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BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN COMMISSION ON INCREASED INDEPENDENCE, TRANSPARENCY AND EFFICIENCY OF THE JUSTICE SYSTEM OF THE REPUBLIC OF MOLDOVA

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EXPERT ASSESSMENT OF MOLDOVAN LEGISLATION IN ORDER TO BRING LAWYERS' STATUS AND RIGHTS IN THE EXERCISE OF THEIR CLIENTS DEFENCE IN LINE WITH EUROPEAN STANDARDS AND BEST PRACTICES

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In case of discrepancy between the English and the Moldovan version of the present expert opinion, the English version shall prevail.

COMMENTS

by

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1. OBJECT AND SCOPE OF THE OPINION

1. *The object of the present Opinion is to provide an assessment of the compliance of the provisions of the Law on the Bar Association (Legal Profession) (hereinafter "LBA"), the Law on State Guaranteed Legal Aid (hereinafter "LSGLA"), the Criminal Procedure Code (hereinafter "CPC"), and of excerpts of the Code of Administrative Offences (hereinafter "CAO") and the Code of Civil Procedure (hereinafter "CCP") of the Republic of Moldova with the Council of Europe standards in relation to the independence of lawyers, the efficient exercise by lawyers of the protection of clients' rights and interests, equality of arms, and, more generally, the proper functioning of the principles of access to justice and fair trial guarantees (hereinafter "Council of Europe standards"). The principles arising from the European Convention on Human Rights (hereinafter "the Convention" or "ECHR") and from the relevant jurisprudence of the European Court of Human Rights ("the Court" or "ECtHR"), norms and rules of other Council of Europe instruments, namely the European Social Charter (hereinafter "ESC"), as well as soft, non-binding international law, such as Committee of Minister's (CM) Recommendations have been used as benchmarks in forming our opinion.*

2. PRELIMINARY REMARKS

2. *As a preliminary matter, we should observe that preparing this Opinion has been made more difficult by reason of the linguistic difficulties in relation to the translation of the legislation that we have examined. The English version submitted to the experts contains a number of examples of linguistic imprecision which may, on occasions, have resulted in us reaching certain conclusions which might not, in fact, be correct. This is the case, for instance, with the numerous expressions used in the various pieces of legislations to describe those parties practicing the legal profession. The following are examples of the terminology adopted: lawyer (Article 8 LBA), defence attorney (lawyer) (Article 378 CAO), defender (Article 67 CPC), public defender (Article 29 LSGLA), defence lawyer on duty (Article 29 LSGLA), ex officio representative (Article 77 CPC). Given the above, it is not always easy to say whether a certain expression has been used as a synonym, in order to avoid repetitions, or because it refers to some similar though different notion. We have attempted to highlight instances of such deficiencies and inaccuracies in this Opinion. The same problem arises, perhaps because of a lack of precision of the translation, with the use of certain expressions, both within the above mentioned pieces of legislation as well as other texts forming the object of the present Opinion.*

3. *Another aspect that the experts would like to highlight pertains to the legislative technique adopted. In some instances, it appears that the laws have been given a hybrid nature, combining some features of substantive legislation with those of implementing rules, that is to say of norms providing practical, operative guidance as to the application of other provisions.[1] The experts note that whilst some progress in this respect has been achieved with the draft of the LSGLA, the technique can be improved. In this respect, the experts would like to point out that, though commendable, the attempt of the legislator to ensure compliance with the international standards by promoting very detailed pieces of legislation[2] might, in the long term clash with that very aim. It is often the case that*

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[1] See, for example, art. 19 and 20 of the LBA.

[2] An example being represented by the very strict deadlines set by the CAO for the issuance of copies of the material included in the case-file (art. 384 and 387).

detailed legislation becomes obsolete rather quickly. The alternative could be that of ensuring, in the area of human rights, that the principles inspiring what is known as "the spirit of the ECHR" are fully embodied into the legislation. In such ways, decision-makers and interpreters of the legal texts will be guided in applying these principles in all circumstances brought before their attention, regardless of their explicit inclusion. In addition, the experts would like to point out that the introduction of cross-references within the legal texts (which, at present, is almost non-existent) might represent a valuable tool in order to improve the completeness of the legal provision.

3. METHODOLOGY

4. *Our expert opinion is based on the English translation of the texts provided to us by the Council of Europe.*
5. *Whilst performing the task given, and in order to avoid repeating the conclusions of their predecessors, who have reviewed the CPC in 2004 and 2006, the experts have focused on the provisions of the latter which have been the objects of amendments introduced after the second expertise by Council of Europe experts, that is after 2006.*
6. *The LBA and the LSGLA have been the subject of a full assessment, whereas only the excerpts of the CCP and the CAO provided by the Council of Europe were examined.*
7. *Each piece of legislation has been examined separately. Relevant articles and provisions have been commented upon individually, though often we have preceded our comments with general considerations on the examined law.*

4. ASSESSMENT

LAW ON THE BAR ASSOCIATION

General considerations

Requisite of nationality of lawyers

8. The Law sets Moldovan nationality as one of the conditions to exercise the profession of lawyer.[3] This does not seem in line with the provisions of the ESC as interpreted by the European Committee on Social Rights. In its Conclusions of 2006 concerning Albania's compliance with the obligations borne by Article 1 para. 2 of the Revised ESC, related to freely undertaken work (non-discrimination, prohibition of forced labour, other aspects), the Committee notes that "*as regards discrimination in employment on grounds of nationality the Committee recalls that, under Article 1§2 of the Charter, while it is possible for States to make foreign nationals' access to employment on their territory subject to possession of a work permit, they cannot ban nationals of States Parties, in general, from occupying jobs for reasons other than those set out in Article G[4]. Restrictions on the rights guaranteed by the Charter are admitted only if they are*

[3] See, for example, the provisions included in art. 8 para. 2 and art. 21 para. 1 lett. f).

[4] Article G, rubricated Restrictions states that: 1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. 2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed. Footnote added by the experts writing the present Opinion.

prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. The only jobs from which foreigners may be banned therefore are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority."[5] As the exercise of the legal profession does not seem to fall within such last category, and in view of the fact that Moldova ratified the Revised ESC, explicitly accepting the provision enshrined in the second paragraph of Article 1, the experts consider that it would be opportune to change the present Law deleting reference to the nationality requirement.

Article 1 Definition of the Legal Profession

Article 30 Association of lawyers

9. Chapter I, denominated "General Provision", opens with the definition of the legal profession and it is only in Chapter VI, rubricated "Lawyers' Self-Administration Bodies", that the Bar Association is introduced. No definition of the latter, however, is clearly contained in the Law and it can only be inferred from the texts of the various articles directly or indirectly referring to it and to the functions it performs. The confusion is further exacerbated by the fact that Article 1 para. 1 of the Law specifically refers to the legal profession as an "independent institution of the civil society", whereas a more general yet comprehensive definition of lawyer (used consistently throughout all legal texts) would have been sufficient and more effective[6]. Article 1 para. 2 seems to fall into the same error. It defines the legal profession as a "legal institution representing the totality of the lawyers who practice law". This, in the eyes of the experts, could be an appropriate definition of the Bar Association, to be placed either in Chapter VI dedicated to it or within an initial article rubricated "Definitions".[7] With regard to the provisions embodied in Article 30 of the present law, it is interesting to recall that according to the case-law of the ECHR, the obligation which requires a professional to join a Law Society is not an obstacle to the freedom of association recognised by the ECHR, so long as membership of the Association does not prevent professionals from creating associations and freely joining them.[8]
10. Article 1 para. 3 of the Law must be read in conjunction with Article 30 of the Law recognizing and guaranteeing lawyers the right to create professional associations and to freely join them. The law limits the freedom to associate to participation in not-for-profit organizations only. Although the experts understand the rationale behind the choice, they are not fully convinced that this limitation is appropriate, especially in view of the fact that such associations would not replace the compulsory membership to the Bar Association and, therefore, could not be regarded as having "public status".

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[5] European Committee of Social Rights, Conclusions 2006 (Albania) - Articles 1, 5, 6, 7, 19 and 20 of the Revised Charter, page 5.

[6] The experts suggest that the Law provides a definition of lawyer closer to the one provided by the CM's Recommendation No. R(2000)21, according to which "lawyer means a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the legal practice of law, to appear before the courts or advise and represent his or her clients in legal matters." This definition echoes the one that can be inferred from the definition of "Duties and responsibilities" of lawyers included in the UN Basic Principles mentioned above.

[7] Similarly, the definition of lawyer contained in para. 3 of art. 1 should either be included in an opening article rubricated "Definitions" or placed under Chapter II of the Law, currently specifically entitled to "Lawyers".

[8] Van Leuven, Le Compte and De Meyere v. Belgium, decision of 23 June 1981.

Article 3 Principles of the Legal Profession

11. Letter e) of the present article refers to legality and humanism, an expression which could be profitably changed in respect for the principle of legality and human dignity.[9]

Article 5 Right to Qualified Legal Assistance

Article 6 State Guaranteed Legal Assistance

12. With regard to Article 5, the experts point out the confusion arising by the joint examination of this article with Article 2 of the LSGLA. Rubricated "Definitions", the latter introduces the concepts of primary and qualified legal aid. In the eyes of the experts, the legislator, by referring to qualified legal aid meant to indicate what Article 5 of the LBA identifies as qualified legal assistance. The doubt as to the coincidence of the meaning of the two expression, however, remains and should be resolved. In addition, the content of Article 5 is in conflict with its title. Whilst the latter refers to "qualified legal assistance", the use of the expression "right to be advised in legal issues by a lawyer" encompasses what is elsewhere defined as "primary legal assistance" (Article 2 of the LSGLA), thus creating further confusion.

13. In relation to Article 6, the experts note the discrepancy in the terminology between the LBA and the LSGLA. Whilst the former uses the expression "legal assistance" to indicate the free legal aid scheme established by the State, the latter defines the same provision as "legal aid".[10] The conflict not only encompasses the use of the term "assistance" instead of "aid", but also the definition itself of such activity. The LSGLA defines it as "delivery of legal services of counselling, representation and/or defence before the criminal investigation bodies, courts of law in criminal cases, administrative offences cases, civil cases or cases of administrative jurisdiction, as well as representation before the public administration authorities", thus referring to both primary and qualified legal assistance. A thorough harmonization across laws or a clarification as to whether the institutions are different is therefore advised.

Article 8 Lawyer[11]

14. The admission criterion set by the requirement of enjoying an "irreproachable reputation" appears not to be defined in such way as specifically to ensure access to and exercise of the legal profession under the guarantees set forth under Article 14 of the ECHR and Principle II (1) of Rec (2000) 21. Similarly, the provision does not specify the meaning of "compromising reasons" which can be interpreted with unlimited margins of discretion by

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[9] This article could be inspired by the description of duties of lawyers embodied in the CM's Recommendation No. R(2000)21.

[10] Art. 2 LSGLA rubricated "Qualified Legal Aid".

[11] Para. 1 of the present article embodies a definition of lawyer as "the person who has been licensed according to the law and has the right to participate in the criminal investigation and assist in trials, to decide and act on behalf of his/her client and/or to represent his/her client and provide them with the consultations related to the field of law". The experts highlight the discrepancy between the above definition and that provided by art. 392 CAO, rubricated "The defence attorney", who is defined as "the person admitted to the legal profession, with the right to participate in the administrative proceedings in order to provide legal aid or to represent the party, which s/he assists on contract basis or *ex officio.* As both definitions encompass elements of primary legal aid (deliverable by non members of the Bar Association, i.e. Paralegals) and qualified legal aid (only deliverable by lawyers who are member of the Bar Association), as defined by the LSGLA, it is unclear to the experts if the various pieces of legislation have been the object of an harmonization exercise and, if yes, why such discrepancies still exist.

the competent authorities.[12] More specific benchmarks[13] should be adopted or, else, the present vague wording should be dropped. In addition, the experts note that even if annulled, previous convictions for serious, very serious and exceptionally serious crimes could hinder the exercise of the legal profession, thus creating a situation of conflict with the prohibition of discrimination in the access to the legal profession.[14]

Article 11 The Right to Perform the Lawyer's Activity

15. It might be advisable to coordinate the content of the present article better with that of Article 17, which regulates the same aspects of the profession and clarifies the possibility to appeal against the decision denying issuance of the licence.

Article 13 Cessation of the Lawyer's Activity

16. The experts believe it would be opportune to introduce a provision making it clear that a disbarred lawyer has the right to seek restoration to the roll. The provision must also embody clear indications of the circumstances in which re-admission could be considered (i.e. elapse of a certain amount of time).[15]

Article 17 License issuance

17. According to the present Law, the "qualification examination" conducted by the Commission for Licensing Legal Profession represents the pre-requisite to access the legal profession[16]. Although the Commission is tasked with the decision on the admission to the legal profession, the ultimate responsibility for the issuance of the license – which constitute a necessary pre-condition for the exercise of the legal profession – lies with the Ministry of Justice (MoJ), with whom an application for the issuance of such licence has to be lodged (see Article 11 and 17). The decision of the Ministry of Justice shall be based on the decision of the Commission for Licensing Legal Profession (art.17 para 2. and the newly added Article 40^1 para. 2 lett. c). The wording of Article 17 para 4 seems to suggest that the issuance of the license by the MoJ does not automatically follow the decision of the Commission but involves the exercise of discretion by the MoJ. Otherwise, the provision of appealing against a denial to "issue" a license would not make sense. If the above mentioned interpretation of the legislative framework is correct, then the situation raises serious concerns as to the full independence of the legal professionals from external bodies. Although the norms examined suggest that the access to the legal profession is administered by an independent body, namely the Commission for Licensing Legal Profession, the mere possibility that the MoJ is in a position to hinder the exercise of the profession represents an undue interference. In this respect the experts highlight the importance that the law is

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[12] See H. v. Belgium, decision of 30 November 1987, para. 53.

[13] For instance, reference could be made to conviction for crimes being sanctioned with a specific penalty or to the outcome of disciplinary proceedings.

[14] The nature of the crime committed must also be examined, as clarified by the Grand Chamber in Thlimmenos v. Greece, judgment of 6 April 2000, where the Court concluded that the refusal to admit the applicant to the profession of chartered accountant because of an earlier conviction for refusing a military uniform based on religious grounds and pacifist beliefs amounted to a violation of art. 14 ECHR in conjunction with art. 9

[15] See H. v. Belgium, decision of 30 November 1987, para. 53.

[16] The Commission is one of the organs of the Bar Association, composed of eleven members, five of which are appointed by the Ministry of Justice.

drafted in such a way as not to enable the MoJ to decide *proprio motu*, and independently from the decision of the Commission, on the issuance of the license.[17] This conclusion is in line with Principle I (2) of the CM Recommendation (2000) 21F of 25 October 2000 on the Freedom of Exercise of the Profession of Lawyer and the related Explanatory Memorandum which states that "*the authorization to practice as a lawyer or to accede this profession should be given by an independent body. The independent body may be a professional body or a body composed of members of the judiciary, members of the general public and other members, in addition to a number of the representative of the legal profession*". Given the emphasis that the CM's Recommendation cited above places on the protection of the freedom of exercise of the profession of lawyer from external interference (authorities and public are specifically mentioned)[18], the experts would also suggest a revision of Article 21 of the present law. By stating that "the register of issued legal profession licenses shall be kept by the Ministry of Justice", the legislation on legal profession introduces an element which might affect not necessarily the substance of independence but its "appearance". The experts, therefore, suggest that the roll/register of licenses be kept by the Bar Association.

Article 19 Documents to be submitted for admission to the qualification examination and for the issuance of the legal profession license

18. The article refers to "unreliable" information. The experts believe that reference to "false" information could better serve the transparency of the admittance procedure, as well guaranteeing further the lawyer-to-be wishing to challenge the refusal of admittance to the qualification examination before a judicial body.

Article 21 Register of Licenses

19. According to this article, the register of issued legal profession licenses shall be kept by the Ministry of Justice. The experts believe that, as a safeguard to the independence of lawyers (and, by reflection, of the Bar Association) the roll/register of licenses should be kept by the Bar Association itself.[19] This conclusion is grounded on Principle V (Associations) of CM's Recommendation No. R(2000)21F (and the Explanatory Memorandum) which states that lawyers can only fully play their role in a State based on the Rule of Law if Bar associations are independent, in particular from the State and economic pressure groups.

Article 22 Withdrawal of the Legal Profession License

20. The experts recommend that better coordination is established between this article and those dealing with the liability of lawyers to disciplinary procedures (artt. 48, 49, 50, and 51 of the present Law). In addition to the arguments raised during the examination of articles 17-19 of the LBA, the experts would like to recall the conclusions reached above and to extend them to the issues of the loss of Moldovan nationality by the lawyer and the (vague) reference to "severe violation" of the disciplinary code or "serious breach" of a legal contract.

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[17] This comment also apply to the provision of art. 22 para. 2 of the present Law, related to the withdrawal of the legal profession licence.

[18] That of independence is also considered a pivotal aspect by the UN Basic Rules, which particularly stress it in the point dealing with "Guarantees for the functioning of lawyers".

[19] The experts note that, similarly, according to art. 33 of the LSGLA the list of lawyers on duty is kept by the National Territorial Office and not by the MoJ.

21. As far as the wording of newly introduced para. 1 letter b[1] and amended para. 2 of the present article is concerned, the experts express their concern in that the licence of a lawyer refusing to provide legal assistance at the request of the Territorial Office (art. 33[1] LSGLA) can be withdrawn by the MoJ without any prior disciplinary procedure. The Bar's Commission on Ethics and Discipline will be consulted by the MoJ. The provision, however, does not refer to the findings of the Commission and therefore it is reasonable to assume that no disciplinary proceedings have to take place before the MoJ's decision. In the eyes of the experts, this provision conflicts with Principle VI.2 of CM's Recommendation No. R(2000)21, according to which Bar Associations have the responsibility to conduct, or at least to participate, in the conduct of disciplinary proceedings concerning their associates. Conversely, in the circumstances falling within the scope of application of the present article, the responsibility for drawing conclusions on the disciplinary responsibility of a lawyer would lie in the hands of the National Council, which is an emanation of the Executive. All in all, the recognition of such a strong power (withdrawal of licence) in the hands of the MoJ to intervene in the practice of the legal profession undermines, in the eyes of the experts, the independence of the legal profession and, therefore, should be abandoned.

22. The wording of para. 1 letter b)[1] should in any case be amended and clear benchmarks should be inserted as to illustrate what is considered to be repeated and ungrounded refusal allowing for the licence to be withdrawn.

Article 43 Lawyer's Independence

23. The experts suggest that the article is worded as to mirror Principle III (1) of the CM Recommendation R(2000) 21F, which states that lawyers "*shall act independently, diligently and fairly*".

Article 44 Guarantees of Independence

24. This article touches upon a sensitive issue, which has been the object of recent censures by the ECtHR. The ruling in Mancevschi v. Moldova of 7 October 2008 is rather illustrative of the situation. Here the Court found a breach of Article 8 of the Convention in that the domestic authorities failed in their duty to give "relevant and sufficient" reasons for issuing the search warrants due to the broad formulation of the search warrant and the absence of any special safeguard to protect lawyer-client confidentiality.[20] Safeguards aimed at protecting against any interference with professional secrecy, such as, for example, 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 should be the object of specific provision[21], to be incorporated in Section III of the CPC (which foresees exceptions to the general rules of conducting search and seizure only with regard to diplomatic representations).[22]

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[20] On the issue of confidentiality in general, the experts observe that the comments expressed with regard to the LBA, apply also to the procedure disciplined by art. 66 CPP, in particular with regard to para. 4.

