COMMENTS ON PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF MOLDOVA

Introduction

1. These comments are concerned with the compatibility of proposed amendments ('the Amendments') to the Criminal Procedure Code of the Republic of Moldova ('the Code') with both European standards and, in particular, the European Convention on Human Rights ('the Convention'), and European best practices. They have been prepared under the auspices of the Council of Europe's Project "Support to a coherent implementation of the ECHR in Moldova", financed by the Danish Government.

2. These comments have been prepared on the basis of English translations of both the Code and the Amendments. In preparing these comments, account has also been taken of the Constitution of the Republic of Moldova.

3. In addition to commenting on the Amendments, the opportunity has been taken to draw attention to certain problems or shortcomings that became evident when reviewing the unamended provisions of the Code.

4. The comments consider first the objectives being pursued in the Amendments. They then examine each of them in turn before concluding with a summary of recommendations and an overall assessment of their compatibility with European standards and best practices.

Objectives

5. The Amendments have been prepared by the Ministry of Justice and are intended to fulfil an objective set out in the Strategy for Justice Sector Reform 2011-2015, namely, to improve the Criminal Procedure Code so as to exclude the contradictions between it the standards for the protection of human rights and fundamental freedoms[1]. In particular, the aim is to bring the Code into conformity with the requirements of Article 5 of the Convention, as elaborated in the case law of the European Court of Human Rights ('the Court').

6. Thus, the Amendments seek to reinforce the existing limitation on the use of coercive measures involving deprivation of liberty prior to the conclusion of criminal proceedings, to require more explicitly the need to consider the possibility of using such measures that do not have that consequence in preference to ones that do and to strengthen the ability of a person subject to such measures to appeal against their imposition and to challenge their legality.

7. These are welcome initiatives which, if properly implemented, could contribute to the more effective implementation of obligations under the Convention and of especially those arising from Article 5.

8. However, the Amendments go beyond the requirements of the Convention in excluding persons who are merely suspects - a 'natural person before an accusation is brought against him and in respect of

[1] Adopted by the Parliament of the Republic of Moldova in 2011; see point 2.1.5 in Part 5.

whom there is certain evidence that he committed a crime'[2] - from the possibly of being subjected to coercive measures that entail any deprivation of liberty. Pursuant to the Amendments, such measures will henceforth only be capable of being imposed on someone who is an accused or a defendant, i.e., 'the person in respect of whom under the terms of the present code an indictment order was issued'[3] or an accused 'in the respect of whom the case was referred for examination to the court'[4].

9. This exclusion is potentially welcome as it could reduce the use of deprivation of liberty in the preliminary stage of the criminal process. However, this innovative approach will need to be monitored closely lest it be undermined by the abusive filing of indictments in order to be able to adopt preventive measures and thereby bring more persons than necessary into the criminal process' more advanced stages.

Individual amendments

10. The comments on individual amendments are organised under the heading of the specific articles of the Code to which they relate.

Article 1

11. The addition of not being deprived of liberty illegally or without explanation to the qualifications in paragraph 2's definition of the twin purposes of criminal procedure as being protection against offences and against unlawful acts in their investigation and trial is, at first glance, consistent with the requirements of Article 5 of the Convention since it would seem designed to preclude both deprivations of liberty that have no legal basis and those that take place without any justification for them being provided, which is an element of arbitrary detention. However, the provision being amended is formulated so as to provide protection from such treatment only for the 'innocent' when the protection of Article 5 is actually applicable to everyone, including those who may well be guilty[5]. Although the Amendments to the Code are not otherwise so limited, the present limitation could result in an unfortunate and misplaced assumption that a guilty verdict would extinguish any responsibility for preceding violations of the right to liberty and security under the Convention. It would, therefore, be appropriate to replace 'no innocent' by 'no one'.

12. Such a change would, of course, also have implications for the existing qualification on the twin purposes that 'no innocent be prosecuted and convicted'. This is not actually a requirement of the Convention since Article 6(1) only requires trials to be fair and Article 3 of Protocol No. 7 only requires compensation for a conviction that is overturned where a miscarriage of justice is established. Nonetheless, the aim of criminal justice systems should certainly be to avoid if at all possible the conviction of the innocent, even though that would not necessitate a bar on them being prosecuted since it may only be the trial that establishes their innocence. It might be better, therefore, for the existing provision to provide that no one should be unjustifiably prosecuted or convicted.

