasonableness" is unclear. The grounds specified in Article 310 are objective matters which will be the basis for a decision on the merits under Article 314.

[186] See paras. 221-222 and 348-349 above.
[187] *Ibid.*

There is no basis in Article 310 for any subjective consideration to inform the decision-making. It may be that there is a wish to ensure that there is at least some basis for considering a motion on its merits before proceeding to that stage. However, such a wish would be better fulfilled by a requirement to show a prima facie case that one of the grounds in Article 310 exists.

602. *There is thus a need to replace "it is reasonable" in this provision by "there is a prima facie case that a ground for review exists".*

D. CRIMINAL CODE

603. The provisions of this Code to be examined are those relating to the judicial discretion while imposing sentences under Chapter XI, the imposition of conditional sentences under Chapter XII, release from criminal liability and punishment under Chapters XIII and XIV, amnesty and pardon under Chapter XV and the offences relating to torture and ill-treatment under Chapter XXIII.

1. Chapter XI. Sentencing

Article 55

604. This provision allows a court to impose a sentence that is less than the lowest limit of the measure of a sentence provided for by an appropriate article of the Code, or another, more lenient sentence if a plea bargain is concluded between the parties. However, there is no guidance in this provision as to the considerations that need to be taken into account when deciding whether a more lenient sentence should be imposed or, indeed, as to the determination of what that sentence should be.

605. It has already been noted that, at present, Article 213 of the CPC limits the judicial role to determining whether the proposed sentence in a plea bargain is "lawful and fair", which is inconsistent with the need under Article 6(1) of the ECHR for a judicial determination of any sentence being imposed.[188] In the context of a plea bargain, the considerations that ought to be taken into account go beyond those enumerated in Article 53(3). They should also address the appropriateness of a proposed sentence in the light of the rights of the victim and the public interest as defined in Article 210(3) of the CPC.

606. In the absence of judicial regard to these questions, there is a serious risk that the imposition of a lenient sentence will result in a failure to treat with sufficient seriousness the rights of the victim under the ECHR and, more generally, the rule of law.[189]

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[188] See paras. 423-425.

[189] See, in this connection, the observation of the European Court in *Vazagashvili and Shanava v. Georgia*, no. 50575/07, 18 July 2019: "92. As stated above (see paragraph 84 *in fine* above), although substantial deference should be granted to the national courts in the choice of appropriate sanctions for ill-treatment and homicide, the Court must intervene in cases of manifest disproportion between the seriousness of the act committed by State agents and the punishment imposed. This is essential for maintaining public confidence, ensuring adherence to the rule of law and preventing any appearance of tolerance of or collusion in unlawful acts committed by State agents (compare, for instance, with *Bektaş and Özalp v. Turkey*, no. 10036/03, § 50, 20 April 2010, and *Nikolova*

607. *There is thus a need to limit the ability to impose a lenient sentence under this provision by requiring that no such sentence can be imposed that would be inconsistent with the rights of the victim and the public interest as defined in Article 210(3) of the CPC.*

2. Chapter XII. Conditional sentence

Article 63

608. Paragraph 1 of this provision allows, in cases where a plea bargain has been concluded, for the court to rule that the sentence be considered conditional, i.e., replacing the possibility of serving a sentence of imprisonment by a period of probation and the imposition of certain obligations. As with the possibility of imposing a lenient sentence, there is no specific guidance as the basis on which such a ruling is to be made apart from.

609. Although the imposition of a conditional sentence in the case of a plea bargain will not necessarily be inappropriate, for the reasons already noted[190] the decision to impose one should only be taken after addressing the potential for doing so to lead to the rights of the victim under the ECHR and, more generally, the rule of law not to be taken sufficiently seriously.