[21] See Smirnov v. Russia, judgment of 7 June 2007, para. 48; Sallinen and Others v. Finland, judgment of 27 September 2005, para 89.

[22] "A prohibition on removing documents in respect of which legal professional privilege can be maintained provides a concrete safeguard against interference with professional secrecy and the administration of justice" (Tamosius v. the United Kingdom (dec.), no. 62002/00, ECHR 2002-VIII). The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional

25. The experts also suggest that para. 2 of this article be complemented by recalling the principle of legality and therefore clarifying that the interferences can only be authorized in the circumstances provided by the law. In any case, it ought to be recalled that the authorization to search a lawyer's domicile or office when impinging on professional secrecy should respect the principle of proportionality.[23] The threshold for the execution of a search should not be as low as to interfere with the right and obligation of secrecy of a person to whom a confidentiality obligation applies. Further safeguards to prevent breaches of the confidentiality obligation, may be found in the possibility of submitting the issue of a seizure to an independent Court for review or to have any material that has been seized in a search examined by an outside advocate who would have to determine which material is, for example, related to an investigation and which is not. A similar procedure would allow for the upholding of the advocate's confidentiality obligation as well as the client's right to confidentiality. The Court emphasized that 'search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a "law" that is particularly precise. In this respect, the Court has made it clear that it is essential to have clear, detailed rules on the subject. Moreover, it requires search and seizure measures to be implemented with proper legal safeguards, such as regulations specifying with an appropriate degree of precision the circumstances in which privileged material could be subject to search and seizure.[24] Cross-reference to articles 12, 41 and 57 para 4, as well as to Sections IV and V of the CPC could also be introduced in order to clarify further the content of the right.[25]

26. Last but not least, the experts would like to recall the issues related to the protection of the rights guaranteed under Article 8 ECHR that the conservation, storage, and use, of the information gathered might raise.

Article 45 Lawyer's rights

27. The present article regulates, amongst other matters, the sensitive issue of the confidentiality of lawyer-client relationship, with particular attention to the case of a client who is detained, arrested or otherwise convicted (Article 45 paras. 3, 4, 5, and 6).[26] Having in mind the recent judgements of the ECtHR on the issue[27], and considering that the wording of the present article has not been amended as a result of the Court's decision, the experts believe that what is necessary, in order to ensure the confidentiality of the relationship between a lawyer and his/her client, are clear regulations providing practical guidance for the enforcement of certain provisions which, whilst *prima facie* and theoretically might appear in line with the European human rights standards (in this

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secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see Niemietz, cited above, pp. 35-36, § 37).

[23] Niemietz v. Germany, 1993, para. 37 "[...]the search impinged on professional secrecy to an extent that appears disproportionate in the circumstances".

[24] See Sallinen and Others v. Finland, judgment of 27 September 2005, para. 89.

[25] Cross-reference to art. 12 would also be recommeded in the light of the findings of the Court in Niemietz v. Germany, 1993, where the Court extended the notion of home also to business premises (a lawyer's office).

[26] Interestingly enough, the right to held confidential consultations with his/her clients is limited to the provision of legal assistance to persons deprived of their liberty (at various stages). Under this provision, lawyers's confidentiality in their relationship with non-restained persons is clearly challenged and therefore the experts suggest that a general provision guaranteeing the confidentiality of lawyer-client relationships be added.

[27] See, for instance, Istratii and others v. Moldova of 27 June 2007, Mordaca v. Moldova of 10 August 2008, and Cebotari v. Moldova of 13 December 2008.

respect see, for instance, the provisions embodied in Article 64 paras. 4 and 6, 66 para. 6, 68 para. 2 no. 1 of the CPC), nevertheless require to be clearly spelt out.[28]

28. The experts further point out the need to complement the provision of para. 3 of the present article by making it clear that respect of confidentiality shall be extended so as to include the content of any conversation, file, document or communication (whatever the means) exchanged between the lawyer and his/her client.[29]

29. Lastly, the experts note that the law does not provide clear rules defining what happens, for instance, when a breach of confidentiality takes place. Whilst, taken together, paras. 5 and 6 of the present Law do provide that failure to ensure the confidentiality of the lawyer-client communication can be the object of a petition and shall be considered as a violation of the right to defence and entail liability under law, there are no provisions dealing with the prohibition of the use of the information gathered in breach of the confidentiality principle. Although it is true that such sanction should be contained in the procedural legislation, it seems, in the light of the already cited findings of the Court in Iordachi and others v. Moldova, as well as of the formulation of the Law, that no such provision exists.

Article 47 Professional secret

30. Para. 2 of the present article should be complemented by a provision stating that any violation of professional secrecy/breach of confidentiality obligation without the consent of the client should be subject to appropriate disciplinary sanction.[30]

Article 48 Disciplinary Liability

31. The experts suggest that para. 2 of the present article should be complemented by a sentence making it clear that the disciplinary proceedings enjoy all the guarantees of Article 6 ECHR. They would like to express their doubts as to the possibility of tasking lawyers external to the Commission with the control of these disciplinary proceedings. Given the nature of the procedure, it would be advisable that the functions be kept within the competencies of the Commission on Ethics and Discipline.

32. Para. 3 might be reformulated so as to include an obligation that proper minutes are kept of all proceedings, meetings, and other activities of the Commission on Ethics and Discipline (unless this provision is already embodied into the Code of Ethics).

33. Para. 4 contains reference to “confirmation of the deviations committed by lawyer”. It is not clear to the experts what this refers to and what it entails. Reference to “grounded evidence” might therefore be more appropriate.

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[28] This was already the conclusion reached by the Parliament decision no. 370-XVI dated 28.12.2005 “Concerning the results of the verification by the special Parliament Commission regarding the situation of persons detained pending trial in the remand centre no. 13 of the Penitentiaries Department whose cases are pending before the courts”. The decision found, inter alia, that “the activity of the Ministry of Justice in the field of ensuring conditions of detention does not correspond to the requirements of the legislation in force”. However, as the Court noted in its judgment in the case Iordachi and others v. Moldova of 10 February 2009 concerning secret surveillance, although the overall control of the system is entrusted to the Parliament which exercises it through a specialized commission, the manner in which the Parliament effects its control is not set out in the law. In the specific case, the Government failed to produce any evidence indicating that there is a procedure in place which governs the Parliament's activity in this connection.

[29] Reference here is made to Principle I (6) of CM's Recommendation R(2000)21.

[30] See Principle III (2) of CM's Recommendation R(2000)21.

34. Although subsequent art. 49 para. 3 foresees the possibility to apply for a judicial review of the disciplinary decision, the text mentions specifically that the penalty can form the object of the appeal, whereas in line with the joint provisions of Article 6 and Article 2 Protocol no. 7 ECHR as well as with Principle VI (3) of the CM's Recommendation R(2000) 21 the object of appeal should be the decision (thus extending the review also to the procedure). In addition, should the disciplinary proceedings amount (for the reasons explained whilst discussing the administrative sanctions of the CAO) to “criminal proceedings” according to Article 6 para. 1 ECHR, the right to appeal automatically must follow from Article 2 Protocol no. 7 to the ECHR.

Article 49 Disciplinary Penalties

35. The wording of Article 49, not specifying the intensity of the various penalties, fails to comply with the principle of proportionality in determining the sanction stated in Principle VI of the CM's Recommendation R(2000)21.

LAW ON STATE GUARANTEED LEGAL AID

Preliminary observations

36. Whilst reading the Law on state guaranteed legal aid (LSGLA), the experts were struck by a number of elements. First and foremost, the legislation introduces a system for the provision of legal aid which is rather confusing, both because of the number of legal categories involved (paralegals, qualified lawyers, public defenders, *ex officio* lawyers, duty lawyers) and of the mechanisms overseeing the participation of such subjects in the various procedures and proceedings. Having already expressed the doubts and criticisms as to the possibility that non-lawyers and non-members of the Bar Association practice law (either in civil cases, where they might be called "representatives", or within criminal proceedings), the experts also consider that the fact that the responsibility of appointing a lawyer entitled to deliver qualified legal aid rests in the hands of the Coordinator of the Territorial Office is unsatisfactory. The lack of reference to future by-laws suggests that each Coordinator will establish his/her rules and criteria for the allocation of cases/requests to the various legal professionals. This is a choice that evidently opens the door to possible manipulation of the system of appointment, which could then be used in an arbitrary way (whether to the detrimental or to the benefit of certain categories/individual members of the legal profession).

37. Furthermore, neither the Law on the Bar Association nor the present Law establish a coordinated scheme for the provision of free legal aid and the qualified legal assistance provided by duty lawyers to those in need of emergency legal aid (better, assistance) because they are *in vinculis* (deprived of their liberty, either within the framework of administrative or criminal proceedings).

38. Lastly, when the text mentions the word "Government"[31] the experts believe that the reference should be interpreted as "Parliament".

Article 1 Object of the Law

Article 19 Persons entitled to qualified legal aid

Article 21 Delivery of qualified legal aid depending on the level of income

Article 22 Partially free qualified legal aid

39. Though commendable, the experts are concerned about the sustainability of the choice made by the legislator. Free legal aid, regardless of the income of the person provided with it, is delivered to all those falling into the categories of Article 19 para. 1 letters b-d. This may put an excessive burden on the State, which is obliged to cover legal expenses also for those who, in practice, might have their own means to pay a lawyer. This, in turn might have a detrimental influence on the level of legal aid provided as the money allocated will be spread over a large number of persons and cases. The risk, in other words, is that low remuneration of lawyers providing free legal aid may cause a lowering of the quality of their services and may hinder the full exercise of defence rights, as a result of difficulties in obtaining adequate remuneration for such legal services.

40. The experts also note the vagueness of the benchmark used, which is echoed in the reference in Article 22 to "material possibilities" of the person applying for legal aid. Article 21 refers to the level of income established by the Government, suggesting that the threshold might vary according to the decision of the Executive. Considering that the latter represents the political component of a State, the experts consider that it would be more appropriate for the present law to contain clear indications as to the minimum

[31] See, for example, arts. 12 and 21.

income below which free legal aid is provided. In order to guarantee accessibility and transparency of the procedure, the experts additionally suggest that the guidelines, if not the criteria, for determining the admission to partially free legal aid be included in the present Law.

41. Lastly, the experts note a discrepancy between what is foreseen by Article 21 and the provisions of Article 22. While in the case of a request for partially free qualified legal aid the conditions applicable are those established by the National Council, in case of totally free qualified legal aid the conditions are set by the Government.

Article 2 Main definitions

Article 3 Types of state guaranteed legal aid

42. The definition of public defender is rather complicated. It would have sufficed to embody into it the definition of "lawyer" as stated in the LBA and specify that they are employed on a contract basis with the Territorial Offices, which pays them a fixed amount of money (Article 32).

43. The experts note, in addition, that despite the importance of the provision of the so called "emergency legal aid", neither article defines it clearly. Emergency legal aid being a component of both the primary and the qualified legal aid, the experts believe that it should be included both among the defined terms and the forms of state guaranteed legal aid.

Article 4 Principles of State guaranteed legal aid

Article 23 Reimbursement of expenses for qualified legal aid delivery

44. The reference, included in the wording of Article 4 letter c) to the cost-effectiveness of the delivered service as one of the principles against which measuring the provision of State legal aid may adversely affect the right of the defence, as the appointed lawyer might be reluctant to undertake certain expenses (i.e. forensic expertise) knowing the risk that the claim of such expenses will be (successfully) challenged by either the State, the opposing party, or the client no longer entitled to free legal assistance. In this respect, the experts also note regarding the issue of reimbursement that Article 23 para. 1 only refers to civil and administrative cases and that para. 2 refers generically to the loss of entitlement to such aid, whereas no provision is specifically devoted to criminal proceedings.[32] With regard to the latter, a question arises whether all the expenses have to be anticipated by the lawyer out of his/her own pocket or, where outsourcing is required (i.e. forensic expertise), the fees to be paid can be anticipated out of the funds received for such purpose by the Territorial Office.

Article 9 Prerogatives of the Ministry of Justice in the field of State guaranteed legal aid

Article 10 Prerogatives of the Bar Association in the field of State guaranteed legal aid

Article 11 Prerogatives of the National Council

45. Article 9 letter b) lists among the prerogatives of the MoJ the development of draft legislation in the field of State guaranteed legal aid, a task which is entrusted neither to

[32] The Commission and the Court examined under art. 4 ECHR the economic issues related to the official appointment of lawyers in the case Van der Mussele v. Belgium (1983). Although in that occasion, the Court did not conclude that the lack of remuneration and reimbursement of expenses breach art. 4 ECHR, the Court made it clear that those are "relevant factors" when considering what is proportionate or in the normal course of affairs with regard to "the requirement of modern life".

the Bar Association nor to the National Council. In the light of what has been said earlier (while commenting on the LBA and the question of the independence of lawyers), the experts believe that any draft of legislation touching on legal aid should be considered in concert with those delivering such assistance.

Article 14 Territorial offices of the National Council

46. Para. 2 of the current article refers to the cities (municipalities) where the Courts of Appeal are located. As the State guaranteed legal aid is provided before all Courts, the sentence should be amended so as to extend to all judicial instances operating within a certain (administrative/judicial) territory.

Article 18 The manner of primary legal aid

47. The experts note that para. 3 of the present article does not make clear who determines whether the case for which primary legal aid is sought duplicates a request already introduced to another office and, therefore, within the very tight timeframe identified in para. 2, calls for the request to be rejected. The consequences of the client acting in bad faith are also not envisaged.

48. Para. 4 authorises the continuation of the provision of legal aid even if a conflict of interest is detected, provided that the applicant consents. The experts note, in the first place, that the norm does not seem fully in line with the principle of the legal profession discussed earlier. Secondly, it opens the door to an ambiguous situation, especially considering that it also affects non-members of the Bar Association and non-lawyers (who, therefore, are not bound whatsoever by the ethical and disciplinary norms regulating the profession), leaving the client with very few option in order to challenge the work of the counsel.

Article 26 Submission of application or request for the delivery of qualified legal aid

49. In addition to the general comments introduced at the beginning of the examination of the present Law on the issue of the concentration of the decision-making process in the hand of one person (the Coordinator of the Territorial Office) and the absence of a pre-established rota for the allocation of lawyers to cases, the experts would like to draw attention to the deadlines introduced by the norm. Whilst, on the one hand, the timeframe identified can be regarded as being rather short, on the other hand, the indication of a specific number of days/hours does not guarantee against the risk that the effective right to defence might be impaired. One solution could be to insert the provision of a “prompt” communication of the request and appointment of a lawyer into the text.

50. The experts note, furthermore, that non-observance of the set deadlines is not sanctioned and would suggest that this aspect is tackled, especially with regard to the position of the Coordinator.

Article 27 Decision on the delivery of qualified legal aid[33]

51. Para. 2 of the present article clearly leaves the appointment of a defender (rectius lawyer providing qualified legal assistance) in the hands of the Coordinator of the Territorial Office, who solely is responsible of the process. There is no element in the law suggesting that the Coordinator works on the basis of pre-established rota or criteria as to the allocation of the cases to the various lawyers or public defenders entitled to provide free legal aid. This, in the eyes of the experts, raises issues that should be addressed.[34]

Art. 31[1] Lawyer appointed by the territorial office

52. Art. 31[1] of the LSGLA was recently introduced in order to ensure that legal aid is available across the whole territory of Moldova. The norm calls for various comments. First of all, the experts note that the provision seems to conflict with the rationale of the LSGLA, according to which legal aid paid by the State is to be provided only by lawyers who accepted to enter into an agreement with the Territorial Offices. In general, it can be said that the obligation introduced by art. 31[1] is not *per se* in breach of the ECHR.[35] Indeed, art. 4 para. 3 lett. d) of the Convention clarifies that "work or service which forms part of normal civic obligations" cannot be regarded as "forced or compulsory labour", which is, on the contrary, prohibited. With particular regard to the obligation to provide (unpaid or underpaid) legal assistance, the Court found that the provision of legal assistance to the indigent stems from a conception of social solidarity which cannot be regarded as unreasonable. This is very much so also having in mind that the maximum amount of time to be devoted to such activity (120 hours per year) does not prevent lawyers from taking up cases from paying clients. The provision, however, does not list any criteria on the basis on which legal aid cases are to be allocated to lawyers who had not expressed the wish to provide legal aid upon request. The only criteria laid out, that is the geographical location of the lawyer's office, cannot be regarded as sufficient, especially having in mind that the "repeated, ungrounded refusal" to deliver legal aid can lead to the withdrawal of the professional licence. All in all, as it is worded, the article might raise issues under art. 14 of the Convention in conjunction with art. 4, in that it introduced a difference in treatment among all those practising a legal profession, without any objective and reasonable justification. The situation of lack of professionals delivering state legal aid in a certain area could be tackled differently, for instance by introducing the reimbursement of the costs that lawyers delivering legal aid upon request incur into whilst providing assistance out of their area of responsibility.

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[33] All norms related to the appointment of a lawyer to a person undergoing criminal, civil or administrative proceeding should include the provision that the decision is immediately communicated to all interested party, among which also the lawyer. In this respect, the experts note that the current (and other relevant) rule should be coordinated with the text, of the relevant procedural codes. With regard to the criminal procedure, the reference here is to be made to art. 67 para. 3.

[34] The legislator is aware of the risks inherent in such procedure and therefore, only with respect to judges and prosecutors, states clearly under art. 70 para. 2 of the CPP that they must abstain from recommending the invitation of a certain defender.

[35] See, in this respect, the judgements in the cases Van Der Mussele v. Belgium of 23 November 1983, Schmidt v. Germany of 18 July 1994.

Article 36 Control over the quality of services delivered by lawyers

53. Para. 3 introduces the possibility that a lawyer providing free legal aid may be subject to disciplinary sanctions if s/he does not perform the tasks properly, whereas the same sanction does not apply to NGOs, thus introducing an unjustified difference in treatment which should be addressed by the legislator.

CRIMINAL PROCEDURE CODE

The structure of the CPC

54. The CPC is compartmentalised into 8 principal parts, referred to as Titles. Each Title deals with specific areas of criminal procedure. Each Title is further compartmentalised in Chapters, dealing with specific matters. Some Chapters are further divided into Sections. The CPC concludes with a Special Part containing two further Tiles dealing specifically with the criminal investigation and the court. In summary, the CPC is set out in the following Titles and Chapters, dealing with the matters listed below. This Opinion will deal with the provisions in the same order as they appear in the CPC, except where there is duplication between matters dealt with in separate Titles or Chapters, where we shall attempt to cross-reference those provisions. We shall comment in some detail where we feel that the provisions of the CPC are unacceptable and require amendment in order to bring them in line with the provisions of the ECHR and associated international instruments. In other cases, where we have less fundamental objections or mere observations, we will comment more generally.

TITLE I: General Provisions on Criminal Proceeding

Chapter I: Notions (Articles 1 to 6)

55. This chapter deals with the principal concepts or “notions” comprised within the CPC.

56. Article 1 defines the scope of “criminal proceedings” as encompassing all activities undertaken by the investigating authorities and by the courts, or other person, carried out in pursuance of the CPC.

57. We commend the way in which the Art. 1(2) sets out, unequivocally, the purpose of the CPC as being the protection of individuals, society and state against offences, and the protection of individuals and of society against unlawful acts committed by officials investigating or trying alleged or committed offences. Equally commendable are the specific references in Art. 1(2) to: (i) punishments being proportional to any offence that has been committed; and (ii) to a commitment to the principle that no innocent person should be prosecuted or convicted.