13. The proposed addition to paragraph 3 of the requirement that criminal investigation authorities and courts shall not act during criminal proceedings so that a person becomes 'a victim of his/her fundamental rights' is perhaps a useful reminder of the fact that this process must be governed by such rights. However, as the existing prohibition on being 'arbitrarily or unnecessarily submitted to

[2] Article 63(1) of the Code.
[3] Article 65(1) of the Code.
[4] Article 65(2) of the Code.
[5] See, e.g., *Punzelt v. Czech Republic*, no. 31315/96, 25 April 2000.

procedural constraints' comes within those rights, it might be better if the word 'other' was inserted before 'fundamental'.

Article 3

14. The qualification that the proposed paragraph 3 would introduce on the possible retroactive effect of changes in criminal procedural law, namely, that this can only be where they are less exacting, is not, as such, required by the Convention but it could in practice ensure that the use of 'procedural coercive measures' - in proceedings already under way do not, or do not any longer, entail violations of Article 5 as a result of being unjustified by the particular circumstances of the cases concerned. This amendment is, therefore, entirely appropriate.

15. However, there should be greater clarity as to what are the consequences for procedural coercive measures already being applied under the Code before its amendment. For example, is the effect of the Amendments that someone already detained should be released automatically if the new maximum period has been reached and does any failure to implement this immediately render his/her detention on remand illegal and thus entail a right for redress or liability of the relevant authority? Such a clarification will be important both for those subject to the relevant measures and those applying them. Thus, although the proposed retroactivity for the more favourable system of preventive measures merits positive assessment, this should be accompanied with appropriate guidance as to how this is to operate in practice.

Article 6

16. The proposed amendment seeks to clarify the meaning of the term 'warrant', which is not currently explained in the Code. Thus, this is defined as a summary of a court order, containing only the 'operative' part which is needed to execute the restrictive measure which the order authorizes (the English translation says 'judgment' but it appears that what is really meant is a court 'decision' or 'order', according to paragraph 21 of Article 6 of the Code). The aim of the provision is to limit the details of what is to be provided to a person being arrested or subjected to a search so that confidential information in the judgment itself need not be disclosed. This is not inherently problematic as those enforcing the order need not hand the affected persons the long, reasoned judicial ruling at the time. However, actual compliance with the requirements of Article 5(2) of the Convention will very much depend upon the exact formulation of the operative part of the judgment, which will need to provide the essential legal and factual grounds for the action being taken.

17. Furthermore, it should be noted that disclosure of the full judgment, while not required at the time of the arrest or search, may ultimately be necessary in proceedings to challenge the lawfulness of such action since this may reveal information for a submission that there was no substantive justification for it, even if there was some ostensible basis for the arrest or search in the operative part[6].

Article 10

18. The proposed addition to the list in paragraph 3 of the conduct prohibited during criminal proceedings of unlawful or unjustifiable detention or arrest is entirely appropriate.

19. However, such an addition does not seem to be strictly necessary since the requirement that a deprivation of liberty shall be lawful is not only a general principle - see Article 7 of the Code but paragraphs 1 and 2 of Article 11 also recognize the inviolability of the liberty of a person and state

[6] See, e.g., *Svipsta v. Latvia*, no. 66820/01, 9 March 2006 and *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.

that no person shall be arrested save the manner and cases provided for in the law. Nonetheless, there can be no objection to the reiteration of the need for complying with the law and for providing enough grounds for any restriction of a person's liberty.

Article 11

20. The proposed addition to paragraph 3 of the need for a warrant of arrest and of a reasoned court judgment for the prolongation as much as the initial adoption of the coercive measures listed, as well as the clarification that such a warrant and judgment are cumulative and not alternative requirements, is entirely consistent with the requirements of Article 5 of the Convention - helping to ensure that the relevant decisions are sufficiently reasoned - and is thus appropriate[7].