610. *There is thus a need to limit the ability to impose a conditional sentence under this provision by requiring that no such sentence can be imposed that would be inconsistent with the rights of the victim and the public interest as defined in Article 210(3) of the CPC.*

3. Chapter XIII. Releasing from Criminal Liability

Article 68

611. The possibility envisaged in paragraph 1 of a person being released from criminal liability in respect of offences for which the penalty does not exceed three years' imprisonment solely on account of her/his being convicted for the first time, admitting

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and Velichkova, cited above, § 61). In the present case, although domestic law permitted the trial court to impose a higher sentence – either twenty years in prison or life imprisonment – it initially handed down sixteen-year prison sentences for the two authors of the aggravated murder of the applicants' son (Article 109 of the Civil Code, cited in paragraph 64 above). Furthermore, when handing down those sentences, the trial court obviously knew that the terms were not real as they were subject to a further reduction, by a quarter, pursuant to the automatic application of section 16 of the Amnesty Act of 28 December 2012 (see paragraphs 46 and 67 above). The Court regrets that the domestic legislator, when enacting the Amnesty Act, did not apparently give a due consideration to the need to punish serious police misconduct with unbending stringency. In this connection, the Court reiterates that when an agent of the State, in particular a law-enforcement officer, is convicted of a crime that violates Article 2 of the Convention, the granting of an amnesty or pardon should not be permissible (compare, amongst many others, *Nina Kutsenko v. Ukraine*, no. 25114/11, § 149, 18 July 2017; *Yeter*, cited above, § 70; and *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 69, 8 April 2008). Indeed, the Court expects States to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life-endangering crimes than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity the offenders may consider they enjoy by virtue of their very office, and to maintain public confidence in and respect for the law-enforcement system (see *Enukidze and Girgvliani*, cited above, § 274, and, *mutatis mutandis*, *Nikolova and Velichkova*, cited above, § 63).

[190] See paras. 604-607.

guilt, assisting in its discovery and indemnifying the damage is problematic. This is because being convicted for the first time does not necessarily mean that the conduct concerned has not occurred previously without this leading to a conviction and because the level of penalty in cases where release from criminal liability is possible will cover serious offences such as domestic violence,[191] for which recurrent ill-treatment frequently eludes the bringing of a prosecution[192].

612. Although it may not be unreasonable to release those committing minor offences from criminal liability where it is genuinely a first offence, the release provided in paragraph 1 is hardly consistent with the commitment under Article 45 of the Istanbul Convention to "take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness". A more limited penalty – such as one year's imprisonment – and evidence that there was no previous similar conduct, even this though did not lead to a prosecution, would be a more appropriate basis for releasing a first-time offender from criminal liability.

613. *There is thus a need for paragraph 1 to be modified accordingly*.

Article 70

614. This provision allows for release from criminal liability on the extremely vague ground that the imposition of such liability is no longer expedient on account of changed circumstances. Such a ground gives the court an unfettered discretion to render ineffective criminal responsibility and deprive the victim of a crime of this important element of reparation since there are no parameters as to what are to be considered "changed circumstances". Such a possibility is all the more surprising given the availability of release on parole under Article 72.

615. *There is thus a need, at the very least, to elaborate in this provision what might constitute "changed circumstances". However, consideration should also be given to the real necessity for its retention at all*.

Article 70[1]

616. This provision allows for release from criminal liability for someone who has collaborated with investigative authorities. This in one form or another is something that occurs in most, if not all, criminal justice systems. However, the present provision allows the person to be released without regard to the nature of the offence which s/he may have committed and thus could lead to impunity for an offence inconsistent with the rights under Articles 2, 3 and 13 of the ECHR.[193] This could be the situation where, for example, the offences were those covered by Articles 144^1-144^3 of the Code.

617. *There is thus a need for release under this provision to be allowed only if due account is taken of the implications for the rights of the victim under the ECHR*.

4. Chapter XIV. Release from Punishment

[191] Article 126^1.
[192] As in, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009
[193] For such a possible situation, see *X. and Y. v. Georgia* (dec.), no. 5358/14, 9 September 2014.

Article 73[1]

618. Under this provision – in "exceptional cases" – it is possible for the sentence of a person convicted of a particularly serious crime to be reduced or to be subject to a full exemption when (a) her/his identity is revealed as a result of collaboration with investigative authorities and (b) s/he has assisted in the creation of the essential conditions for the discovery of the crime.