58. Art. 1(3) places a specific obligation on the investigating authorities to proceed in such a way as to no person shall be suspected, accused or convicted on ill-founded grounds, and that no person shall arbitrarily or unnecessarily subjected to procedural constraints. This commitment is reinforced by the provisions of Art. 10 which states that no temporary restrictions on the rights and freedoms of a person, or any application of constraints, may be imposed by the competent authorities, except in the cases and strictly in the manner provided for in the CPC. The provisions of Art. 1(3) and Art. 10 reflect a general commitment to the rights under Art. 5 (3) of the ECHR in relation to pre-trial detention. Further specific guarantees and procedural safeguards regarding pre-trial detention are provided for in Art. 11. However, whilst Arts. 1(3), 10 and 11 do reflect a general commitment to the rights under Art. 5(3) of the ECHR, we are concerned that Art. 11(4) of the CPC allows a person to be detained under preventative arrest without an arrest warrant for a period of up to 72 hours. Further reference to this provision is made when considering Art. 11 in detail.

Recommendation for the inclusion of an overarching duty

59. For the avoidance of any doubt about the scope and application of Art. 1 of the CPC , we recommend that Art.1 should include a paragraph setting out an overarching duty on judges, investigating judges, prosecutors and all criminal investigating authorities[36] to carry out their functions, duties and powers in accordance with the overriding objective set out in paragraphs (2) and (3) of Art.1 of the CPC.

60. Article 2 deals with the status of the CPC within national law and its position *vis-à-vis* the Constitution of Moldova and international treaties to which Moldova is a party. We commend the way in which Art. 2(1) makes it clear that criminal proceedings are regulated by the provisions of the Constitution, international treaties to which Moldova is a party and by the CPC. Further, Art. 2(2) expressly incorporates the provisions and standards of international law and of international treaties to which Moldova is a party as a component of the CPC. The provisions of international law and international treaties are, therefore, read into the CPC and "directly determine human rights and freedoms in criminal proceedings". This commitment, together with the provision in Art. 2(3), placing the Constitution above any national criminal procedure legislation and declaring any law regulating criminal proceedings which is contrary to the provisions of the Constitution to be of no legal effect, is commendable.

61. Further fair trial guarantees are set out in Art. 2(5), which states that no act taken within criminal proceedings shall have legal force if it: revokes or restrains human rights and freedoms; breaches judicial independence or the principles of adversarial trial; or contradicts generally acknowledged standards of international law or the provisions of international treaties to which Moldova is a party.

62. The combination of the provisions set out in Art. 2 of the CPC not only re-state Moldova's commitment to all of the fair trial guarantees under Art. 6 of the ECHR, but also incorporate the rights set out under any other international treaty to which Moldova is a party. In terms of the drafting of the CPC, Moldova has set out its commitment to human rights guarantees in criminal proceedings in the fullest terms. Moreover, the CPC has been drafted in a way that will enable the courts of Moldova to turn to the Constitution of Moldova, the ECHR and any other source of international law (whether customary international law or the provisions of international treaties to which Moldova is a party), to resolve any case either where the CPC does not provide a sufficient remedy for violations of human rights, or where the CPC is in conflict with the Constitution or international law.

63. Art. 3 of the CPC deals with the applicability of the provisions of the CPC to cases which may have been investigated or tried before the CPC was enacted (the last amendment being on 13 November 2008). The wording of the English translation may not be as clear as it could be, but Art. 3(1) seems to provide that criminal proceedings shall be regulated by the law which was in force during the criminal investigation or during the trial of the case. In our opinion this is not satisfactory as there are likely to be many cases which were investigated before the CPC was enacted. It would be unjust and contrary to the intention of the CPC that some accused persons will have the protection of the CPC whilst others may not, on the basis that the investigation took place before the CPC was enacted.

64. Art. 3(2) attempts to redress this unfairness by stating that the CPC *"may have an ultra active effect, meaning that its provisions may be applicable during a transition to the new law to proceedings regulated under the new law. The ultra active effect shall be provided for in the new law."* This provision does not meet our concerns. First, the use of the word

[36] Listed in art.56 CPC

"may" is arbitrary and Art. 3(2) should be amended to make it clear that the CPC will apply to all cases being tried by the courts after the CPC was amended, irrespective of when the criminal investigation took place. Secondly, there does not seem to be any further explicit reference to the ultra active effect of the CPC in the latest amendment. Clear provisions should be set out in the CPC to deal with those cases that fall within the transition between the old law and the provisions of the amended CPC.

65. Arts. 4 and 5 of the CPC deal with the geographical jurisdiction of the CPC and its application to foreign citizens.

66. Art. 4(1) of the CPC provides that it shall be applicable throughout the territory of Moldova and shall be apply to all criminal investigating authorities and all courts, irrespective of the place where the offence was committed. Art. 4(2) makes further provision for criminal law procedures contained in international treaties to which Moldova is a party. These provisions are both acceptable.

67. Art. 5(1) states that criminal proceedings in the territory of Moldova against foreign citizens and stateless persons shall be subject to the CPC. Art. 5(2) deals with criminal proceedings against those persons enjoying diplomatic immunity. These provisions are both acceptable.

68. Art. 6 of the CPC defines various expressions used in the CPC. Whilst we have found the English translation of some of the definitions cumbersome, we have no comments on the contents and they appear to be acceptable.

Chapter II: General Principles of the Criminal Proceedings

69. This chapter of the CPC contains provisions dealing with some of the most fundamental human rights of a suspect or an accused person, including the rights under the following Articles of the ECHR: Article 3 (prohibition of torture); Art. 5 (right to liberty and security of person); Art. 6 (fair trial guarantees); Art. 8 (respect for private life, home and correspondence); and Art. 1 of Protocol No.1 (peaceful enjoyment of possessions).

70. Before commencing our review of this Chapter of the CPC we note again that the provisions of Art. 2 of the CPC expressly incorporate the provisions of the Constitution of Moldova and all international treaties to which Moldova is a party (including, most importantly, the ECHR). In those circumstances, where there is any lacuna in the provisions of the CPC or any inconsistencies between the CPC and the Constitution or the ECHR (or any jurisprudence of the ECtHR), there is a positive obligation upon the authorities and the courts of Moldova to comply with the Constitution and the ECHR, just as if those provisions were expressly included in the CPC. For that reason, it can be argued that the CPC is not only fully compliant with the ECHR, but it is also a flexible instrument (in precisely the same way that the ECHR is viewed).

71. It is important that investigators, prosecutors, defence lawyers, and judges should be aware of this overarching provision of the CPC, and that they must interpret the CPC in this extremely broad manner. This obligation must be seen in two ways. First, the CPC must be given a *"purposive interpretation"* (i.e. where it is possible to do so, the courts must interpret the CPC in such a way as it is compliant with the Constitution and the ECHR). Secondly, and more fundamentally, where any provision of the CPC is inconsistent with the Constitution or the ECHR, it is of no legal effect and must be struck down.

72. Art. 7(1) of the CPC reinforces this overarching obligation under the CPC by stating that:

73. "7(1) criminal proceedings shall be carried out in strict compliance with the generally acknowledged principles and standards of international law, with international treaties to

which the Republic of Moldova is party, with the Constitution of the Republic of Moldova and with the present Code."

74. Furthermore, Art. 7(2) provides that where there is any inconsistency between the CPC and international treaties on fundamental human rights and freedoms to which Moldova is a party, the international treaties shall have priority.

75. The wording of the English translation of Art. 7(3) and 7(4) provided to us is difficult to follow but we have taken it to mean as follows.

76. Art. 7(3) provides a mechanism whereby if, during (criminal) proceedings, a legal provision (it is not clear whether this means a legal provision of the CPC) to be applied is found to be contrary to the Constitution, and is an act which is subject to constitutional review, the court shall suspend the proceedings and shall notify the Supreme Court of Justice for further notice to the Constitutional Court.

77. Art. 7(4) provides a similar mechanism where the court finds that a legal provision (again, it is not clear whether this means a legal provision of the CPC) to be applied is found to be contrary to the legislation (again, it is not clear what this means), and is an act which is not subject to constitutional review, the court shall directly apply the law.

Commentary:

78. We have taken *this to mean that if the court finds that an act to be applied in the proceedings (by some legislation outside the CPC) is contrary to the CPC but is not subject to constitutional review, the court must apply the provisions of the CPC and not the legislation outside the CPC. Please note that we are not being critical of the translators, and we raise this difficulty because these provisions of the CPC are crucially important and need to be made absolutely clear as they involve fundamental principles to be applied when there is an inconsistency between the CPC and other legislation. We advise that the translators check the translation of these articles and resubmit them for our further opinion.*

79. By comparison, the English translation of Art. 7(5) is clear and it provides that where the courts find that a legal provision[37] to be applied is contrary to international treaties to which Moldova is a party, "the court shall directly apply international provisions". Further, the court is required to state its reasons for so doing in its judgment and to inform the authority that "adopted the national norm"[38] and also the Supreme Court of Justice. This is a wide power vested in the courts, and obliges judges to apply international law where they find that a "legal provision" is contrary to international law.

Commentary:

80. Again, as Art. 7(5) is of such fundamental importance, we advise that the translators check the translation of this article, especially the words "legal provision" as no definition is given of "legal provision" in the CPC.

81. Art. 7(6) makes the decisions of the Constitutional Court (finding legal provisions unconstitutional) binding on investigating authorities, the courts and for all those persons participating in the criminal proceedings (presumably prosecutors and defence lawyers). We commend this provision.

82. Art. 7(7) gives explanatory decisions of the Plenary of the Supreme Court of Justice (regarding the implementation of legal provisions as to court practice) the status of a "recommendation" to criminal investigating authorities and to the courts. Whilst this is commendable, no instruction is given as to the way in which investigators or courts

[37] Presumably under the CPC, but it is not so limited by the words of the translation provided to us.

[38] Presumably a reference to the act by the authority which the court has found to be in violation of international treaties.

should be guided by such “recommendations”. We advise that the status of explanatory decisions of the Plenary of the Supreme Court should be given a binding status on investigators and the courts.

Presumption of innocence

83. Art. 8 of the CPC deals with the presumption of innocence in a clear and unequivocal way. It is fully compliant with Art. 6(2) of the ECHR.

Equality before the law and authorities

84. Art. 9 of the CPC deals with equality before the law and the authorities. Art. 9(1) deals with the right to equality before the law in a clear and unequivocal way. We would, however, advise that the ground of “sexual orientation” should be included as one of the express categories. Whilst “sexual orientation” can be assumed to be included within the words “any other situation”, we regard it as such an important ground that it should be referred to expressly in the wording of Art. 9(1).

85. Art. 9(2) deals with “special conditions of criminal investigation and trial in respect of certain categories of persons that ***pursuant to the law enjoy a certain degree of immunity*****”.** We presume that this Art. refers to the immunity of such persons as Heads of State, however, the wording of Art. (9) is not sufficiently clear in its scope (i.e. who it applies to?) or intent (i.e. how will this group of persons be dealt with?). We recommend that the wording of Art. 9(2) should be amended to make clear who is referred to and what is the intention of the Article. The words ***“special conditions”*** are imprecise and, without further definition or regulation, they are wholly inappropriate when dealing with the mode of criminal investigations and trial of any group of persons.

Respect for human rights, freedoms and dignity

86. Art.10 of the CPC deals with respect for human rights, freedoms and dignity. Art. 10(1) states clearly and unequivocally that all authorities and persons participating in criminal proceedings shall be bound to respect human rights, freedom and dignity. We commend this general statement of the obligation to respect human rights.

87. Art. 10(2) of the CPC provides that any restrictions placed upon the rights and freedoms of a person shall only be permitted in the cases and strictly in the manner provided for in the CPC. We suggest that the following words should be added to Art. 10(2): “… and only to the extent that they are necessary and in accordance with the Constitution and international treaties to which the Republic of Moldova is party.” Whilst conformity with the Constitution and international treaties is deemed to apply to any provision of the CPC, we are of the opinion that the scope of Art. 10(2) is so fundamental that these words should be added to the Article.

88. Art. 10(3) of the CPC deals with the prohibition on torture or cruel, inhuman or degrading treatment. It is fully compliant with Art. 3 of the ECHR and will be interpreted in accordance with the jurisprudence of the ECtHR.

89. Art. 10(31) deals with the burden of proof in cases in which an investigation into allegations of torture or cruel, inhuman or degrading treatment is being made. It is fully compliant with the jurisprudence of the ECtHR and will be interpreted in accordance with those decisions.

90. Art. 10(4) provides that a person shall be entitled to defend by all means not forbidden by law any violation of his rights, freedoms or dignity. We advise that this Article should be amended to make express provision for such a person to be entitled to an effective remedy before a national authority notwithstanding that the violation has been committed

by persons acting in an official capacity. The proposed words are taken from Art. 13 of the ECHR and, whilst they are deemed to be part of the CPC, we are of the opinion that they are so important as to justify inclusion in Art. 10(4) of the CPC.

91. Art. 10(5) of the CPC deals with reparation for violations of human rights. If Art. 10(4) is amended in the terms that we have suggested above, then we do not suggest any amendments are necessary to Art. 10(5).

92. Art. 10(6) deals with the protection of an under-aged victim or a witness before a court. Whilst we commend this provision, further provision must be made for regulating such special measures, to ensure that fair trial guarantees are not improperly imbalanced or eroded.

Inviolability of the person

93. Art. 11 of the CPC deals with liberty and security of the person. We do not propose any amendments to Art. 11(1) and 11(2).

94. Art. 11(3) deals with the grounds for deprivation of liberty. We suggest the inclusion of the words "and in accordance with the Constitution and the international treaties to which the Republic of Moldova is party." Once again, whilst the provisions of the ECHR are deemed to be part of the CPC, we are of the opinion that this Article is of such importance that the words should be expressly included in Art. 11(3).

95. Art. 11(4) deals with the permitted length of detention without an arrest warrant. As presently enacted, Art. 11(4) permits detention without an arrest warrant for a period not exceeding 72 hours. This is not compliant with Art. 3(3) of the ECHR which requires that a person who has been arrested or detained "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power". Whilst a period of 72 hours may, in some cases, not violate the provisions of Art. 3(3) of the ECHR, there will be many cases in which a detained person can be brought before a judge in a shorter period of time. The ECtHR has held that the degree of flexibility attaching to the notion of "promptly" is very limited.[39] We suggest that Art. 11(4) be amended to read as follows:

96. "11(4) A person may be detained under preventative arrest without an arrest warrant. A person so arrested shall be brought promptly before a judge (or insert the other appropriate officer authorised by law to exercise such judicial control) who shall review the lawfulness of such an arrest in accordance with this code, the Constitution and international treaties to which Moldova is a party."

97. If Art. 11(4) is amended in the terms that we have suggested, then we do not suggest that any amendments to Articles 11(5) or 11(6) are necessary.

98. Art. 11(7) deals with searches and other procedural actions that interfere with the inviolability of the person. For the same reasons that we have already mentioned, we suggest that the words "and in accordance with the Constitution and international treaties to which the Republic of Moldova in party" should be added at the end of the Article.

99. We note that "criminal proceedings" are defined by Art.1(1) as "the activity of the criminal investigating authorities". We have presumed that this definition includes the police and that, therefore, Art. 10(3) of the CPC will apply from the moment that a suspect is detained (whether with or without an arrest warrant). If this is a correct assumption then no amendments to Art. 11(8) or 11(9) are necessary. If, however, our assumption is not correct (and that Art. 11(9) does not apply from the moment of arrest, then we suggest

[39] Brogan v UK 1988 11 E.H.R.R. 117

that Art. 11(8) be amended to add the words: “and shall not be subjected to torture or to cruel, inhuman or degrading treatment”.

Inviolability of domicile

100. Art. 12 of the CPC deals with inviolability of domicile. As the provisions of the ECHR are deemed to be part of the CPC, we do not propose any amendments to Art. 12(1).

101. The English translation of Art. 12(2) contains a contradiction where it refers to “such actions shall immediately, and not later than during 24 hours after …” We surmise the word “immediately” needs to be replaced by the word “promptly”, or some similar description .

Inviolability of property

102. Art. 13 of the CPC deals with inviolability of property. We do not suggest that any amendments are necessary to Art. 13(1) or Art. 13(2). We suggest that a time limit for the provision should be inserted into Art. 13(3). We suggest that the word “promptly” be inserted so that Art. 13(3) states that “a copy of the report shall ***promptly*** be made available to the person …”

Right to respect for correspondence

103. Art. 14 of the CPC deals with the right to respect for correspondence. Art. 14(1) creates the right to privacy of correspondence and it is enacted in very wide terms and does not require any amendment. Art. 14(2) states that restrictions to the right under Art. 14(1) may only be imposed by a court warrant issues under the terms of the CPC. It is necessary, therefore, to consider the other parts of the CPC that deal with seizure of correspondence.

104. Art. 41 of the CPC (Competence of the investigating judge) provides that “the investigating judge shall ensure judicial control during criminal investigation by:

……

3) authorising searches and corporal search, sequestering of goods, seizure of objects representing state, commercial or bank secret, exhumation of corpse;

.....

5) authorising interception of communications, sequester of correspondence, video recording;

……

105. Article 52 of the CPC (Prosecutor’s prerogatives during criminal investigation) provides that

(1) In the framework of criminal investigation, the prosecutor:

……

16) shall address requests to courts for the authorisation of ….. seizure of correspondence, of interception of communications, ……of physical and electronic surveillance of a person, ……video and audio surveillance of the room, installing video and audio recording devices in room, surveillance of information transmissions to the suspect, ……and other actions for which the authorization of the investigating judge is required;

……

1. Article 57 of the CPC (Criminal investigating officer and his prerogatives) provides that

(1) The criminal investigating officer is the official who on behalf of the state shall carry out within the limits of his powers, the criminal investigation of criminal cases.

(2) The criminal investigating officer:

…….

3) shall bear responsibility for the legal and timely conduct of the criminal investigation;

4) shall propose to the prosecutor the submission of requests before the court in order to obtain the authorization to search, to seize goods, mail and telegraphic correspondence, to intercept phone and other communications, to provisionally suspend the accused from position, to seize objects and documents from third parties, to physically and electronically survey a person, to forcedly take samples of saliva, blood, hair, nails, to exhume a corpse, to video and audio survey a room, to install audio and video recording equipment in a room, to survey the information transmissions addressed to the suspect;

……

106. Section V of the CPC (Seizure of postal correspondence and interception of communications) deals with the grounds for seizure of correspondence. This section is dealt with later in this joint opinion but a summary of the procedure is set out below.

107. In summary Art. 133(1) provides that if there are reasonable grounds to believe that the correspondence sent or received by the suspect, accused, may contain information, which may be relevant evidence in the criminal case, on one or more serious, extremely serious or exceptionally serious crimes, and if the evidence cannot be collected by other probation procedures, the criminal investigating authority shall be entitled to seize the correspondence of mentioned persons.

108. Art. 133(3) provides that the prosecutor leading or conducting the criminal investigation must draw up an order and submit it to the investigating judge or, if it be the case, to the court for authorisation. In particular the order must contain the following information: reasons for ordering the seizure of correspondence, name of the post office to seize the correspondence, the name of the person/s whose correspondence is to be seized, the exact address of those persons, the type of the correspondence to be seized and the duration of the action. The duration of the action may be prolonged under the terms of the present article.

109. Art. 133(4) provides that the correspondence seizure order with the respective authorisation must be submitted to the head of the respective post office for which the execution of the order shall be binding.

110. By Art. 133(5), the head of the post office must immediately inform the authority that issued the order about the seizure of requested correspondence.