21. The proposed addition to paragraph 4 of a stipulation of an absolute limit on the total term of detention of 12 months incorporates a requirement already found in Article 25(4) of the Constitution, while at the same time resolving a debate as to its effect. Thus, the 12 month period is specified to be inclusive of and not distinct from any period of detention during the trial. Such a provision should, in many instances, ensure that the length of detention on remand is not incompatible with Article 5(3) of the Convention. Nonetheless, it needs to be borne in mind that the reasonableness of a period of detention is never assessed *in abstracto* and even 12 months in a given case could be too long if special diligence had not been displayed in the conduct of the proceedings[8]. Thus, while welcome, care should be taken to ensure that this amendment does not lead to complacency in the handling of individual cases.

22. While the proposed addition is correct, positive and welcome, the linking of the maximum time of police detention without a judicial order - with which paragraph 4 was concerned with the maximum term of preventive detention - does not seem entirely appropriate. Certainly, the latter maximum is already provided in paragraph 2 of Article 186 of the Code and its inclusion here might not really be necessary. However, this point concerns only legal style and the desirability of avoiding reiterations and is not essential.

23. The proposed insertion into paragraph 6 of 'the prosecutor' into the list of those bound immediately to release someone unlawfully arrested or detained[9] or in respect of whom the grounds for arrest or detention become invalid should contribute to ensuring that any unjustified deprivation of liberty is terminated as soon as possible. This addition is thus consistent with the presumption in favour of liberty enshrined in Article 5 of the Convention and is clearly appropriate. However, it should be noted that the related provision on this point - paragraph 3 of Article 195 of the Code - is formulated in terms of a power rather than an obligation to release[10] and needs to be harmonised with what will be inserted into paragraph 6 of the present provision.

Article 18

24. The proposed replacement in paragraph 1 of 'article' by 'Code' reflects the reality that the stipulations governing closed hearings are, in fact, in other provisions of the Code. As such the

[7] On the inadequacy of reasoning for prolongation decisions, see, e.g., *Svipsta v. Latvia*, no. 66820/01, 9 March 2006.
[8] See, e.g., the finding of a violation of Article 5(3) *Khayredinov v. Ukraine*, no. 38717/04, 14 October 2010 in respect of such detention lasting just 8 months.
[9] The words 'arrested or detained' are not in the English translation but, from the context, it would appear that they are meant to be in the text. If, of course, they are also missing from the Moldovan original then that text would need to be corrected.
[10] See para. 93.

proposed change is not problematic. Furthermore, the Court has established that there is no general requirement for public hearings in respect of judicial control over deprivation of liberty[11]. Nonetheless, it has not excluded that such a hearing might not be required in the particular circumstances of a case[12] and the restrictions found in the Code could thus prove to be inconsistent with the requirements of Article 5(3) and (4) of the Convention in some cases, as well as potentially damaging to public confidence in the criminal justice system.

Article 39

25. The proposed addition to point 2 extends the Supreme Court's competence to examine appeals in cassation in order to implement proposed amendments to Articles 185(4) and 186(13) of the Code. As such, the proposal is not problematic.

Article 40

26. The proposed introduction of a new paragraph 4 is intended to resolve jurisdictional responsibility in respect of the imposition of procedural coercive measures and of challenges to their imposition. Thus, it links the territorial competence of the court or judge to decide on coercive measures to the jurisdiction of the prosecutor who leads the investigation. This criterion is adequate, as the application for coercive measures should be filed in a close jurisdiction to the place where the investigation is directed, although in cases of urgency it might be convenient to allow the court of the place where the measure is to be carried out, to take the decision, for example in cases of search and seizure. The new paragraph 4 is important as otherwise the scope for confusion could lead to unjustified delay and attempts to circumvent rulings already made[13], as well as to frustration of attempts to challenge the legality of a deprivation of liberty[14]. This proposal is thus entirely appropriate.

27. However, it is noted that the criteria for determining the territorial jurisdiction in criminal matters do not seem to be fully adequate: first, under paragraph 1 it states two concurrent fora, without establishing which of both has priority, the place where the crime was consumed or the place where it ceased; secondly, paragraph 2 determines the competence of the court upon the territory where the criminal investigation 'was completed', if the place where the crime was committed may not be identified. This leaves a wide margin of discretion to the investigating authorities, as by not stating that the forum *delicti commissi* cannot be identified, they will render the court of the place of investigation competent; thirdly, for crimes committed abroad or on ships, it might be easier to choose a single court to deal with them, and thus specialising in international cooperation. It would be appropriate for these provisions to be reviewed further.