619. This possibility is problematic, notwithstanding that full exemption is not possible for offences involving torture and inhuman treatment , i.e., those under Articles144[1]-144[3]. ("the torture-related offences"), as well as crimes against a minor under Articles 137-139, 141 and 253-255[2].

620. This is because there is no indication as to the character of the circumstances to be regarded as "exceptional" or as to the basis for deciding whether an exemption is to be full or partial and because, even if the exemption is not full for the torture-related offences, there is no limitation or guidance as to how a far a reduction might go, meaning that it could be even as much as 95% of the sentence.

621. Furthermore, while the reduction might not be as extreme as that, it remains the case that a full exemption would be possible for other particularly serious offences such as murder.

622. In these circumstances, the provision made for full or partial exemption has the potential to lead to a failure to ensure the imposition of an appropriate penalty for conduct that is incompatible with the rights under Articles 2 and 3 of the ECHR. This is especially serious since the need to deal with the consequence of an offender's identity could be addressed by making arrangements for her/him to serve her/his sentence in a secure environment.

623. *There is thus a need, at the very least, to introduce very significant qualifications on the possibility of releasing a person from punishment under this provision. However, consideration should also be given to the real necessity for its retention at all*.

Article 76

624. Under this provision a convicted person is to be released from punishment if the judgment convicting her/him is not enforced within certain periods depending upon the seriousness of the crime. The running of the relevant periods is to be suspended if the convicted person evades serving the sentence or s/he is protected by an immunity, as well as in certain other circumstances relating to international cooperation.

625. However, this provision is problematic in that it is effectively inconsistent with the making of limitation periods inapplicable to cases provided by an international agreement (such as genocide and crimes against humanity) and to torture-related offences in Article 71(5) and (5[1]), with the latter being required under Article 3 of the ECHR.[194]

[194] *Abdülsamet Yaman v. Turkey*, 32446/96, 2 November 2004, at para. 55.

626. *There is thus a need to exclude the possibility of persons being released from punishment in respect of those crimes to which limitation periods cannot be applied.*

5. Chapter XV. Amnesty, Pardon, Record of Conviction

Articles 77 and 78

627. The possibility of granting amnesties and pardons under these provisions are not generally problematic.

628. However, no exception is made for crimes provided for in international agreements made by Georgia (such as genocide and crimes against humanity) and for torture-related offences, with the latter being required under Article 3 of the ECHR.[195] Furthermore, the use of the powers of pardon and amnesty has been found by the European Court to contribute to depriving a prosecution of remedial effect for the purpose of the rights to life under Article 2 of the ECHR on account of the inadequate punishment imposed on State agents for committing murders with aggravating circumstances.[196]

629. *There is thus a need for exceptions for crimes provided for in international agreements made by Georgia to be introduced into the possibility to invoke these provisions. In addition, it should be provided that these provisions cannot be invoked where this would lead to the non-fulfilment of the remedial obligations under Article 2 and 3 of the ECHR.*

E. THE OPERATIVE INVESTIGATIVE ACTIVITIES LAW

630. The provisions in the Operative Investigative Activities Law are inevitably linked with those dealing with investigative activities in the CPC. However, it will be seen that the former is not entirely an appropriate complement to the latter.

Article 1

631. This provision lists various forms of operative investigative activity, some of which are also dealt with in the CPC. There are many others – visual surveillance, controlled purchase and delivery, secret collaborator undercover organisation and electronic communication company – that are not.

632. It is undesirable to have two sets of rules covering the same activity, particularly where they are not formulated in the same manner. The Operative Investigative Activities Law does not deal with any of the activities in substantive terms but does deal with some aspects of their conduct. However, it would be more appropriate for the scope and

[195] *Ibid.*

[196] *See respectively Enukidze and Girgvliani v. Georgia*, no. 25091/07, 26 April 2011 and *Vazagashvili and Shanava v Georgia*, no. 50375/07, 18 July 2019.

regulation of all operative investigative activities to dealt with just in the CPC, with other norms – whether in this Law or the normative acts referred to in Article 4 - only addressing aspects related to their practical implementation and organisation.