111. By Art. 133(6), the seizure of the correspondence must be discontinued by the authority that issued the initial order, by the higher prosecutor, by the investigating judge, after the expiry of the established duration and not later than the completion of the criminal investigation.

112. Articles 134 and 135 make provision for further regulation of: (Art. 134) the examination and seizure of correspondence; and (Art. 135) the interception of communications.

113. Whilst the powers of seizure given under the CPC are wide ranging, nevertheless the CPC does provide a detailed framework of judicial regulation of the procedures. In addition, the CPC is deemed to include the provisions of the ECHR and, thus, the

regulatory provisions of the CPC relating to seizure of correspondence must be interpreted so as to comply with the ECHR and the case law of the ECtHR. If the provisions are not capable of being interpreted so as to comply with the ECHR and the case law of the ECtHR, then the provisions have no legal force (see: Art.2(5)).

114. Accordingly, we are of the opinion that the Art. 14 of the CPC does comply with Art. 8 of the ECHR. However, as previously stated in this joint opinion, it is essential that the police, investigators, prosecutors, defence lawyers and judges are aware of the requirement that any order for the seizure of correspondence or interception of communications will be unlawful if the circumstances in which the order is made or the manner in which it is executed violates the provisions of Art. 8 of the ECHR as interpreted by the ECtHR.

Inviolability of private life

115. Art. 15 of the CPC provides for the inviolability of the right to a private life.

116. Arts. 15(1) and 15(2) make provision for the right to the inviolability of private life. Whilst no mention is made in Arts. 15(1) or 15(2) that any interference with the right to private life must be in accordance with the provisions of the ECHR, as previously stated, the provisions of all international treaties with which Moldova is a party are deemed (by Arts. 1 and 2 of the CPC) to be part of the CPC and to take precedence over the provisions of the CPC where there is a conflict between them. However, as the right to inviolability of the right to private life is so fundamental, it may be thought appropriate to include a specific reference in Art. 15 that any interference with the right to a private life must be in accordance with international law.

117. Art. 15(3) of the CPC provides that no one may refuse to provide information on his or a third person's private life by invoking the right to inviolability of private life, but they shall be entitled to demand explanations from the criminal investigating authority concerning the need for obtaining such information. We are of the opinion that this provision is so wide that it violates both Art.8 of the ECHR (right to private life) and also, potentially, the privilege against self-incrimination. We strongly suggest that Art. 15(3) is repealed and replaced with a more specific provision that makes it clear that any demands for information regarding a person's private life, or that of a third person, must be necessary and in accordance with the CPC and international law. The provision must make it clear that it is only in circumstances where a demand is lawfully made that a person can be compelled to give such information.

118. Art. 15(4) of the CPC provides "that evidence confirming information on one's private and intimate life, may be examined in camera upon his request". No further instruction or guidance is given in the Article as to when the court should grant such an application, or to the procedures for granting such an application. However, further provisions for hearings to be held in private are contained in Art. 18 of the CPC (Publicity of court hearings). Art 18(1) provides that "all hearings in courts shall be public, save for cases provided for in the present article". Article 18 would appear, therefore, to provide an exhaustive list of cases in which hearings are permitted to be held in private.

119. Art. 18(2) provides that: "Access in the court room may be forbidden for the press or for the public by a court reasoned order, during entire proceedings or only for a part of it, for the respect of morality, public order or national security, when the interests of minors or the protection of private life of parties in the proceeding require it, or to the extent the court considers this measure strictly necessary or when, due to special circumstances, publicity may damage the interests of justice. We suggest that Art. 15(4) of the CPC should be amended so as to make it clear that hearings in camera are only permissible if they fall within the terms of Art. 18(2).

Language of criminal proceedings and the right to an interpreter

120. Art. 16 of the CPC deal with the language in which criminal proceedings are to be conducted and makes provision for interpreters. We consider that, generally, Art. 16 is fully compatible with the provisions of Art. 6 of the ECHR. However, Art. 16(3) provides that "criminal proceedings may be carried out in another language acceptable by the majority of the persons taking part in proceedings". We would suggest that the following words are added to Art. 16(3): "…… and the court is satisfied that it is in the interests of justice that the proceedings are carried out in that other language".

Securing the right to defence

121. Art. 17 of the CPC deals with the right of the parties (the suspect, the accused, the defendant, the injured party, the civil party and the civilly responsible party) to legal representation. As the rights under Art. 6 of the ECHR are deemed to be part of the CPC and to take precedence over any provision in the CPC which is in conflict with the ECHR, Art. 17 must be interpreted in such a way as to make it compliant with the ECHR and the case law of the ECtHR. For the sake of clarity, however, we suggest that all references in Art. 17 to "a lawyer who renders state guaranteed legal assistance" should make it clear that such a lawyer must be a lawyer chosen by the party and not by the criminal investigating authority. We have no further suggested amendments.

Publicity of court hearings

122. As previously mentioned, Art. 18 of the CPC deals with publicity of court hearings. The presumption is (Art. 18(1)) that all hearings shall be in public, except for case provided for in Art. 18. The list of circumstances in which cases can be heard in private under Art.18 is, therefore an exhaustive list. Art. 18(2), 18(2^1) and 18(3) provide as follows:

"(2) Access in the court room may be forbidden for the press or for the public by a court reasoned order, during entire proceedings or only for a part of it, for the respect of morality, public order or national security, when the interests of minors or the protection of private life of parties in the proceeding require it, or to the extent the court considers this measure strictly necessary or when, due to special circumstances, publicity may damage the interests of justice.

(2^1) In the proceedings where an under-aged is a victim or witness, the court shall hear his/her declarations in a closed hearing.

(3) The examination of a case *in camera* may be justified and carried out with the respect of all judicial procedure requirements."

123. Art. 18 of the CPC must be interpreted in such a way as it is compliant with the ECHR. However, for the sake of clarity we advise that Art. 18(2) should be amended to read as follows:

"18(2) - Access in the court room may be forbidden for the press or for the public by a court reasoned order, during entire proceedings or only for a part of it, where *it is deemed necessary by the court* for the respect of morality, public order or national security, *or* when the interests of minors or the protection of private life of parties in the proceeding *are deemed by the court to require it*, or when, due to special circumstances, *the court considers that* publicity may damage the interests of justice. *But in any case, a hearing shall be held in private only to the extent that the court considers this measure strictly necessary for one of reasons set out in this Article.*"

124. We consider that Art. 18(2^1) is unnecessary as the interests of minors are already protected under Art. 18(2). However, if Art. 18(2^1) is considered to be necessary then we suggest that the words *"where the court considers it necessary in the interests of the under-aged victim or witness"* should be added at the end of Art. 18(2^1). We suggest this amendment as there will be many cases in which it is not necessary for the evidence of

a minor to be heard in camera, and hearings *in camera* should only take place where there is good reason for a hearing not to be in public.

Free access to justice

125. Art. 19 of the CPC deals with fair trial guarantees. Again, (under Art. 2 of the CPC) these provisions must be interpreted in accordance with the ECHR. We commend the provisions of Art. 19(3), which places a specific obligation on the criminal prosecuting authority "to undertake all measures provided for in the law for a complete and objective investigation, under all aspects, of the circumstances of the case, to outline both the circumstances that prove the guilt of the suspect, accused, defendant and those that prove his innocence, the circumstances that mitigate or aggravate his responsibility". We note, however, that no reference is made to the right of an accused to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (See Art. 6(3)(d) of the ECHR). However, that right can probably be inferred from the wording of Art. 19(1) in conjunction with Art. 24(3). In any event the provisions of Arts. 19 and 24 must be interpreted widely so as to comply with Art. 6(3)(d) of the ECHR.

Length of proceedings

126. Art. 20 of the CPC deals with the length of criminal proceedings. Art.20 mirrors the provisions of Art.6, para.1 of the ECHR as developed by the case law of the ECtHR. We commend the fact that Art.20 expressly incorporates four criteria which must be taken into account in determining the reasonableness of the length of the proceedings, namely: the complexity of the case; the conduct of the parties in proceedings; the conduct of the criminal prosecuting authorities and of the court; the age of the victim (being under 18 years). We also commend the fact that express reference is made in Art.20(3) to the need for criminal investigations and trials involving defendants who are minors or who are in pre-trial detention to be conducted urgently and as a matter of priority.

Right to silence

127. Art.21 of the CPC provides the right to silence and the privilege against self-incrimination. Art. 21 is fully compliant art. 6 of the ECHR and we commend the breadth of the protection given by this Article.

Double jeopardy (*non bis in idem*)

128. Art.22 of the CPC deals with protection from double jeopardy (*non bis in idem*). This article is fully compliant with Art.4 of Protocol No.7 of the ECHR.

Rights of victims and persons unlawfully detained

129. Art.23 of the CPC deals with the rights of both the victims of crime and persons unlawfully convicted or detained or whose rights have been violated in any other way. We commend the breadth of this article which gives effect to the rights of victims and defendants to an effective remedy, under Art.13 of the ECHR.

Adversarial criminal proceedings

130. Art.24 of the CPC provides a number of fair trial guarantees. Paragraph (1) makes provision for the functions of the prosecution, defence and the trial to be separated and carried out by different authorities and persons. Paragraph (2) makes provision for the independence and impartiality of the tribunal. Paragraph (3) guarantees equality of arms. Paragraph 4 guarantees the rights of the prosecution and defence to present their cases independently. This Article, when interpreted (as it is required to be) in the light of the ECHR and the case law of the ECtHR, adequately provides guarantees of the rights of a defendant to an independent and impartial tribunal, equality of arms and an independent defence.

Exclusive prerogative of criminal courts

131. Art.25 of the CPC makes provision for the exclusive jurisdiction of the courts established by the law. This Article guarantees the right of a defendant to have his case dealt with exclusively by a court established by the law. It forbids the establishment of any unlawful court. For the purposes of the CPC, "court" is defined as:

"any court, part of the judicial system of the Republic of Moldova, that considers criminal cases in first instance, in appeal or in cassation, by extraordinary remedy, and that examines complaints against criminal investigation authorities and against authorities empowered to enforce court judgements and authorizes certain procedural actions;"[40]

132. Accordingly, we are of the opinion that this Article adequately protects the exclusive jurisdiction of the courts to deal with criminal cases.

Independence of judges

133. Art.26 of the CPC deals with the independence and impartiality of judges. We commend the very clear and explicit guarantee of the independence and impartiality of judges contained in this Article. It is fully compliant with Art.6 of the ECHR. Art.27 of the CPC provides further guarantees that judges are required to assess the evidence on the basis of all the evidence that is presented in the case.

Official nature of criminal proceedings

134. Art.28, para. (1) of the CPC requires prosecutors and the criminal investigation authority to instigate criminal proceedings when they are informed about an alleged crime. This provision also requires prosecutors to act within the limits of their jurisdiction and in accordance with the provisions of the CPC. We commend the inclusion of this overriding duty.

135. Our overall conclusion in relation to the provisions of Title 1 of the CPC is that, given that Art.2 of the CPC requires that criminal proceedings are regulated by the provisions of the Constitution, international treaties to which Moldova is a party and by the CPC, and that the provisions of the CPC must be interpreted in such a way as to comply with and incorporate all the rights and obligations under the ECHR and other international treaties to which Moldova is a party, the fair trial guarantees provided by Title 1 do meet the requirements of the ECHR and the associated jurisprudence of the ECtHR.

[40] See: art.6 16 of the CPC

TITLE II: COURTS AND THEIR JURISDICTION

136. Articles 29 to 32 of the CPC specify the courts that are empowered to deal with criminal cases and the composition of the judges of those courts, replacement of judges within a panel (due to prolonged illness, death or dismissal) and the place where criminal cases shall be examined. The provisions are not controversial and are entirely compliant with the ECHR.

Incompatibility of judges

137. Art.33 of the CPC deals with circumstances in which a judge must recuse himself/herself from sitting as a judge in the proceedings. The circumstances in which the CPC proscribes a judge from sitting are all sensible and there is an overriding requirement that a judge shall withdraw "if there are other circumstances that cast a reasonable doubt as to the judge's impartiality.[41] However, we consider that Art.33, para. (4) should include the words "unless there are circumstances (whether generally or by reason of the previous involvement of the judge in the case) that cast a reasonable doubt as to the judge's impartiality."

138. The meaning of the first sentence of the English translation of Art.34(3) is not sufficiently clear for us to understand what it means. Clarification of the meaning of Art.34(3) should be obtained.

139. Art.35(2) provides that "(2) The request for or declaration of withdrawal shall be considered the same day, hearing the parties and the person requested to withdraw." It is not clear what this means; nor is it clear what the "same day" refers to. This translation should be checked.

Chapter 2: Jurisdiction of courts

140. Articles 36 to 39 of the CPC deal with the jurisdiction (in terms of the allocation of types of cases) of the District Courts, the Court of Appeal and the Supreme Court of Justice. We have no comments on these articles.

141. Article 40 of the CPC deals with the question of territorial jurisdiction. The basic rule (see art.40(1)) is that criminal case shall be dealt with by the District Court which has jurisdiction over the territory in which the crime is alleged to have been committed. Art.40(1) goes on to provide that where a crime is "continuous or prolonged" it may be dealt with by the court having jurisdiction over the territory in which the crime was consumed (*sic*)[42] or ceased. Whilst there are some attractions in allocating work to courts within geographic areas, there is no provision for transfer of cases to other geographic areas. In some cases, for example where a case has received a large amount of hostile press in the particular area, or for some other reason the defendant may not appear to have a fair trial if the case is heard in that area, it may be desirable to transfer such a case to another geographical area.

142. Art.40(3) deals with alleged crimes committed abroad or on a ship. In these circumstances, the case is dealt with by the court having jurisdiction over the geographical area in which the defendant was last known to reside, or if that is unknown, by the court having jurisdiction over the place where the criminal investigation was completed. We consider that these rules may, in some cases, prove to be impractical or

[41] Art.33(2) 5) CPC

[42] We are not sure whether this is a correct translation.

impossible. Under international treaties there are some cases (for example allegations of torture) where a court must assume jurisdiction, irrespective of whereabouts the conduct constituting the crime was carried out. If the last known residence of the defendant in such a case is known to the authorities and yet it is at a place which is abroad, then the rules would not permit such a defendant to be tried by a court in Moldova. We recommend that this omission should be urgently re-considered.

Competence of the investigating judge

143. Art.41 of the CPC deals with the powers of the investigating judge. The powers vested in the investigating judge include a number of, potentially, highly invasive measures such as: ordering, replacing, terminating or revoking detention on remand or house arrest;[43] ordering and revoking the provisional release of the person arrested, the provisional seizure of the license for driving vehicles;[44] authorizing searches and corporal search, sequestering of goods, seizure of objects representing state, commercial or bank secret, exhumation of corpse;[45] placement in a medical institution;[46] and, authorizing interception of communications, sequester of correspondence, video recording.[47] We consider that the exercise of these powers is so fundamentally linked to possible violations of human rights that the article should contain a clear, mandatory instruction that, when considering whether any of these powers should be exercised, the investigating judge must have regard to the human rights of a suspect, defendant, or any other person who may be affected by the exercise of such powers, under the ECHR or any other international treaty to which Moldova is a party.

144. As previously stated, we recommend also that Art.1 of the CPC should include a paragraph setting out an overarching duty on judges, investigating judges, prosecutors and all criminal investigating authorities[48] to carry out their functions, duties and powers in accordance with the overriding objective set out in paragraphs (2) and (3) of Art.1 of the CPC.

145. Art.42 of the CPC provides that where there are “indivisible” or “joint” cases, they shall be dealt with by the same court. Whilst this is a desirable aim in most cases, we are of the opinion that there should be a provision which allows the court to order separate trials where, in the opinion of the court, it is necessary for the proper administration of justice. We have in mind cases in which there may be an inordinate delay in the hearing or determination of cases if they are heard by the same court. Similarly, in cases involving numerous defendants, some of whom may only be involved in a relatively small way; it may result in a violation of the fair trial rights of some of the defendants if the courts are obliged to order that the same court considers all the allegations.

146. Articles 44 to 50 deal with the transfer of cases between courts where it is found that a court does not have jurisdiction to deal with a case or where two or more courts claim jurisdiction to deal with a case. We only have one comment in relation to the need to avoid manipulation of the power to transfer cases from their pre-established Court: all such transfers must be based on objective elements and the destination courts must be pre-determined by the law.

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[43] Art.41, (1)

[44] Art.41, (2)

[45] Art.41, (3)

[46] Art.41, (4)

[47] Art.41, (5)

[48] Listed in art.56 CPC

TITLE III: PARTIES AND OTHER PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS

Chapter 1: Prosecuting Party

147. Art.51 of the CPC sets out the powers and duty of the prosecutor. Art.51(3) ensures the independence of the prosecutor and provides that his actions shall only be subject to the law. Although Art.51(7) does provide that "during the enforcement of court judgements, the prosecutor shall carry out the duties provided in the present code", we consider that there should be an express provision in Art.51 to the effect that the prosecutor shall be under an overriding duty to act in accordance with the provisions of the CPC, and, in particular, to pursue the aims of Art. 1 of the CPC.

Prosecutor's prerogatives during criminal investigation

148. Art.52 of the CPC sets out the powers and duties of the prosecutor during the criminal investigation. The powers vested in the prosecutor include the right to apply to the courts for authorisation of highly invasive measures. These include requests for: the authorisation and prolongation of the remand of and arrested person; the seizure of correspondence; the interception of communications; the provisional suspension of the accused from his position; the physical and electronic surveillance of a person; the exhumation of corpses; the carrying out of video and audio surveillance of a room; the surveillance of information transmissions to a suspect; and the placement of a person in a medical institution to carry out an expert investigation.[49] Notwithstanding the fact that Art.52, para.(1)(1) provides that the prosecutor "shall directly perform the criminal investigation under the terms of the law", we consider that the exercise of these powers is so fundamentally linked to possible violations of human rights that the article should contain a clear, mandatory instruction that, when considering whether any of these measures should be requested, the prosecutor must have regard to the human rights of a suspect, defendant, or any other person who may be affected by the exercise of such powers, under the ECHR or any other international treaty to which Moldova is a party.

149. As previously stated, we recommend also that Art.1 of the CPC should include a paragraph setting out an overarching duty on judges, investigating judges, prosecutors and all criminal investigating authorities[50] to carry out their functions, duties and powers in accordance with the overriding objective set out in paragraphs (2) and (3) of Art.1 of the CPC.

Prosecutor's prerogatives in court

150. Art.53 of the CPC deals with the powers of the prosecutor in court. We are concerned by a number of the powers given to the prosecutor.

151. Art.53, paras. (3), (4) and (5) provides that ***during the examination of a criminal case***,[51] the prosecutor:

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[49] Art.52, para. (16) of the CPC

[50] Listed in art.56 CPC

[51] These words have been emphasised as they clearly denote an examination of the substantive case, under Art.314 et seq of the CPC. This is the determinative hearing of the case and this is why the Experts consider that the provisions of Art.53 are a violation of Art. 6(3) of ECHR.

"(3) shall request the court to return the criminal case in order to draw up a more serious accusation for the defendant and to submit new evidence, if during the judicial investigation is found that the defendant also committed other crimes and the evidence is insufficient;

(4) shall change the legal classification of the crime committed by the defendant if during judicial investigation is found that the defendant committed this crime;

(5) shall request the court to interrupt the examination of criminal case for a period provided for in the present Code in order to submit new evidence corroborating the charges brought against the defendant if the criminal investigation was not complete; "

152. We are concerned that these provisions violate the fair trial provisions of Article 6(3) ECHR. By Art.6(3) ECHR, everyone charged with a criminal offence has the right (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and (b) to have adequate time a facilities for the preparation of his defence. The combination of these rights ensures that an accused person knows with a degree of certainty that nature and scope of the accusation against him and is then given sufficient time to prepare his defence to that accusation. We are of the opinion that the combination of paras. (3), (4) and (5) of Art.53 CPC offends against this protection by giving the prosecution an opportunity of changing and extending the nature of accusation against the defendant after the trial has commenced. In effect, these provisions give the prosecution an opportunity to alter the case against an accused after the trial has commenced and after the defendant has prepared his defence, if the prosecution realises that it has omitted to obtain the necessary evidence to prove the charge or if the prosecution have failed to charge the accused with the appropriate charge. This "moving of the goal posts" by the prosecution during the criminal trial offends against the notion that an accused should know with certainty the prosecution case that he has to deal with at the commencement of the trial and, thereby, be able to prepare his defence accordingly. It allows the prosecution to change its direction or to "top up" the evidence against the accused when it realises that the investigation was not adequately conducted. We consider that these provisions of the CPC should be removed, or at least modified in such a way that the prosecution are not allowed to change the nature of its case during the trial, and to prevent the defence from being put at any disadvantage by reason of the prosecution "moving the goal posts" during the case. For a further clarification on the point see commentary to art. 326 of the CPC.

153. Once again, we recommend that Art.1 of the CPC should include a paragraph setting out an overarching duty on judges, investigating judges, prosecutors and all criminal investigating authorities[52] to carry out their functions, duties and powers in accordance with the overriding objective set out in paragraphs (2) and (3) of Art.1 of the CPC. Such an overarching duty would allow the defence to challenge any actions taken by the prosecutor which were considered to be an abuse of the process of the court, as being inconsistent with the overriding objective.

Criminal investigation officer

154. Art.57 of the CPC deals with the powers of the criminal investigation officer. Again, we note that many of the powers vested in the criminal investigation officer[53] are so fundamentally linked to possible violations of human rights that the article should contain a clear, mandatory instruction that, when considering whether any of these powers should be exercised, the investigating judge must have regard to the human rights of a suspect, defendant, or any other person who may be affected by the exercise

[52] Listed in art.56 CPC

[53] See, for example, the powers vested by Art.57(4)

of such powers, under the ECHR or any other international treaty to which Moldova is a party. Once again, we recommend that the CPC should contain a direction that criminal investigation officers must carry out their functions, duties and powers in accordance with the overriding objective set out in paragraphs (2) and (3) of Art.1 of the CPC.

The victim

155. Art.58 of the CPC deals with the victim of a crime. We are concerned that the right for a victim to withdraw his complaint, under Art.58, para.(3)(7), may lead to intimidation of vulnerable victims to withdraw complaints through fear of reprisals by the accused or third parties. We recommend that a provision to this right should be included in the CPC making it clear that a complaint can only be withdrawn where the court is satisfied that a victim has not been intimidated into attempting to withdraw the complaint. We do not understand why an exception to the right to withdraw a complaint has been made in the case of companies, institutions or state organisations.[54]

156. Art.60 of the CPC deals with the rights of the injured party.[55] We do not understand why a particular right has been given to the injured party to request the withdrawal of the person carrying out the criminal investigation, or of the judge, prosecutor, expert, interpreter, translator or court clerk. We recommend that such a right must be conditional upon the injured party showing that such a person should recuse himself from the proceedings on the grounds of partiality or conflict of interest, or any other reason making it necessary in the interests of justice.

157. Again, we do not understand why the injured party has been given a unconditional right to withdraw his complaints, including complaints in relation to actions committed against him which are forbidden under the law.[56] We recommend that such complaints may only be withdrawn where the court is satisfied that the injured party has not been intimidated into withdrawing such complaints.

The Civil Party

158. Again, we do not understand why a particular right has been given to the civil party to request the withdrawal of the person carrying out the criminal investigation, or of the judge, prosecutor, expert, interpreter, translator or court clerk. We recommend that such a right must be conditional upon the civil party showing that such a person should recuse himself from the proceedings on the grounds of partiality or conflict of interest, or any other reason making it necessary in the interests of justice. Similarly, the civil party should only be permitted to withdraw his/her claim where the court is satisfied that the civil party has not been intimidated into doing so.[57]

The Suspect

159. Art.63 of the CPC deals with suspects. Art.63, paras. (2), (3) and (4) provide as follows:

"(2) The criminal investigating authority shall not be entitled to maintain as a suspect:

1) an arrested person - for more than 72 hours;

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[54] See, Art.58, para.(6).

[55] As defined b Art.59 of the CPC

[56] See Art.60, para. (1)(12).

[57] See Art.62, para (18).

2) a person in respect of whom a non-custodial preventive measure was applied – for more than 10 days from the moment when he was informed about the order applying the preventive measure;

3) a person acknowledged as suspect by an order – for more than 3 months, and with the consent of the Prosecutor General and his/her deputies – for more than 6 months;"

"(3) At the expiry of a term provided for in paragraph 2, the criminal investigating authority shall release the arrested suspect or shall revoke pursuant the law the preventive measure applied to him, ordering the discontinuation of the criminal investigation or the presentation of the accusation."

"(4) The criminal investigating authority or the court, finding that the suspicion is not confirmed, shall release the arrested or shall revoke the preventive measure applied to him before the expiry of terms provided for in paragraph 2, ordering the discontinuation of the criminal investigation."

160. We are concerned that the wording of Art.63 denotes an acceptance that an arrested person may be maintained as a suspect for a period of 72 hours as a matter of course. We recommend that the wording of Art.63 should be amended so as to make it clear that an arrested person may only be maintained as a suspect for as long as is justified by the circumstances of the case and, in no circumstances for more than the period in which he must be produced before a court to review his detention. It is a fundamental safeguard against the abuse of power by the police or any equivalent officer with the power of arrest or detention that the person is brought "promptly" before a judicial authority to review his detention. The ECtHR has held that the degree of flexibility attaching to the notion of "promptly" is very limited. While individual circumstances must be taken into account in assessing promptness, their significance can never be taken to the point of impairing the very essence of the right.[58]

161. We consider that when interpreted in accordance with Arts. 1 and 2 of the CPC, Art.64 of the CPC, dealing with the rights of a suspect, is compliant with the ECHR.

Accused, defendant

162. We consider that when interpreted in accordance with Arts. 1 and 2 of the CPC, Arts.65 and 66 of the CPC, dealing with the rights of a defendant, are compliant with the ECHR and international law standards.

Legal representation for a suspect, accused or defendant.

163. Art.67 of the CPC deals with legal representation for a suspect, accused or defendant. We consider that, generally, when interpreted in accordance with Arts. 1 and 2 of the CPC, Arts.67, 68, 69 and 70 of the CPC, dealing with legal representation for a suspect, accused or defendant, are compliant with the ECHR and international law standards. However, we are concerned about the power vested in the prosecution and the court to remove a defence lawyer from the case under the provisions of Arts.67, para. (6)(3). We consider that it is not appropriate for such a power to be vested in a prosecutor and that such power should only be exercised by the court after hearing representations from the prosecutor, the defence lawyer and the accused or defendant. There should be a proper procedure laid down for such applications to be determined and cogent reasons must be shown to exist before the court exercises such a power.

[58] Brogan v. UK , November 29, 1988, Series A, No.145-B, para 59

164. We are also concerned about the provision contained in Art.70, para. (5) CPC. We consider that it is not appropriate for the criminal investigation authority to be allowed to suggest to the suspect, accused or defendant to invite another defender. This procedure is plainly open to abuse and could be used, for example, to attempt to persuade a defendant to replace defence counsel for improper reasons. The power to suggest to a defendant that he should consider replacing his defence lawyer should rarely be used and only where the court considers that it is absolutely necessary in the interest of the defendant.

165. Similarly, we consider that it is not appropriate for the prosecutor to participate in the decision to allow the defendant to relinquish the services of a defence lawyer and to defend himself in person (under Art.71, para. (2)). Such a process should be sanctioned by the court alone after hearing representations from the defendant and, where the court considers it to be necessary, from the prosecution and the defence lawyer.

166. Finally, we consider that a request by a defender to withdraw from criminal proceedings (under Art.72, para. (4)) should be determined only by the court and not by the prosecutor.

Note: Further reference should be made to the comments made by the experts in relation to the Law On The Bar Association (Legal Profession).

Civilly responsible party

167. Articles 73 and 74 of the CPC deal with the rights and obligations of a civilly responsible party. A civilly responsible party is defined as "the natural person or legal entity that under the law or pursuant to civil proceedings instituted within criminal proceedings may be held responsible in tort for the pecuniary damage caused by the accused, or defendant."[59] We note that the involvement of such a person would automatically engage Art.6(1) of the ECHR and that the provisions of Arts. 73 and 74 of the CPC must be interpreted in such a way as to comply with the ECHR and any other international treaty to which Moldova is a party.[60]

168. We consider that, generally, the provisions of Arts. 73 and 74 are compliant with the ECHR and international law standards. However, we consider that the provisions of Art. 74, para (3)(2), whereby a civilly responsible party is bound to comply with "the legitimate instructions of the representative of the criminal investigating authority or the court" are too vague and require clarification. The civilly responsible party should only be required to comply with orders made by an independent and impartial tribunal established by law. If the prosecutor seeks an order against a civilly responsible party he should be required to make an application to the court for such an order and the civilly responsible party should be given a right to be heard by the court and to make representations as to why the order should not be made.

Chapter III: Representatives and successors in criminal proceedings

169. Articles 75, 76 and 77 deal with cases in which the various parties (i.e. injured party, the civil party, the suspect, the accused and the defendant) may be found by the court to have no legal capacity or limited legal capacity (for example by virtue of their young age or their mental condition). In such cases, the rights of person having limited or no legal capacity are deemed to be exercised by his or her legal representatives. We are concerned that Art. 77 of the CPC vests powers in the criminal investigating authority

[59] Art. 73, para (1)

[60] Art. 2, paras. (2) and (3)

relating to the determination of the person who shall act as the legal representative of such a person. We do not consider that it is appropriate for the criminal investigating authority to take part in this process and we recommend that all functions and duties in relation to the determination of whether a person is under a legal incapacity and, if so, the appointment of legal representatives should be reserved to the court.

170. Similarly, the appointment or acknowledgement of a person as successor of the injured party or civil party (under Art. 81, para. (2)) should be decided by the court and not by "the prosecutor leading the criminal investigation".

Interpreters and translators

171. Article 84 of the CPC deals with interpreters and translators. We do not consider that it is appropriate for the interpreter or translator to be appointed by the criminal investigating authority. Such an appointment should be made by the court or by the defendant's lawyer or some other body which is independent of the criminal investigation. We consider that is not appropriate for the criminal investigating authority to participate in the selection of an interpreter, or in an assessment of his competence, and the present procedures under Art. 85, paras. (1) and (3) should be amended so as to remove any participation by the criminal investigating authority in the selection or assessment of an interpreter or translator.

Specialists

172. Under Art. 87 of the CPC, the criminal investigation authority and the court have power to appoint a specialist. A specialist is a person invited to participate in the conduct of a procedural action in the cases provided for in the present Code and should not be interested in the outcome of the criminal proceedings.[61] Whilst we appreciate that the position of a specialist is different to the position of an interpreter or translator, and that it is appropriate for the criminal investigation authorities to participate in the appointment of such a person; nevertheless, we are of the opinion that there should be some mechanism whereby the accused or defendant can make representations objecting to the appointment of a person as a specialist if there are proper grounds upon which to do so. Alternatively, the concept of equality of arms (under Art. 6 ECHR) requires that the defence should be allowed to appoint a specialist to participate jointly in the conduct of the particular procedural action.

Experts

173. Article 88 of the CPC deals with the appointment of experts. We note that there is no mention in art. 88 of the possibility of an expert being appointed to act on behalf of the defence. The concept of equality of arms under Art. 6 ECHR requires that the defence shall be in the same position as the prosecution to deal with matters of expert evidence and, therefore, may require the assistance of an expert themselves. We recommend that provision be made in Art. 88 of the CPC for the appointment of an expert to assist the defence to consider and, if appropriate, to refute the evidence of any expert appointed by the criminal investigating authority or the court.

[61] Art. 87, para. (1)

Witnesses

174. We do not understand the meaning of Art. 90, para. (4) of the CPC, insofar as it states that the persons listed under para. (3) is concerned. If this provision requires a legal representative to divulge information which is protected by legal professional privilege, then plainly is objectionable and should be deleted.

175. We are deeply concerned about the scope and effect of Art. 90, para. (7)(5) of the CPC, which provides as that a witness has the obligation:

"5) at the request of the criminal investigating authority and when there are reasonable doubts, to be subjected to an expert examination in a medical institution in order to confirm his ability to properly understand the circumstances to be revealed in the case and to make truthful depositions;"

176. This is a draconian power and it is highly likely that it may violate the human rights of the witness. We strongly recommend that this provision be amended to provide stricter control of the use of this power. We find it difficult to foresee any circumstances, in which the criminal investigation authority could compel a witness to give evidence and then compel him to be subjected to expert examination in a medical institution, which would not amount to a violation of his human rights.

TITLE IV: EVIDENCE AND MEANS OF EVIDENCE

177. Articles 93 to 98 deal with the general principles relating to the admissibility of evidence. Art. 94 deals with the circumstances in which evidence shall specifically be regarded as inadmissible. Art. 94 para. (1) expressly deems inadmissible evidence any information that is obtained "through violence, threats or other coercive methods, violating a person's rights and freedoms". Although the paragraph does not expressly refer to information obtained through torture, inhuman or degrading treatment or punishment, the provisions of the CPC incorporate all the provisions of the ECHR and the CPC must be interpreted so as to comply with the obligations of the ECHR. Nevertheless, we consider that express reference should be made in Art. 94 to the mandatory exclusion of all evidence obtained as a result of torture, inhuman or degrading treatment or punishment.

178. Articles 99 to 101 deal with the right of the various parties to obtain and submit evidence in the criminal proceedings. As these are articles that must be interpreted so as to comply with the ECHR, we have no observations to make.

179. We commend the way in which Art.103, para. 2 CPC expressly provides that: "2. A suspect's, accused's admission of guilt may be used as basis for accusation only if it is confirmed by facts and circumstances resulting from all the evidence found in the case."

180. Similarly, we commend the fact that Art. 103, para.3 expressly provides that: "3. The suspect, accused or defendant may not be forced to testify against himself or against his close relatives or to admit being guilty and may not be held accountable for his refusal to make such depositions."

181. Art. 104 of the CPC deals with interviewing a suspect, accused or defendant. We consider that Art. 104 should contain a provision making it a requirement that when a suspect, accused or defendant is interviewed, he shall be informed of his right to remain silent and not to incriminate himself.

182. Article 115 of the CPC does contain provisions dealing with audio and video recording of an interview of a suspect, accused or defendant. However, Art.115, para. 1 does not make such recording of interviews mandatory. We consider that there should be clear provisions requiring all interviews to be tape recorded or video recorded and transcribed.

183. In addition, we consider that there should be a comprehensive code dealing with the conduct of any interview of a minor or of any person suffering from a educational or intellectual disability.

184. Article 107, para. 2, provides that a person may not be interviewed without a break for more than four hours. We consider that, in some cases, a maximum period of four hours without a break is too long and that provision should be made for the interviewee to be informed that he/she may request a break in the interview and that all such reasonable requests should be granted. In addition, an interviewee should be granted an opportunity to consult with his/her lawyer in private at any time during an interview.

185. Article 109, para. (3) provides as follows:

"(3) If the witness is not able to appear in court due to his departure abroad or due to other well-founded reasons, as well as in order to reduce or to exclude the exposure of the witness to an evident danger or in order to reduce the revictimisation of the witness, then the prosecutor may request that the witness be interviewed by the investigating judge, securing an opportunity for the suspect, accused, defender, injured party and prosecutor to address questions to the witness."

186. We consider that it is essential that there should be a reasoned basis set out in the CPC for the exercise of this power. At present there is no framework upon which the court is required to determine whether to allow this power to be used. Detailed guidance as to the conditions that need to be found to exist (and the requirements as to who must establish those requirements and on what standard of proof) by the court before this procedure is permitted should be included in the CPC.

187. We also consider that a similar framework for the procedures provided for in Art. 110 need to be included in the CPC .

188. Article 111, para. (3) deals with vexed problem of protecting the victim of an alleged sexual offence from attacks based upon his or her previous personality or background. We acknowledge that this is an area of the law in which a wide margin of appreciation needs to be given to the member state as to the appropriate method to control unwarranted attacks on the character of a complainant in cases involving an allegation of a sexual crime. We are of the opinion that the way in which Art.111, para. (3) deals with this difficult area is compliant with the ECHR and we have no criticism of these provisions, especially as they must be interpreted so as to be compliant with the ECHR and the case law of the ECtHR.

189. Article 113 of the CPC deals with the matter of confrontation of witnesses who appear to have made statements (depositions) which are inconsistent, as between each of the witnesses. Art.113, paras. (1) and (2) of the CPC provide as follows:

"(1) If there are differences between depositions made by persons interviewed in the same case, then, whenever it is necessary, a confrontation of these persons shall be conducted, including with those whose declarations are unfavourable for the suspect, accused, in order to learn the truth and exclude contradictions.

(2) The confrontation shall be conducted by the criminal investigating authority at its own motion or at the request of participants to proceedings."

190. We consider that the exercise of this power may create an unfair advantage to the prosecution where, for example, the witnesses who appear to give evidence against the defendant contain inconsistencies between each other. The concept of adversarial proceedings demands that such inconsistencies should be investigated at the trial by cross-examination of the witnesses by the parties. To allow the prosecution an opportunity to "patch up" its case by attempting to resolve inconsistencies in the way provided for by Art.113, para. (1) is inconsistent with the concept of adversarial proceedings. Any questioning ***"to learn the truth and exclude contradictions"***

[62]should take place during the trial and the defence should be given an opportunity of questioning the witnesses with a view to challenging the credibility of the witness and examining the circumstances surrounding the inconsistencies, in order to establish whether the witnesses have made a genuine mistake in giving his/her evidence, or whether there are other reasons for the inconsistencies, including the possibility that a witness may have falsified his/her evidence.

191. Article 114 of the CPC makes provision for the interviewing of a witness at the scene of the alleged offence. Art.114, para. (2) provides as follows:

"(2)The interviewed person shall show the way to the place where the crime was committed, shall describe the circumstances and objects about which he already made depositions and shall answer the questions of the representative of the criminal investigating authority."

192. We are of the opinion that the paragraph should be amended so as to allow the defence lawyer also to put questions to the witness. Art.114, para. (1) clearly envisages that the defence lawyer may be present at the scene and we can see no justification for excluding the right of the defence to question the witness at this stage in the proceeding.

193. Art.114, para. (4) provides that:

(4) "The verification of depositions at the crime scene shall be allowed only if it does not harm the dignity and honour of the persons who participate at this procedural action and does not jeopardize their health."

194. We are concerned this provision may give too much protection to a witness who may be lying. We can see no reason to presume that the status of a witness should be elevated in this way. This provision may result in a witness who is untruthful not be exposed as a liar and, thus, may prejudice the defence. We accept that proper regulation of this procedure is necessary, however, in some cases it may be entirely appropriate for the "dignity and honour" of a witness to be tested by questioning, in order to expose a lying witness. A proper framework for the regulation of such verifications at the crime scene needs to be considered. Such a framework should make provision for the court to balance the interests of the witness against the wider interests of justice.