633. It would be preferable for the omissions in the CPC regarding certain investigative activities to be rectified and for the present provision just to refer to aspects related to the practical implementation and organisation of such activities.

634. *There is thus a need for the CPC to be revised in the manner suggested and for the present provision just to refer to the relevant provisions in it.*

635. Furthermore, the authorisation to perform operative investigative activities goes beyond criminal acts and extends to "other unlawful infringements". This would include administrative misconduct. As a result, the state law enforcement authorities are authorised to respond to any kind of illegal action, regardless of the severity of the threat posed by it. This is potentially inconsistent with Article 8 of the ECHR in that it has the potential to authorise a significant interference with the right to respect for private life for conduct that is not particularly serious.[197]

636. Insofar as there is a real need to authorise operative investigative activities outside the criminal sphere, this would have to be limited to "particularly serious unlawful infringements". Even so, this would still require judicial authorisation together with other requirements established by the European Court,[198] which is a condition absent from the provisions in the Operative Investigative Activities Law.

637. *There is thus a need to elaborate entirely separate legislative covering operative investigative activities outside the criminal sphere consistent with the requirements of the ECHR.*

Article 2

638. This provision lists a set of principles, formulated in very broad terms and similar to many of those set out in Article 143^2 of the CPC. As already noted with the latter provision,[199] it would be preferable for the standards in this area to be formulated in more concrete terms.[200] Moreover, the issue of principles governing all investigative activities should be dealt with just in the CPC and does not need repetition here.

639. *There is thus a need to delete this provision.*

Article 3

640. This provision lists the objectives of operative investigative activities, which are already evident from the list of activities in Article 1 and other provisions in the Operative Investigative Activities Law. It is highly questionable whether this provision adds anything of use and, in any event, this is more properly a matter for the CPC.

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[197] See *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 51.
[198] *See Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015.
[199] See para. 320 above.
[200] See the concern in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 46 in connection with a measure governing certain investigative activities about the lack of definition of terms such as "national security", "public order", "protection of health" and "protection of morals" in connection with their use.

641. *There is thus a need to delete this provision.*

Article 6

642. The stipulations in this provision are generally appropriate. However, they concern matters that are or should be in the CPC as they concern the scope of powers to undertake operative investigative activities and the remedies for disregarding them.

643. *There is thus a need to delete this provision and, to the extent that this may be necessary, to ensure that the points covered are dealt with in the CPC in a manner consistent with any comments made with respect to its existing provisions*.

Article 7

644. This provision again lists the operative investigative activities that can be undertaken, referring to their use for the objectives specified in Article 3 but only adding substance to what is in the CPC as regards visual surveillance, controlled purchase and delivery and search for persons and a minimal reporting obligation. These are matters more appropriately dealt with in the CPC. As already noted,[201] the latter does not – but should – deal with undercover operations with the guarantees required under the ECHR, while it already has reporting requirements in more detail for various investigative activities.

645. Insofar as there is an element of duplication with the CPC, this provision applies a different approach to the CPC and will cause confusion as well as risk of requirements in the CPC and the ECHR not being observed.

646. *There is thus a need to delete this provision*.

Article 8

647. This provision sets out what are said to be the legal grounds for conducting operative investigative activities. However, this is a misdescription as the legal ground must be the relevant provisions of the CPC and a court order (save for the limited exceptions where an order can be given by a prosecutor).

648. In the case of criminal investigations, the intent may be to set out the manner of carrying out a duly authorised investigative activity but the present formulation risks creating confusion about the lawful basis for investigative activities.

649. However, the grounds also extend to the conduct of operative investigative activities outside of criminal investigations without, as already noted,[202] the guarantees required under Article 8 of the ECHR.

650. The present provision also specifies some time limits for conducting operative investigative activities but some – such as interception of communications – are regulated differently and more restrictively.

[201] See para. 314 above.
[202] See para. 635 above.

651. *There is thus a need to harmonise this provision with the requirements in the CPC so that those carrying out operative investigative activities understand their authorisation to conduct them is subject to those requirements.*

Article 10

652. This provision deals with the termination of operative investigative activities which is something that is – or should be – dealt with in the CPC.