Identification evidence

195. Articles 116 and 117 of the CPC deal with identification of persons and objects. This area of evidence has been widely acknowledged as a cause of miscarriages of justice in many cases. It has been widely recognised that whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the court must recognise the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition the court should take into account the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.[63]

196. Article 116, paras. 3 to 6 of the CPC provide as follows:

"3. The person to be identified shall be brought before the one meant to identify him, outside the visibility of the former, along with at least other four procedural assistants of the same sex, with resembling appearance. During the identification photographs shall be taken. The photographs of the person to be identified and of the procedural assistants shall be attached to the report.

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[62] See Art.113, para. (1) of the CPC

[63] See the judgment of the UK Court of Appeal in R. v. Turnbull [1977] Q.B. 224 at228-231

4. Before the identification, the representative of the criminal investigating authority shall propose the person to be identified to choose a place among the procedural assistants and this fact shall be reflected in the report.

5. Identification shall not take place or a conducted identification shall not be valid if the person invited to identify provided uncertain features for identification of the person. A repeated identification of and by the same person, on the basis of same features shall not be conducted.

6. If the identification cannot be conducted, a person may be identified on the basis of their photograph exhibited along with the photographs of at least other four persons, which do not differ significantly. All the photographs shall be attached to the report."

197. We are of the opinion that these provisions do not provide sufficient safeguards against the risk of mistaken identification of a suspect by a witness. The inclusion of only four other persons (or photographs) in addition to the suspect on an identification parade is not adequate to prevent the possibility of a mistaken identification. We recommend that the total number of persons on the identification parade (or the number of photographs shown to the witness) should be increased to bring the procedures in line with other member states.[64]

Corporal examination

198. Article 119 of the CPC deals with the conduct of corporal examination of a suspect, accused, defendant, witness or injured party. We are concerned that Art.119, para. 2, provides that: "In the case of a flagrant crime the corporal examination may take place without an authorisation of the investigating judge. However, within 24 hours period of time, the latter needs to be informed about the conducted action and the respective materials linked to this action shall be submitted for a lawfulness control." We can see no justification in obviating the necessity of authorisation by the investigating judge purely on the grounds that an alleged offence may be viewed as "flagrant". The removal of the condition of authorisation by the investigating judge can only be justified in the most pressing and justifiable circumstances, where the interests of justice require that an examination should take place as soon as possible and where the circumstances make it impossible for the prior authorisation of the investigating judge to be obtained. We recommend that this provision be amended accordingly.

199. In addition, Art. 119, para. 3, should be amended so as to make it mandatory in every case that a corporal examination is conducted only by a doctor.

Experiments in criminal investigation

200. Article 123 of the CPC deals with the carrying out of experiments during the criminal investigation. Art.13, para. 2 provides as follows:

"(2) If necessary, the criminal investigating authority shall be entitled to involve the suspect, accused, witness, with their consent, the specialist and other persons in the conduct of the experiment and to use different technical means."

201. We are concerned that this provision offends against the principle of equality of arms. We recommend that consideration should be given to amending this provision so as to give the suspect or accused a right to participate in the experiment.

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[64] In the UK the required number is 12. For a detailed analysis of identification parades see the Draft Revised Code D Issued in the UK under The Police Powers And Procedures Act 1998 at www.gov.im/lib/docs/dha/ceo//reviseddraftpolicecoded.doc

Search and seizure of objects and documents

202. Article 125 of the CPC deals with powers of search and seizure of objects and documents. We are concerned that Art. 125, para. (4), provides that in cases of flagrant crime a search may be conducted without the authorisation of the investigating judge. We can see no justification for obviating the requirement that the investigating judge must authorise a search solely on this ground. Clear and justifiable grounds must be required in every case before a search can be allowed to be carried out without the authorisation of the investigating judge.

203. Similar objections exist in relation to the execution of searches during night time in the case of flagrant crimes. The mere fact that a crime is "flagrant" cannot justify the exception and a proper and justifiable basis for carrying out searches at night must be required.

204. Article 129 of the CPC makes no provision for the way in which legally privileged material should be dealt with during a search. We recommend that consideration be given to the implementation of a specific code of practice dealing the execution of searches and, in particular, the manner in which material which is (or is claimed to be) subject to legal professional privilege is dealt with.

Seizure of postal correspondence and interception of communications

205. Article 133 of the CPC deals with the seizure of correspondence. Article 135 of the CPC deals with the interception of communications (including telephone conversations and communications by radio or using other technical means). In summary, these articles permit the interception of communications with the authorisation of the investigating judge on "the basis of a reasoned order (application).

206. In the case of seizure of correspondence, Art.133, para. (3) provides the following grounds for authorisation by the investigating judge or the court:

"(3) For the seizure of the correspondence, the prosecutor leading or conducing the criminal investigation shall draw up an order and shall submit it to the investigating judge or, if the case, to the court for authorization. The order shall contain particularly the following information: reasons for ordering the seizure of correspondence, name of the post office to seize the correspondence, the name of the person/s whose correspondence is to be seized, the exact address of these persons, the type of the correspondence to be seized and duration of the action. The duration of the action may be prolonged under the terms of the present article."

207. In the case of interception of communications, Art.135, paras. (1) to (4) deals with the grounds upon which the investigating judge may authorise such an interception. The relevant paragraphs provide as follows:

(1) The interception of communications (the telephone conversations, radio or using other technical means) shall be performed by the criminal investigating authority with the authorization of the investigating judge, on the basis of a reasoned order of the prosecutor, in cases referring to serious, extremely serious and exceptionally serious crimes, if from the accumulated evidence and the materials of operative investigations results a reasonable suspicion that such crimes were committed.

(2) In case of emergency, if a delay in obtaining the authorization requested in paragraph (1) may cause severe flaws in the collection of evidence, the prosecutor may order on the basis of a reasoned order the interception and recording of communications and shall inform the investigating judge about this immediately, but no later than 24 hours. The investigating judge during 24 hours shall authorize the order and the interception shall continue, or shall not confirm it ordering the immediate discontinuation of the interception and the destruction of already made records.

(3) The interception of communication according to the present article may be made at the request of the injured party, the witness and members of his family in case of threats with violence, blackmail or other crime in respect of these persons, on the basis on a reasoned order of the prosecutor and with the judicial control according to the procedure provided for in para (2).

(4) The interception of communications during criminal investigation shall be authorised for maximum 30 days duration. The interception may be prolonged under the same conditions if there are well-founded reasons and for not longer than 30 days. The total term of the interception shall not exceed 6 months. In any case the interception shall not last after the completion of the criminal investigation.

208. In summary, the basis for authorisation of both seizure of correspondence and interception of communications is ***"a reasoned order of the prosecutor, in cases referring to serious, extremely serious and exceptionally serious crimes, if from the accumulated evidence and the materials of operative investigations results a reasonable suspicion that such crimes were committed."*** It is clear that both seizure of correspondence and interception of communications may involve potential violations of Article 8 of the ECHR. Interceptions are rightly regarded by the ECtHR as serious interferences with the right to respect for private life, home and correspondence, under article 8 ECHR. The case law of the ECtHR has made it clear that it will be concerned to examine the lawfulness of such interferences on the basis of whether such interceptions are grounded in accessible and foreseeable legal rules and that those rules verify the existence of safeguards against abuse. To avoid a violation of article 8 ECHR the domestic law authorising the interceptions must be compatible with the notion of the rule of law. The domestic law must make foreseeable both the circumstances in which and the conditions under which the authorities are empowered to interfere with the right under article 8 ECHR. In addition, the domestic law must be such as to provide adequate protection against arbitrary interferences.[65] To avoid a violation, it is necessary for there to be clear detailed rules as to the circumstances in which an interception is permitted. Relevant factors are the existence of a definition of the categories of persons or offences which may attract interception, limits on duration, regulation of the circumstances in which records are destroyed, and whether the originals are available for inspection by the court.

209. Whilst the provisions of Articles 133 to 135 of the CPC do go some way to make proper provision for detailed rules as to the circumstances in which interceptions are permitted, we are extremely concerned that the CPC does make adequate provision for the identification of the persons who will be subjected to the interceptions. The present basis for authorisation is merely that ***from the accumulated evidence and the materials of operative investigations results a reasonable suspicion exists that serious, extremely serious or exceptionally serious crimes have been committed.*** However, there appears to be no requirement to show that there are grounds to show that person who it is proposed to be subject to the measures is connected in some way with the suspected crimes. There is nothing in the CPC which contains satisfactory regulation of the category and identity of the person who is going to be the victim of the interception. We are of the opinion that the present provisions of the CPC do not sufficiently regulate the category of persons who are to be subjected to the interception. We are of the opinion that there should be a specific code of practice (either within the CPC, or in a separate code of practice which is referred to in the CPC and which is an integral part of domestic law of Moldova) which makes adequate provision for the regulation of intercepts and, in particular, which properly identifies and justifies the category and identity of the particular persons who are to be the subject of the interception.

[65] Klass v Germany 1978, Malone v UK 1984, Halford v UK 1997, Khan v UK 2000

210. Sections VI and VII of the CPC deal with examinations and investigations carried out by specialists and experts. Section VIII of the CPC deals with the procedures for taking samples for examination and comparison.

211. We are concerned that, whilst Art. 2, para.5 of the CPC expressly protects the principle of an adversarial trial, the powers and procedures set out in Sections VI of the CPC do not provide an adequate procedural framework to provide the defence with similar facilities to carry out examinations and inspections, either. We recommend that consideration should be given to increasing the rights of the defence to test the evidence of experts instructed either by the criminal investigation authority or by the court.

212. Section IX of the CPC deals with material evidence. Article 158 of the CPC deals with the admissibility of real evidence. Again we are concerned that there does not appear to be any procedural framework to provide the defence with a right to apply to the court to produce real evidence on behalf of the defence. If this is the case then it would appear to offend the principle of an adversarial trial.

TITLE V: COERCIVE PROCEDURAL MEASURES

213. Articles 165 to 174 of the CPC deal with the powers of arrest of persons suspected of having committed a crime punishable with imprisonment for more than one year. By Art.165, para. (1) "arrest" is defined as: "the deprivation of liberty of a person for a short period of time not exceeding 72 hours in the places and according to the law". Under Art.166, the ground required to allow a person to be arrested is that there exists a reasonable suspicion that he/she has committed a crime for which the law prescribes a custodial sentence for a period of more than one year. There are further conditions and restrictions under paragraphs 2 to 4. Paragraph 5 of Art.166 provides that the arrest of a person shall not exceed 72 from the moment of his deprivation of liberty. In the case of a juvenile, that period is reduced to 4 hours (see para. 6). Paragraph 7 of Art. 166 provides the following protection:

"(7) The person arrested under the terms of the present article, before the expiry of the terms indicated in the paragraphs (5) and (6), shall be brought as soon as possible from the moment of arrest to the investigating judge for the examination of the issue of either his/her detention on remand or, if appropriate, release. The request on detention on remand of an arrested person shall be submitted at least 3 hours before the expiration of terms of arrest. The prosecutor, within terms stipulated in paragraphs (5) and (6), shall issue an order of release of the arrested person or, as the case may be, shall submit the request, according to art. 307 to the investigating judge."

214. Article 5(3) of the ECHR guarantees the right of an arrested person to be brought before a judge or other judicial officer "promptly" after an arrest. We are of the opinion that the provisions of Articles 166 comply fully with Art.5(3) of the ECHR. As the CPC must be interpreted so as to comply with the ECHR and the case law of the ECtHR, we are of the opinion that the whole of chapter 1of Title V is fully compliant with Article 5 of the ECHR. However, we recommend that the words used in Art. 168, para (2) should include an express reference making it clear that only necessary and reasonable force may be used in restraining a person who resists arrest.

Preventative measures

215. Articles 175 to 196 of the CPC deal with preventative measures. Article 175, para. (2) provides as follows:

"(2) Preventive measures shall have the purpose to ensure the proper conduct of the criminal proceedings or to prevent the suspect, accused or the defendant from

absconding from the criminal investigation or from the trial not to hinder the finding of truth or to secure the enforcement of the court sentence."

216. The preventative measures available under the CPC are listed in art. 175, para. (3) as follows:

1. interdiction to leave the locality

2. interdiction to leave the country

3. personal guarantee

4. guarantee of an organization

5. temporary suspension of driver's license

6. sending a military person under supervision

7. sending an under-aged of the minor under supervision

8. provisional release under judicial control

9. provisional release on bail

10. house arrest

11. remand.

217. We note that the preventative measures listed as numbers 1 to 7 can be imposed either "by the prosecutor, ex officio or on the proposal of the criminal investigation authority, or, as the case may be, by the court only in those cases where there are reasonable grounds for believing that a suspect, an accused, a defendant will abscond, obstruct the establishment of the truth during criminal proceedings or re-offend, or they can be applied by the court in order to ensure the enforcement of a sentence."[66] The preventative measures of detention on remand, house arrest, provisional release on bail and provisional release under judicial control can only be imposed by an order of the court. We are concerned that, under the CPC, the prosecutor has power to impose the less serious previous measures listed under numbers 1 to 7. Whist there is a clearly defined appeal procedure, under art. 196, para. (1),[67] against the making of any preventative order made by the prosecutor , we are of the opinion that the power to make such preventative orders should be imposed only by a judge, as the prosecutor cannot be regarded as an independent and impartial tribunal.

218. Similarly, we are of the opinion that the power vested in the prosecutor to prolong certain preventative measures for more than 30 days,[68] and the power to order personal guarantees and guarantees by organisations,[69] should only be exercised by a judge.

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[66] Art. 177, para. (1)

[67] Art. 196, para. (1) provides that "the order of the prosecutor on the application, prolongation or replacement of the preventive measure may be appealed with a complaint to the investigating judge by the suspect, accused, their defender or legal representative."

[68] Art. 178, para. (3) provides as follows: "The preventive measures provided in paragraph (1) and (2) of the present article cannot be applied for more than 30 days and if necessary may be prolonged if there are reasons. The prolongation of the term is decided by the prosecutor and each prolongation may not exceed 30 days."

[69] Art. 181, para. (1)

Detention on remand

219. Article 185 of the CPC deals with detention on remand. Art. 185, para. (2) sets out the cases in which detention on remand may be ordered. It provides that detention on remand may be applied in cases and in conditions provided by article 176. However, it also provides that detention on remand may be applied in the following additional cases:1) when the suspect, accused, defendant does not have a permanent residence on the territory of the Republic of Moldova; 2) the identity of the suspect, accused, defendant is unknown; 3) the suspect, accused, defendant failed to observe the conditions of other preventive measures applied on him.

220. Art. 176 of the CPC provides important safeguards against the application of preventative measures in cases in which they are not absolutely necessary. Art. 176, para. (1) provides that preventative measures may be applied only "in those cases where there are reasonable grounds for believing that a suspect, an accused, a defendant will abscond, obstruct the establishment of the truth during criminal proceedings or re-offend, or they can be applied by the court in order to ensure the enforcement of a sentence. Art. 176, para. (2) provides that "detention on remand and alternative preventive measures may be imposed only in cases of existence of reasonable suspicions of committal of offences in respect of which the law provides for a custodial sentence exceeding two years. In cases concerning offences in respect of which the law provides for a custodial sentence of less than two years, they may be imposed if the accused, the defendant has already committed the acts mentioned in paragraph (1) of the present article."

221. We can see no justification for making an exception to the provisions of Art. 176 solely on the basis that a "suspect, accused or defendant does not have a permanent residence on the territory of the Republic of Moldova"[70]. We are of the opinion that the question of whether it is necessary and appropriate to detain on remand a suspect, accused or defendant who does not have a permanent residence in Moldova, should be determined in accordance with the provisions of Art. 176 and that there is no justification for placing such a person outside the safeguards of Art. 176.

222. Whilst Article 176 of the CPC does provide real and sufficient safeguards against the arbitrary or inappropriate imposition of preventative measures, we are concerned that the CPC does not make any provision for ensuring that the suspect, accused or defendant has a right to be present and to participate in any hearing where an application is to be made for a preventative measure against him/her. In cases in which the prosecutor makes an application for an order of detention on remand, the suspect, accused or defendant must be given a right to be present and to present his/her case as to why such an order should not be made.

Provisional release under judicial control of the remanded person

223. Article 191 of the CPC deals with provisional release under judicial control of a person under remand. Art. 191, para (1) provides as follows:

"(1) The provisional release under judicial control of the person under remand, arrested person or one concerning whom a request for remand was lodged may be applied by the investigating judge or, as the case may be, by the court and may be accompanied by one or several obligations provided for in the paragraph 3) hereto."

224. This provision is another important safeguard against detention in cases in which it is not absolutely necessary. However, we are concerned about the provisions of Art.

[70] Art. 185, para. (2)

191, para. (2), which limit the power of the court to release under judicial control. Art. 191, para. (2) provides as follows:

"(2) The provisional release under judicial control is not applied to the suspect, accused, defendant if he has a non-extinct criminal record not extinct for serious and for particularly serious or exceptionally serious crimes or if information is available about his intention to commit another crime, if he may try to influence the witnesses or to destroy evidence or to abscond."

225. We are of the opinion that Art. 191, para. (2) unnecessarily interferes with the function of the court to determine what preventative measures are appropriate in a particular case. The court should not be prevented from imposing provisional release under judicial control solely on the ground that the suspect, accused or defendant has a "non-extinct criminal record" for serious, particularly serious or exceptionally serious crimes. Article 176, para. (3) makes adequate and proper provision for the criteria upon which the court should determine what preventative measures, if any, are appropriate in a particular case.

226. Similar restrictions apply in relation to the preventative measure of provisional release on bail. Article 192, para. (2)[71] prevents the court from ordering provisional release on bail in the circumstances described in Art. 191, para. (2). We have similar objections to this restriction.

227. Except as stated above, we are of the opinion that, as the CPC must be interpreted so as to give effect to the ECHR and the case law of the ECtHR, Articles 175 to 196 are compliant with the ECHR and other international standards.

Other procedural coercive measures

228. Articles 197 to 210 of the CPC deal with other coercive procedural measures. For the same reasons as mentioned by us in relation to preventative measures, we are of the opinion that is not appropriate that the power to impose other procedural coercive measures is vested in the criminal investigating authority and the prosecutor.[72] We are of the opinion that coercive procedural measures, such as those under Art. 197, should only be exercisable by an independent judicial tribunal and not by a prosecutor or criminal investigating authority.

229. For the same reason, we are of the opinion that the power, under Art. 197, para. (2) and Art. 199, para. (2) should not be vested in the criminal investigating authority. Such a power involves the forced presentation of a person by police officers and should only be exercised by an independent judicial tribunal.

230. Article 200 of the CPC deals with temporary suspension from office. The exercise of such a power prevents a suspect, accused or defendant from carrying out his "professional tasks or activities, which he performs or carries out in the interest of the public service". It is not clear from the translation of the wording of Art. 200 whether this power is limited to those persons who are employed in the public sector. In any event, we are of the opinion that it is not appropriate for the decision as to whether this power should be exercised to be made by "the administration of the institution where the suspect or accused works". In addition, we do not think that it is appropriate that the decision temporarily to suspend a suspect or accused from office should be taken on the

[71] Art. 192, para. (2) provides that: "The provisional release on bail is not applied in the cases described in paragraph (2) of the article 191."

[72] Art. 197, para. (1)

basis of a request submitted by the prosecutor.[73] Our concern and objection to this procedure are not overcome by the fact that an appeal against that decision lies to the investigation judge.[74]

231. Article 202 of the CPC deals with measures to secure the reparation of damages and enforcement of fines. We are of the opinion that it is not appropriate for the criminal investigating authority, at its own motion, to exercise these powers. These powers should only be exercisable by an independent judicial tribunal.