653. *There is thus a need to delete this provision and to ensure that any gaps in the CPC are remedied.*

Article 11

654. This provision states that the results of operative investigative activities may be used in connection with investigative and procedural actions and preventing and solving crime but not for restricting the rights and freedoms of persons. This formulation seems inconsistent with the use of these activities to obtain evidence that can be the basis for a conviction.

655. The need for this provision is not entirely clear given that the CPC also addresses the use of the results of operative investigative activities.

656. *There is thus a need to reconsider the formulation of this provision, insofar as its retention is necessary.*

Article 14

657. This provision gives a legal basis for conducting operative investigative activities, especially those of an undercover nature. Such powers are undoubtedly required but they ought to be provided in the CPC, together with the requirements previously noted to ensure that such activities are not found to lead to a violation of Article 6(1) of the ECHR.[203]

658. *There is thus a need to transfer this provision to the CPC, along with the safeguards previously noted.*

F. CONCLUSION

659. In many respects, the CPC and the related legislative provisions are in compliance with European standards.

660. However, there are still a considerable number of aspects that require attention, whether in terms of additional provisions or the elaboration, clarification or deletion of others.

661. A review of the CPC and related legislation would benefit from some reconsideration of the drafting techniques adopted. In part, this concerns matters of style and detail. However, it is also about the relationship between legislative provisions - in particular, the Operative Investigation Activities Law conflicts with the CPC rather than being a

[203] See paras. 315-319 above.

complement to it, as well as the former dealing with matters that really should be dealt with in the latter – and the internal consistency of provisions within the CPC.[204]

662. In addition, there are a range of issues for which significant changes to the CPC are required.

663. These relate to: the position of vulnerable persons; the arrangements for investigating offences and protecting victims; the ability to appeal against the way conduct is classified for the purpose of a prosecution; the undertaking of covert investigative activities; an approach to the use of measures of restraint that ensures their proper justification and facilitates release on bail; the tightening up of the arrangements for plea bargaining; various aspects related to ensuring equality of arms and adversarial proceedings; the conduct of jury trials; the approach to sentencing and the serving of sentences imposed; and more recognition of the advantages afforded by modern technology for the conduct of criminal proceedings.

664. Furthermore, there are many points of detail concerning individual provisions which also need to be addressed.

665. Nonetheless, as many aspects of the foundations required for a criminal process that accords with European standards are already in place, the required revisions to the CPC and related legislation should not be difficult to put into place.

G. PRINCIPAL RECOMMENDATIONS

666. In revising the CPC, it is recommended that the following general considerations should be followed;

- Ensuring consistency between its various provisions (paras. 16-18);
- Specifying provisions in other legislation to which reference is intended to be made (para. 21);
- Providing definitions for any general terms used (paras. 22-24);
- Taking into account the possibility that all participants in criminal proceedings and not just victims may be vulnerable (paras. 30-31);
- Strengthening further the rights of victims in the light of the provisions in the Victims Directive (paras. 32-36 and 158-183); and
- Facilitating the use of modern technology (paras. 44-45).

667. In addition, the following specific changes should be made in the CPC:

- Remove the possibility of juries with less than 12 persons other than where some of those appointed are unable to fulfil their duties (paras. 55-62);Clarify how it

[204] The need for a coherent reform of the two sets of provisions is further underlined by the ruling of the Constitutional Court in *Giorgi Kebuaria v. Parliament of Georgia*, Complaint No. 1276, 25 December 2020, requiring neutral evidence proving the credibility of a search in which an illegal item was found and precluding the necessity of a search being based on the results of what was seized during it.

is to be determined that someone is entitled to refuse to perform the duties of a juror (paras. 75-77);
- Clarify the situations in which someone can be recognised as the defendant, accused (paras. 85-88);
- Provide for repeating the notification given to a defendant, accused of her/his rights when s/he is transferred from one place of detention to another (paras. 112-113);
- Define "close relative" in a way that takes account of the evolving notion of family life under Article 8 of the ECHR (paras. 136-137);
- Limit the capacity of remarks that an interpreter can make to those s/he can understand and be understood (paras. 145-146);
- Specify that the need for a juror or prospective juror to disclose circumstances that would exclude her or his participation arises when s/he actually becomes aware of them (paras.205-206);
- Provide that evidence obtained by torture in all circumstances , regardless of victim or place, is inadmissible (paras. 219-222);
- Define the term "substantial violation" in the manner proposed for the Criminal Code (paras. 221-222);
- Provide how the integrity of material evidence is to be ensured both at the time that it is gathered and for as long as it is retained (paras. 229-230);
- Provide for the electronic transfer of material in the case file to the defence (paras. 232-233);
- Make it clear that the defence is not required to disclose evidence to the prosecution but should give advance notice of nature of any defence that will be relied upon (paras. 234-236);
- Require the past record of anyone alleged to have committed an offence to be checked at the outset of the investigation (paras. 249-250);
- Limit the prohibition on disclosing information about the progress of investigations to situations in which there is a well-founded fear of this being prejudicial to their conduct or the legitimate interests of particular persons, including victims and provide for the possibility of warning all participants in proceedings in this regard (paras. 251-254);
- Define the term "urgent necessity" for all aspects of investigative actions (paras. 269-270, 292-295 and 306-307);
- Require judicial authorisation for the questioning of someone after s/he has been charged (paras. 280-281);
- Require the video recording of the questioning of witnesses ((paras. 285-286);
- Provide for the protection of vulnerable witnesses as regards the manner of questioning and its conduct by a defendant, accused ((paras. 290-291);
- Ensure that all forms of covert investigative actions are regulated by provisions in the CPC in a manner consistent with the case law of the ECtHR (paras. 20, 314-319 and 632-634);
- Specify that probable cause regarding the commission of an offence and the existence of grounds for imposing measures of restraint are distinct but cumulative requirements to be fulfilled in all cases (paras. 380-382);
- Make all measures of restraint available in all cases and require consideration to be given first to the possibility of using ones not involving deprivation of liberty (paras. 385-386);
- Provide that any amount of bail proposed must be within the means of the defendant, accused concerned (paras. 390-391);

- Require the prosecution to demonstrate due diligence in the conduct of proceedings where a motion to annul detention as a measure of restraint is being considered (paras. 406-407);
- Require the offer of a plea bargain to be made in writing and the involvement of a lawyer in all discussions concerning any such bargain (paras. 412-413);
- Require the prosecutor to be satisfied that the punishment to be imposed under a plea bargain reflects the gravity of the conduct concerned and that the defendant, accused has not entered into it as a result of torture or inhuman or degrading treatment or punishment (paras. 416-418);
- Require in Article 210 that the defence lawyer should be involved from the outset of any discussions about a plea bargain (paras. 419-420);
- Specify that the approval by a court of a plea bargain must be based on its appropriateness in the light of the rights of the victim and the public interest as defined in Article 210(3) (paras. 423-425);
- Provide for the possibility of a defendant, accused to obtain redress where the terms of a plea bargain have not been respected (paras. 426-427);
- Provide for right of appeal of a decision holding evidence to be admissible (paras. 432-433);
- Require jurors to surrender their mobile phones while taking part in the proceedings (paras. 500-501);
- Require jurors to be informed of plea bargains involving witnesses as well as other defendants, accused (paras. 505-506); and
- Make provision for breaks, meals and sleep during deliberations by a jury (paras. 540-541).

668. In addition, the provisions in the Criminal Code on reduced sentencing, release from punishment, amnesties and parties need to take account of the requirements elaborated in the case law of the ECtHR regarding the rights of victims (paras. 604-629).

669. Furthermore, it would be appropriate to:

- Develop a guidance note regarding the circumstances that might question the objectivity and impartiality of judges, jurors, prosecutors and expert witnesses (paras. 196-197);
- Publish the considerations applicable to the initiation or termination of a prosecution in the public interest (paras. 259-260);
- Consider introducing preservation of public order as a ground for applying detention as a measure of restraint (paras. 404-405); and
- Develop a guide for prospective jurors and elaborate the instructions for those appointed regarding evidence that might support or negate criminal liability (paras. 452-453 and 475-478).