232. We note that an order of the criminal investigating authority regarding the placement of assets under sequester needs to be authorised by the investigating judge or by the court. However, under Art. 202, para.(1), the criminal investigating authority may, at its own motion, and without authorisation by the investigating judge or the court, take "measures securing the reparation of damages caused by the crime and the enforcement of the fine". We are of the opinion that such measures should only be taken by and independent judicial tribunal and not by the criminal investigating authority.

233. For the same reason, we are of the opinion that the power to enforce the placement of assets in a coercive manner[75] should only be carried out by an independent judicial tribunal. Furthermore, the conduct of any search should require authorisation by an independent judicial tribunal.

Protection of state secrets

234. Article 213 of the CPC deals with the protection of state secrets. We are concerned that the provisions of Article 213 do not provide a sufficiently regulated procedure to ensure that a fair balance is maintained between, on the one hand, the interest of the state in protecting the confidentiality of highly sensitive matters of state, and, on the other hand, the public interest in ensuring open trials and freedom of information. Equally, we are concerned that the CPC does not make sufficient provision to ensure that information which might either materially assist the case for the defence or undermine the case for the prosecution is not withheld from the defence under the provisions of Art. 213 or by the laws relating to state secrets. We recommend that a full appraisal should be carried out of the laws relating to state secrets and the availability of procedures for courts to examine whether the withholding of material which the state asserts to be a state secret could have an adverse effect upon the fairness of a criminal trial. Clearly, such an appraisal is outside our remit and we are not in a position to make firm recommendations about this matter.

235. We make the same comments and recommendation in relation to Article 214 of the CPC, which deals with the protection of trade secrets and other secrets protected by law.

Protection measures

236. Article 215 of the CPC deals with measures to protect the life, health, honour and dignity of the parties participating in criminal proceedings. This Article recognises the positive obligations on the organs of the state to protect the health and safety of persons within the territory of Moldova. Whilst we commend the provisions of Art. 215, we

[73] Art. 200, para. (3)

[74] Art. 200, para. (3)

[75] Art. 207, para 1

recommend that the words of the article should make it clear that the obligation extends to a suspect, accused or defendant.

Special Part

Article 259 Terms of criminal investigation

237. The experts suggests that para. 2 be worded as to fully reflect the language the ECtHR uses when indicating the criteria on the basis of which a procedure's reasonable time is evaluated. The generic reference to “conduct of the parties” could therefore be changed in favour of the clearer reference to the “conduct of the suspect and the relevant authorities” (see, among others, Pélissier and Sassi v. France [GC], no. 25444/94, § 67, ECHR 1999-II).

Article 262 Notification of the criminal investigation authorities

238. The wording of newly introduced para. 4 of the present article does not meet the experts' concerns. The rationale of the provision is commendable. The experts, however, believe that reference to “custody” in the text, might suggest that action is due only in such circumstance, whereas it ought to be clear that such obligation arises automatically in all cases in which a death occurs whilst the person is under the responsibility of the State (i.e. restricted in a psychiatric hospital or housed in an orphanage). The provision, in other words, should better clarify and emphasise the special procedural duty arising of the State to investigate persons that are in a vulnerable position (see Paul and Audrey Edwards v. United Kingdom, Judgement of 14 March 2002).

Article 273 Fact-finding authorities, their competence and actions taken by them

239. The experts note that among the fact-finding authorities listed in the present article, the Service of Information and Security is the only for which there is no specific indication as to the crimes falling under its competence. Indeed, whilst letters a) to c) indirectly refer to the articles 266 and following, and letters e) to h) embody the criteria for identification of the competence, no such thing is done for letter c). The vacuum should, therefore, be filled appropriately.

Article 274 Initiation of the criminal investigation

240. The experts observe that para. 7 contains no mention as for the (disciplinary or criminal) consequences that the illegitimate refusal to initiate an investigation and propose that cross-reference with the relevant provisions be inserted.

Article 293 Presentation of the criminal investigation material

241. The provisions in the present article that allow for the civil party, the civilly accountable and their legal representatives to have access only to the material of the case related to the civil proceedings to which they are a party is not clear. The expressions used seem to indicate that the mentioned parties participate in full right to the criminal proceedings. If this is correct, the expert do not understand the reasons why they should not be allowed to examine the parts of the file not strictly related to the civil proceedings: indeed, a civil party within criminal proceedings must have the possibility to argue the accused's responsibility in full.

242. The provision raises reasons of concern also from the angle of the right to equality of arms of the accused. Para. 5 of the present article clarifies that the accused, his legal representative and the defender may have their right to examine the file limited with a judicial decision aimed at preserving the state, commercial or any other secret protected by law, as well as to ensure the protection of life, corporal integrity and freedom of the witness or other persons. This might impair, in substance, the ability of the defence to present its case under conditions of equality vis-à-vis the Prosecution. Though not per se in breach of the ECHR, it might be opportune to underline that such restrictions are exceptional and must be interpreted in accordance with the jurisprudence of art. 6 ECHR on the issue of the equality of arms.76

243. With particular regard to the issue of access to the investigation files by the defense, the experts would like to underline the following. It is correct that defense and prosecution should have access to the same information. A mere consideration of equality, however, does not exhaust the right under art. 6 para. 3 lett. c) ECHR, as time and facilities for the preparation of the defense might be adequate even if there remains a certain advantage for the prosecution (which will in practice always have an advantage over the suspect, with the exceptions of those parts of the investigation in which the defense assists). It is also true, however, that as a counter-weight the defense enjoys the presumption of innocence.

244. As far as to the right to disclosure is concerned (that is the selection of what material will be included in the prosecution file), the Court clarified that this is a requirement of fairness under art. 6 para. 1 ECHR, entailing that the prosecution authorities disclose to the defense all the material evidence for or against the accused (including, for example, report on fruitless searches). It seems possible to conclude, therefore, that full and unfettered access to the entire file prepared by the prosecution (recording all acts of investigations) forms part of the adequate facilities to which art. 6 para. 3 letter d) ECHR refers to. It has to be remembered, however, the failure to disclose all the investigation acts to the defence does not automatically lead to violation of the Convention if the proceeding as a whole can be regarded as having been fair.77

245. As far as to when the right of access arises, the Court has found violation of the ECHR in that the proceedings had not been truly adversarial due to lack of access to the file during preliminary investigations only during *habeas corpus* proceedings.[78]

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[76] As the Court has stated in the case of Rowe and Davis v. UK, judgment of 16 February 2000 para 61 "[...] *the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisal or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the Doorson v. Netherlands judgment of 26 March 1996, Reports of Judgements and Decisions 1996-II, para. 70). In some cases, it may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual or to safeguards an important public interest. However, only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6 para. 1 (see the Van Mechelen v. Netherlands judgment of 23 April 1997, Reports 1997-III, para. 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the above-mentioned Doorson judgment, para. 72 and the above-mentioned Van Mechelen judgment, para. 54)."*

[77] Edwards v. UK, judgement of 16 Decembre 1992.

[78] Lamy v. Belgium, judgment of 30 March 989.

Article 311 Appeal in cassation against the court order of the investigating judge to apply or refusal to apply remand, its prolongation or refusal to prolong or on the provisional release or refusal to release provisionally

246. The experts note that whilst the provision contains rigid deadlines for the presentation of the appeal, the submission of the material to the court of cassation by the court which issued the order and by the prosecutor, no deadline is set in respect of the prison administration receiving the appeal from a detainee. Given the sensitivity of the circumstances in which such appeal is being lodge, it would be advisable to identify clear deadlines within which the penitentiary administration has to inform the relevant public prosecutor and send the appeal to the relevant court, similar to the discipline established for the above-mentioned judicial authorities.

Article 313 Complaint against the unlawful actions and acts of the criminal investigating authority and of the authority conducting operational investigation activity

247. The experts do not believe that the changes introduced in the present article (that foresees in its new formulation that the competence to examine the complaints rests, in the first place, on the prosecutor) contravenes with the ECHR. Considering the interests at stake, though, the experts would suggest that the provision is expanded, so that it includes the suspect and its defender among the persons who have to be present during the hearing set by the investigating judge to rule of the complaint introduced *ex* para. 1 nos. 2) and 3).

Article 326 Aggravating the accusation in court proceedings

248. Reclassification (including aggravation) of charges pressed against an accused is not *per se* in contrast with the right to a fair trial. The European Court found that domestic courts may reclassify the acts which they have to judge, provided that the accused is warned of the possibility of reclassification and given the possibility to contest the new accusation by adversarial argument.[79] The experts believe that the possibility foreseen by the CPC does not contravene with the right to appeal in criminal matters in so far that the historical facts originally contested to the accused are being given a different legal qualification during the proceedings pending at second instance.

Article 369 Hearing other parties

Article 370 Hearing of witnesses

249. Recently amended para. 1 of art. 369 foresees the possibility that the victim/injured party be heard in the absence of the defendant, provided that a request in this sense has come from the victim/injured party itself or from the prosecution. No consent by the defendant is required. Considering that the provision does not contain any reference to articles 105-110 of the CPC, disciplining the deposition of the witnesses, the experts are concerned that, as currently worded, this article allows for an interpretation breaching the right to test witness evidence as enshrined in art. 6 para. 3 letter d) ECHR. If it is correct that the rationale of the latter is to ensure that the defence

[79] Drassich v. Italy, judgment of 11 December 2007 (available in French only), which at its para. 34 states that "*Si les juridictions du fond disposent, lorsqu'un tel droit leur est reconnu en droit interne, de la possibilité de requalifier les faits dont elles sont régulièrement saisies, elles doivent s'assurer que les accusés ont eu l'opportunité d'exercer leurs droits de défense sur ce point d'une manière concrète et effective. Ceci implique qu'ils soient informés, en temps utile, non seulement de la cause de l'accusation, c'est-à-dire des faits matériels qui sont mis à leur charge et sur lesquels se fonde l'accusation, mais aussi de la qualification juridique donnée à ces faits et ce d'une manière détaillée.*"

is given a fair chance to challenge evidence against the accused, then the possibility that this does not occur at the mere request of the victim/injured party or the prosecution can not be regarded as acceptable. Even though, the right to test witness evidence being one aspect of the right to a fair trial, it might well be that failure to observe it does not automatically amount to a violation. In this respect, the experts suggests that the provision be rewarded as to clearly state that the hearing of other parties can be carried out in the absence of the defendant only if the latter explicitly waives the right or if, due to lack of diligence, the waiver can be considered implicit.[80]

Article 371 Reading the depositions of the witness during the trial

250. Experts are not sure whether para. 1 no. 1) refers to the fact that depositions made during investigations can be used during examination or cross-examination of witnesses in order to undermine their credibility or not. If this is the case, then the experts see no reason why the provision foresees the need for the party to expressly request it, as the right would flow automatically from the applicable procedure. It is not clear, moreover, what happens to the request: is it subject to the decision of the judge? Which version prevail in case of conflict between depositions made during investigations and those made during examination of the case? The experts suggest that the article be reformulated in a clearer manner.

Article 396[1] The return of the criminal case

251. The experts suggest that the provision be reworded so that it is clear that in all cases in which the foreseen acquittal is adopted the case file is returned to the prosecution, regardless whether the latter presented a request in this sense or not.

Article 469 Issues to be examined by the court at the execution of punishment

252. The European Court has clearly stated that the provision enshrined in art. 1 of Protocol no. 4, prohibiting imprisonment for debt, does not apply to the system of imprisonment in default of monies owned to the Treasury in respect of fines imposed for criminal offences, as its scope of application concerns debts arising under a contractual obligation. In Goktan v. France, however, "*The Court has to express reservations about the imprisonment in default system as such: it constitutes an archaic custodial measure [...]".*[81]

Article 488 Grounds for the application of medical coercive measures

Article 490 Placement in a psychiatric institution

253. The experts believe that, as it currently worded, the provision at stake fails to clarify the three conditions on the basis of which, according to the Court's well established case-law, an individual can be regarded as being of "unsound mind" and, therefore, subject to the coercive measure of psychiatric internment. Using the words of the Court, such conditions are: "firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39, and the Johnson v. the United Kingdom judgment of 24

[80] See, *mutatis mutandis,* S. v. Austria, declared inadmissible by the Court on 8 September 1988.

[81] Goktan v. France, judgment of 2 July 2002, para. 51.

October 1997, Reports 1997-VII, pp. 2409-10, § 60).[82]While the last condition appear to be sufficiently met, for instance, by article 501 CPC, the first two, though present, could enjoy a more incisive recognition. In this respect, it is worth pointing out that art. 490 entitles the investigating judge to order the placement of a person under investigations if the latter is "found ill". No indication is included in the provision as to the procedure to follow in order to establish if the person can be regarded as being of unsound mind. The theme has been examined not only by the Court but also by the Council of Europe's organs, which provided States with guidelines embodied in three Recommendations and a White Paper.[83] All position papers mirror the approach the Court has adopted in this area, which can be summarised as follows: "The Court considers that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.

254. The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation is necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46)".[84]

255. Lastly, the expert recommend that the investigating judge's order to place a person in a psychiatric institution clearly states the duration of the internment.[85]

Article 517 Court proceedings on flagrant crimes

256. Though commendable in its intention to ensure speedy proceedings, the provision embodied in the last part of para. 2 of the present article does not fully satisfy the experts in that it indicates in 10 days the maximum term that the court can give the parties to prepare their defence. What is missing, in the eyes of the experts, is the possibility that such term, *in abstracto* sufficiently long to prepare a defence, might not be such in the light of the specific circumstances of the case. The provision, therefore, should be amended accordingly.

Article 531 Legal regulation of international legal assistance

257. Recently amended para. 3 of the present provision foresees the possibility that the Ministry of Justice halt the execution of a judgement granting international legal assistance when the fundamental national interests are at stake. This formulation does not meet the concerns of the experts, in that it allows a non-judicial authority to alter the binding decision of a tribunal. The inadmissibility of such approach was sanctioned as

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[82] Varbanov v. Bulgaria, judgment of 5 October 2000, para. 45.

[83] Recommendation 818 (1977) of the Consultative Assembly, CM's Recommendation No. R (83) 2 and Recommednation 1235 (1994), and the "White Paper on on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment".

[84] *Ibidem,* para. 47.

[85] See point 4 of the White Paper.

long ago as 1997, in the case Findlay v UK[86]. It is also mirrored in Principle I - General principles on the independence of judges of the CM's Recommendation no. R (94) 12 on independence, efficiency and role of judges, that states that "*decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law".* In the light of the above, the experts suggest that the paragraph is rephrased and that derogatory clauses be embodied in the procedure and, as a consequence, interpreted and applied directly by the judiciary, without outside and *ex post facto* interferences.

Article 546 Refusal of extradition

258. Para. 2 no. 6 lett. a) allows for the refusal to grant extradition in the request was lodges with the aim to pursue or punish a person for race, religion, sex, nationality, ethnic origins or political opinions or considerations. Given the protective rationale of the norm, the experts suggest that the list is closed by a catch-all clause such as "any other status", which would be able to absorb circumstances (i.e. sexual orientation) that are worth protection and that are currently not covered by the provision.

Chapter IX

259. Chapter IX of the Criminal Procedure Code deals with International Legal Assistance in Criminal Matters and Extradition.

International Legal Assistance in Criminal Matters

260. Articles 531 to 534 of the Criminal Procedure Code deal with International Legal Assistance. We note that Art.531, para.(1) provides that the provisions of international treaties to which Moldova is a party as well as other international undertakings of the Republic of Moldova are expressly deemed to have priority over the provisions of Chapter IX of the Criminal Procedure Code. The Republic of Moldova ratified the European Convention on Mutual Legal Assistance in Criminal Matters on 4 February 1998 and ratified the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters on the 27 June 2001. The provisions of the convention and the Additional Protocol therefore form part of the Criminal Procedure Code and the provisions of Chapter IX must be interpreted so as to give effect to the Convention and the Additional Protocol. However, we note that the Republic of Moldova has not yet signed the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and we recommend that consideration being given to ratifying the Second Additional Protocol. We have no further comments on Section 1 of Chapter IX of the Criminal Procedure Code.

Extradition

261. Articles 541 to 550 of the Criminal Procedure Code deal with extraditions arrangements between the Republic of Moldova and other states.

262. The Republic of Moldova ratified the European Convention on Extradition on 2 October 1997 and it entered into force on 31 December 1997. The Republic of Moldova has also ratified the Additional Protocol and the Second Additional Protocol to the European Convention on Extradition. As we previously commented upon, by Article 2, para. (2), the general standards and principles of international law and of any

[86] Judgment of 25 February 1997.

international treaties to which the Republic of Moldova is a party are deemed to constitute a component part of the Criminal Procedure Code and are expressly deemed directly to determine human rights and freedoms in criminal proceedings. Accordingly, the provisions of Articles 541 to 550 of the Criminal Procedure Code must be interpreted in such a way as to give effect to the European Convention on Extradition and the Additional and Second Additional Protocol.

263. Article 1 of the European Convention on Extradition sets out the obligation to extradite in the following terms:

"The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order."

264. The obligation to extradite is, therefore, confined to cases in which the requesting state is either "proceeding against" a fugitive or where the fugitive has been convicted of an extradition offence in the requesting state and is wanted for the carrying out of the sentence. Article 544, para (3) of the Criminal Procedure Code appears to be inconsistent with Article 1 of the European Convention on Extradition in that it provides for "extradition for the purposes of criminal investigation". We recommend that this provision should be reconsidered and that extradition from the Republic of Moldova should be limited to cases in which a person is being proceeded against for an extradition offence, and that it should not extend to the case of a person whose extradition is being sought at the investigation stage of proceedings.

265. We note that Article 544, para. (8) provides that where a court finds that the conditions for extradition are satisfied it shall order the fugitive to been detained on remand until the transfer of the person whose extradition is requested. We consider that there should not be an invariable rule that a fugitive should be detained on remand pending his return to the requesting state. There may be many cases in which to detain on remand a person, pending his return to the requesting state, may be unnecessary, and may cause grave hardship. Detention on remand pending return to the requesting state should only be ordered where there is a real risk that the person whose extradition is sought may flee, or otherwise interfere with the course of justice. Less onerous restrictions, such as bail, house arrest, reporting to the police or electronic tagging should be imposed where they are considered adequate to deal with any risk of flight or interference with the course of justice.

266. We note with concern that Article 546, para. (3) of the Criminal Procedure Code provides that where the extradition offence is punishable in the requesting state with capital punishment, extradition "may" be refused, unless the requesting party gives adequate guarantees that capital punishment shall not be applied. We urge the authorities to amend this provision so that extradition shall, in all cases in which the extradition offence is punishable with capital punishment, be refused unless adequate guarantees are given that the death sentence will not be imposed.

267. We note that under Article 547, para. (1) of the Criminal Procedure Code preventative detention of the person whose extradition is requested may be replaced by another preventative measure only in cases where:

268. "(a) the health of the person does not allow his/her staying in detention; and (b) the person and his/her family have a permanent domicile and there are no reasons to consider that he/she will avoid the procedure of extradition."

269. We consider that there are many cases in which it is not be necessary to order preventative detention of a person who does not have a permanent domicile in Moldova. The preventative detention should only be ordered in cases where there is a risk of flight, and an application for such an order should be considered and determined by the court having regard to the particular circumstances of each case.

270. Article 548, para. (2) of the Criminal Procedure Code makes provision for the temporary extradition of a person where the postponing of extradition (under Art. 548, para. (1)) may result in the extradition offence being barred in the requesting state by limitation of where such postponement may prejudice the finding of facts. In such circumstances, Art. 548, para (2) provides that the person may be extradited temporarily "on the basis of a reasoned request, under the conditions agreed on in common with the soliciting party".

271. We are of the opinion that the human rights of a person who may be subject to temporary extradition, under Art. 548, para. (2) are not sufficiently safeguarded by the provisions of the Criminal Procedure Code. The concept of "temporary extradition" is highly unusual and could open to many abuses. Any procedure for temporary extradition must contain clear and effective procedural safeguards to ensure that the human rights of a person who has been temporarily extradited will not be violated, and that there are sufficient guarantees in place to ensure that the person will be returned to Moldova within a clearly defined period of time.

CODE OF ADMINISTRATIVE OFFENCE

Article 2 The goal of the administrative offence law

272. The formulation of the article seems tautological. As it is now, the provision refers to a number of values and interests that the administrative law aims to protect "during the examination of the administrative offence, as well as in the process of prevention of the commission of new administrative offences" (emphases added). The experts suggest that the text of the article be amended, first of all by deleting the sentence "during the examination of the administrative offence" and, secondly by making it clear that the scope of the law is "the prevention of the commission of new administrative offences". The article should also include, in the list of protected values, the established procedure for the exercise of state powers.

Article 16 Administrative liability of a natural person

Article 32 Administrative sanction

273. Article 16 para. 4 of the present article introduces a difference in treatment of military servicemen in cases of administrative offences. It provides, in particular, for the application of the administrative offence law for acts committed by military servicemen off duty, with the exception of compulsory servicemen. Subsequently, para. 5 of the same article clarifies that offences committed by compulsory servicemen (either off or on duty), shall be the object of disciplinary proceedings. This difference in treatment[87] introduces, in the view of the experts, two sets of problems. The first, which will only be mentioned and not examined further (given the scope of the present Opinion), concerns the compatibility of such provision with the scope and object of the administrative offence law as stated in Article 2. It is not clear how and to which extent, in the presence of an administrative offence, the rights and interests the law aims to protect can be guaranteed by a disciplinary procedure. The second issue at stake relates to the true nature of the offence and the applicability of the guarantees of due process of law enshrined in Article 6 ECHR. In application of the principle illustrated by the ECtHR in Campbell and Fell[88], it must be clear that if a process is set up for adjudicating (administrative) offences committed by a particular category of persons (who are subject to a particular disciplinary regime), the test as to the application of Article 6 ECHR must still be applied in order not to deprive such person (who is actually being subjected to "criminal proceedings") of his/her fundamental rights.

274. In this respect the experts note that, although categorised as "administrative", the offences punished by the present law might fall under the scope of Article 6 ECHR. The final answer will depend on whether they meet the criteria that the Court originally started to elaborate in Engel and others v. Netherlands.[89] Without illustrating in detail the criteria that the Court has developed from that case onwards, in determining whether a procedure (regardless of its denomination) attracts the protection of Article 6 ECHR

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[87] Art. 16 para. 1 no. 6) also introduces a difference in treatment with regard to "official persons". Provided that what is said in the Opinion in relation to servicemen also applies to the situation of those enjoying a different treatment due to their belonging to a certain category, the experts note the inexactitude of the expression "official person. On the one hand, the term seems to encompass "public officials". On the other hand, though, the reference to "enterprise" (the law is silent about the public/private nature of such entities) suggests that also non-civil servants (occupying positions which are not well clarified) might undergo only disciplinary proceedings if the circumstances listed in letters a-c are not met.

[88] Campbell and Fell v. the United Kingdom, judgment of 28 June 1984.

[89] Engel and others v. Netherlands, 1979-80.

(character of the offence, scope of the sanction, nature and severity of the sanction), the experts note that among the consequences that an administrative offence can lead to are, as listed in Article 32: a fine; the deprivation of the right to conduct certain activity, the deprivation of the right to hold a certain position or a special right; unpaid community work and administrative arrest. As these sanctions lie on the edges of sanctions under the criminal law[90], it is important to recall that the fact that they are labelled as "administrative" does not relieve the State of the obligation to apply the fair trial guarantees under Article 6 ECHR, should the interest at stake so require.

275. Another aspect that needs to be examined under the provision of Article 32 concerns letter h), which deals with administrative arrest. The wording used recalls the provisions of Article 5 ECHR, which must therefore apply should the arrest reach the minimum threshold identified on a case-by-case by the Court, taking into account the space and time element of the deprivation of liberty and the decree of coercion.[91]

Article 378 Right to defence

276. The present article is illustrative of the need to harmonize the wording used in the various pieces of legislation submitted to the experts. Here the expressions used are that of "right to defence", elsewhere identified as right to "qualified legal assistance" or "right to legal aid"; defence attorney, elsewhere indicated with the expressions "defender"; lawyer, qualified lawyer, and *ex officio* defence attorney which apparently are meant to refer to the "duty lawyer" mentioned to in Article 28 of the LSGLA or in Article 8 of the CCP.[92]

Article 383 The administrative proceedings costs

277. The norm foresees, at para. 3, the possibility of compensation (not reimbursement) of legal costs in case of acquittal of the accused, but there is no reference as to the subject upon which such obligation would eventually lie, nor to the procedure available. In the light of the content of the paragraphs preceding it, the wording of the last paragraph seems superfluous.

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[90] See, for instance, Malige v. France, 1999 on the deduction of points leading to the withdrawal of a driving licence, Pierre-Bloch v. France, 1998 on the disqualification from standing for election for a given period, Weber v. Switzerland, 1990 on the capability of a pecuniary sanction to bring the offence within the sphere of "criminal", Konig v. Germany, 1979-80 on the suspension of the right to practice a profession,

[91] For a clarification on the difference between restriction of movement and deprivation of liberty, based mainly on the intensity and decree of the measure, rather than on the nature or substance, see Guzzardi v. Italy, 1981.

[92] In relation to the appointment of *ex officio* lawyers to persons who do not have legal counsel (regardless of their wealth), the experts note that art. 378, just like art. 8 and 304 of the CCP and art. 77 of the CPC, contains a brief, insufficient, description of the step to be undertaken to guarantee the right of defence, without any cross-reference to other norms. In this respect it ought to be noted that art. 28 LSGLA, which does seem the only general provision regulating the appointment of *ex officio* lawyers (paid in any case by the State), has a limited scope of application. Its beneficiaries, in fact, can only be "persons in need for emergency legal aid", that is only to persons who are detained (or, better, deprived of their liberty, thus not only detainees but also person under arrest) within criminal or administrative proceedings. If the assumption of the experts that the only norms regulating the appointment of *ex officio* lawyers is the one mentioned above is correct, then they would like to point out the need to extend its scope of application, which should then not be limited to detainees only, but should include also all those undergoing criminal, administrative and civil proceedings if self-representation does not respond to the interest of justice, which is something close to what art. 77 of the CPC does, though not clearly. More details on this point can be found in this Opinion in the part devoted to the commentary of art. 28 LSGLA.

Article 384 The person against whom administrative proceeding is commenced

278. Though commendable, as it is aimed at providing effective legal representation to a defendant, the provision of para. 2 letter c) of this article seems, in the opinion of the experts, difficult to implement. A more flexible, yet incisive, reference to "immediate/prompt appointment" of legal counsel should be considered. The experts, however, reiterate that it would be better for clear provisions on the appointment of ex officio lawyers (not for the indigent but for those who do not have a lawyer and should have one, whose fees will be paid by themselves) in the light of the importance of the case and in the interests of justice) to be incorporated in specific legislation of general application (either in an amended SLGLA or other).

279. Furthermore, the experts would like to express their concern in relation to the provision included in para. 4 letters b-f. The first of the targeted stipulations, foresees the obligation of the defendant to agree to an examination and body search and to accept "unquestionably" the request by the proceeding authority for the provision of so called "non-testimonial contributions" (i.e. samples of organic fluids).[93] Whilst the ECtHR has made it clear that the privilege of non-incrimination does not extend to the use (in criminal proceedings) of material [...] which has an existence independent of the will of the subject[94], this provision is questionable because of its inclusion of medical and forensic examinations. Such situations trigger the application of Article 8 ECHR from two perspectives. First and foremost, although a forensic/medical examination can prove to be a significant safeguard against false accusation, any intrusion in the individual's private sphere and physical integrity must comply with the specified exceptions to the qualified right under Article 8, and must meet the tests of legality, necessity and proportionality.[95] The consent of the person is not always requested. However, the absence of consent might raise issues both in relation to Article 5 (order to undergo medical examination, such as a psychiatric assessment, enforced through deprivation of liberty) and Article 3 ECHR (in relation to the modalities through which the examination is performed)[96].

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[93] The comments also extend, by analogy, to the provisions of art. 66 para. 5.

[94] See, among others, Saunders v. United Kingdom, application no. 19187/91 and Schmidt v. Germany, decision of 5 January 2006. The comments made in this respect also apply, *mutatis mutandis,* to the relevant provisions of the CPP, among which art. 64 para. 6.

[95] Y.F. v Turkey, judgment of 22 July 2003, para. 43.

[96] In Jalloh v. Germany, judgment of 22 July 2006 the Grand Chamber clarifies, in paras. 71-71 that "*any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence at issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore, the procedure must not entail any risk of lasting detriment to a suspect's health. [...]. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention [...]. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision [...]. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health [...]*"

280. With regard to the guarantees of the confidentiality of the lawyer-client communications, the experts recall the views expressed while examining Article 45 of the LBA.

281. The experts also note the vagueness of the wording of letter e), generically referring to "legal ordinances": as the situation depicted here recalls the other circumstances listed in the same para., either the law clarifies and elaborates further which ordinances it considers or the letter e) is dropped and the paragraph re-lettered accordingly[97]. With regard to the obligations listed in letter f), the reference to the obligation of the defendant to observe order seems superfluous as it is reasonable to believe that, somewhere else, the law tasks the chairperson of the hearing with the chore of keeping order, specifically foreseeing the sanctions applicable to those breaching the censorship by the chairperson. As to the defendant's obligations not to leave the courtroom without the permission of the chairperson, the experts believe it is opportune to recall that, according to the jurisprudence developed under Article 6 ECHR, an accused may waive the exercise of the right to be present at one's hearing, provided that the decision is genuine and unequivocal.[98] As it is formulated, the provision gives the chairperson the right to hinder the exercise of this right without specifying on which grounds, for instance, the permission might not be granted.

Article 387 The injured person

282. Para. 2 of the present article introduces an unjustifiable difference in treatment between the administrative offender (referred to in Article 384) and the injured person. If under age, the administrative offender enjoys the possibility of exercising his/her rights in addition to the actions undertaken by the legal representative. Conversely, if the minor is the injured person, his/her rights are necessarily implemented by the legal representative, with no possibility of direct exercise.[99]

283. Para. 5, letters a), b) and c), detail with the obligations falling upon the injured person of an administrative offence. Amongst others, the victim has the obligations: upon request of the proceeding authority to appear at the hearing when duly cited; to submit, when requested, documents and other means of proof and samples; and, to undergo medical examination in cases where physical injury is a factor. The experts note, in the first place, that there is no provision of sanctions in case of failure to comply with such obligations. Secondly, it does not seem compatible with the ECHR to impose on the injured person an obligation to undergo medical examination if s/he does not wish to. It goes without saying, though, that failure to provide adequate medical evidence may result into the claim of the person being unsubstantiated and therefore his/her claim for compensation (partly) being rejected.

284. Lastly, though commendable, the provisions of para. 3, letter f)[100] seem unrealistic in its practical application and places an excessive burden on the offices

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[97] The same comment applies to the wording of art. 387 para. 5 lett. d) discussed below, where reference is made, *inter alia*, to the "authority that is competent to examine the case" . The rationale behind that referral is not clear, considering that the same sentence also mentions "the chairperson of the court hearing", whose authority can, on occasions, be overcome by some other body not clearly identified.

[98] See, for example, T. v. Italy, judgment of 12 October 1992, Colozza v. Italy, judgment of 12 February 1985.

[99] Art. 79 of the CPC states, conversely, that the rights, freedoms and legitimate interests with persons without full legal capacity (among which, in certain cases, minors) can only be exercised by their legal representative.

[100] Art. 384 para. 2 lett. h) attracts the same criticism.

concerned by stating that 24 hours (not even 1 working day, in a case where the period falls over a week-end) is the maximum length of time for copies of the material included in the case-file to be issued to the injured person. As it is, this requirement should be reformulated by emphasizing that access to the case-file should not be regulated in a way as to impair an effective defence. In any case, in its current version, the experts are not certain as to the sanction that the non-compliance would attract.[101]

Article 467 The person entitled to lodge a cassation appeal

285. The experts do not understand the rationale behind the second sentence of para. 2, which recognises the *locus standi* of the spouse of an arrested offender to introduce a cassation appeal. As it is presently formulated, the article allows a spouse to introduce an appeal regardless of the will of the arrested person. In view of the fact that the offender him/herself and his/her lawyer (who must be present) have the right to appeal, and considering the risks related to linking this right to the presence of a merely formal conjugal relationship (which, by the way, appears to discriminate *de facto* against non married couples), without taking into account the will of the detainee, the experts believe that, although *prima facie* more protective of the rights of the detainees, the provision in realty might, in some cases, be detrimental to the protection of the latter and therefore suggest that it is dropped.

[101] See, for further details, the comments made under art. 384.

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Article 76 Persons who can be representatives in the court

286. The present article introduces the possibility that the case is conducted, on behalf of a party, by a non-lawyer. The experts would like to recall, here, their criticism and conclusions as to the risks related to the presence of legal professionals not bound by the ethical and disciplinary rules established by the Bar Association for its members (qualified lawyers), expressed whilst commenting the LBA.

Article 77 Appointment of an *ex officio* representative

287. In the opinion of the experts, the wording of this article demonstrates the same lack of consistency which we have commented upon in connection with the LSGLA. According to article 77 the Court, via the Territorial Office, can appoint, *ex officio*, a representative lawyer to a party who does not have one and who falls within one of the categories listed in para. 2. letters a) to d). In the opinion of the experts, provisions for compulsory legal aid (see also Article 19 LSGLA, letters a), b), and d) introduce the possibility that a person may be represented by a lawyer, appointed *ex* officio , in situations in which the interest of justice requires legal representation. The experts note that the financial position of the person is not expressed to be the determining factor, though there are other grounds which may provide good reason for a lawyer to be appointed, such as where a party is under a legal disability. In the laws submitted, there are no indication of a roster of *ex officio* lawyers available on a rota basis, whose work will be paid by the party to which it has been attached to, nor to the obligation that the party is informed of the need that the case be conducted by a lawyer and, in case of failure to nominate one, an *ex officio* lawyer (paid by the State) will be appointed compulsorily. This system, for the reasons mentioned earlier whilst commenting the LSGLA, does not seem viable. The risk is that the State budget is used to cover the fees of all *ex officio* lawyers, even in circumstances in which the party could well afford them. This choice, eventually, plays a detrimental role as it contributes to lower the fees paid to *ex officio* lawyer, thus contributing to the current situation in which very few practitioners volunteer to provide free legal assistance.

Article 80 The establishment of power of a representatives

288. Para. 9 of the present article foresees the right for a representative to waive the powers at least ten days before the date of the examination of the case or the expiry of the period of appeal. The experts suggest that this provision should be re-formulated, so as to state that the representative can waive the powers only in circumstances in which the waiver does not infringe on the right to defence within the procedure. If the waver is grounded on a situation of incompatibility or conflict of interest, the waiver must be notified when the representative learns about the conflict (or when the presence of such conflict should have been known, using ordinary diligence). Such occurrence should, in the view of the experts, be considered by the article and the provision directly coordinated, in the relevant parts, with the provision of Article 8 CCP.

Article 85 Exemption of State tax

289. Article 85 para 1 lett. e) introduces yet another category of lawyer, that is to say “parliamentary lawyer”. Given the total uncertainty as to what this category of lawyer refers to (the definition of the nature of the proceedings, included in the wording, does not help), the experts suggest that either the definition is clarified or dropped.

Article 206 Outcomes of the parties and representatives' failure to appear before the court

290. The first sentence of para. 5 of the present article, states the rule that the absence of a party to the proceedings or of his/her lawyer (representative) (here it is not clear to which of the two figures reference is made) does not impede the examination of the case. In any circumstance, the examination of the case can only be postponed once. In the opinion of the experts, the present provision should be coordinated with the rule in Article 75 and with those included in the law on state legal assistance (or better, to the system of *ex officio* lawyers envisaged whilst commenting on Article 77). The article should foresee, instead, that in a case where the lawyer representing a party is absent, a lawyer who is available immediately should be appointed *ex officio* and that, if the judge believes that the circumstances justify the request, a hearing can be postponed more than once.

291. Para. 6 refers to the responsibility to provide compensation of the person guilty of having caused damages to the other party to the proceedings for failure to appear. Reference is made to the guilt of the responsible subject. The experts note, in the first place, that such a provision should be included in the substantive civil code and not in the procedural legislation. For it to be included in the latter, the norm should be reworded with the provision of the power of the party suffering damage for the unjustified absence of others, to introduce a specific request for compensation that the adjudicating body will decide when ruling on the merit of the case.

5. SUMMARY OF MAIN FINDINGS AND RECOMMENDATIONS

292. The experts commend the way the legislation reviewed incorporate the international treaties to which Moldova is party, particularly the ECHR.

293. The experts recommend the inclusion of an overarching duty on judges, investigating judges, prosecutors, and criminal investigative authorities to carry out functions, duties, and power in accordance with the overriding objectives of paragraphs (2) and (3) of art. 1 of the CPC.

294. With regard to the legislative technique adopted, the experts note that, though commendable, the attempt of the legislator to ensure compliance with the international standards by promoting very detailed pieces of legislation might, in the long term clash with that very aim, as detailed legislation becomes obsolete rather quickly.

295. In order to insure compliance with the ESC, the experts recommend that the requisite of Moldovan nationality is excluded from the list of requirements to exercise the legal profession.

296. The experts recommend that respect of confidentiality of lawyer-client communications be extended so as to include the content of any conversation, file, document or communication (whatever the means) exchanged between the lawyer and his/her client.

297. A clause introducing inadmissibility of evidence obtained in breach of the confidentiality protecting lawyer-client communications should be included in the CPC and echoed, if need be, in the LBA.

298. The experts recommend that material which shall not be admitted as evidence in criminal proceedings shall be extended to include all evidential material unlawfully obtained.

299. The experts welcome the adoption of the LSGLA: however, they are concerned about the sustainability of the choice made by the legislator not to means-test it. Instead,

they recommend that eligibility to legal aid should be assessed by reference to financial circumstances.

300. The experts recommend that appointment of legal aid lawyers is done on the basis of objective and pre-determined criteria, so to avoid possible abuses.

301. The experts recommend that a clearer separation of roles and power between judges and prosecutors is established, with particular regard to deprivation of liberty and preventative measures. In all matters in which the Court is considering applying a preventative measure, the Court must pay equal regard to the submissions and representations made on behalf of the prosecution and of the defence.

302. The experts consider that the rules governing jurisdiction over criminal offences may, in some case, prove to be impractical or impossible. In particular, we recommend that the rules dealing with alleged crimes committed abroad or on a ship should be reconsidered, as to avoid impunity.

303. The experts recommend that the rights of victims to withdraw their complaints should be restricted to cases where the Court is satisfied that a victim has not been intimidated into attempting to withdraw the complaint.

304. In relation to the civil procedure, the expert point out the risks for a proper administration of justice inherent in allowing non-lawyers to represent parties.

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