Article 52

28. The amendment to point 12 of paragraph 1 - by deleting the reference to certain exceptions to the prosecutor's competence - is designed to bring the text into line with the Code since the measures enumerated are not an exhaustive listing of what is outside that competence. As such, the proposed amendment is appropriate.

[11] *Reinprecht v. Austria*, no. 67175/01, 15 November 2005.
[12] *Ibid*, at para. 39.
[13] See, e.g., *Străisteanu and Others v. Moldova*, no. 4834/06, 7 April 2009.
[14] See, e.g., *R M D v. Switzerland*, no. 19800/92, 26 September 1997.

29. However, within the scope of the Amendments and their general requirements of a court order for the arrest, it is somewhat surprising that there has been no proposed amendment to point 15 of paragraph 1 since this allows a prosecutor to arrest a person for the seizure of objects or documents. Such a provision does not appear consistent with the general aims of the reform and its retention should be reconsidered.

Article 66

30. The proposed recasting of the text of point 21 of paragraph 2 needs to be taken together with the proposed amendments to Articles 308 and 312 of the Code. The overall aim is to clarify when the accused, defendant gets to read materials and evidence in connection with proceedings about the use of procedural coercive measures. The present amendment makes it clear that the materials and evidence that can be read are those which are presented by the prosecutor – remedying the lack of clarity in the reference in the existing provision to 'materials submitted to the court to confirm his arrest' - and the other proposed amendments deal with the prosecutor's responsibility to give the materials and evidence to the accused, defendant. The latter changes are discussed further below[15] but the present amendment is entirely appropriate.

31. The proposed deletion of 'unconditionally' from point 3 of paragraph 5 removes an inconsistency in the existing text of the Code, namely, that an investigating judge's approval is required under paragraph 2^1 in the event of any disagreement over the taking of blood and other body secretion samples. The proposed deletion is not problematic but is not sufficient to correct the inconsistency since the defendant is not obliged to allow the investigating authority to take blood samples in any event, if this requires them to be extracted from his/her body. However, this is not made clear either in paragraph 2^1 nor in point 3 of paragraph 5. Further clarification as to which bodily samples may be taken without judicial order and as to which ones require it in the event of the defendant/suspect not consent to them being taken is thus necessary.

Article 68

32. The proposed deletion of 'final' from point 14 of paragraph 1 reflects the fact that it is otiose in that a judgment which can be appealed cannot be final. The proposed deletion is thus appropriate.

33. The proposed recasting of point 3 of paragraph 2 is for the same reason as that to the recasting already discussed[16] of point 21 of paragraph 2 of Article 66 of the Code but concerns the defender's entitlement as opposed to that of the accused, defendant. It is, however, equally appropriate.

Article 69

34. The proposed insertion of 'is detained' after 'the suspect' in point 7 of paragraph 1 is a necessary consequence of arrest no longer being applicable to suspects as opposed to accused persons. It is not, as such, problematic since there is no loss of the requirement for a defender to participate in any related criminal proceedings.

35. The proposed modification of clause (a) in point 2 of paragraph 2 is a necessary consequence of the preceding change and is not problematic.

[15] See paras. 98 and 111.
[16] See para. 30.

Article 93

36. The proposed addition to paragraph 1 establishes that the definition of evidence is applicable to establishing grounds for the application of procedural coercive measures as much as the other actions already listed in this provision. The addition is appropriate, not least because it should reinforce the critical judgment needed when evaluating submissions for and against the use of procedural coercive measures. It is, therefore, appropriate. However, it should be noted that, in the English translation, there is no verb before the inserted phrase and, if it is intended to be linked to the phrase before – 'to establish guilt' – that phrase should be followed by 'and' or 'or' rather than a comma.

37. Although the aim of the proposed addition is appropriate, it should be noted that the concept of evidence is usually understood as referring to material presented at the trial and not to other factual elements. Only by using the term 'evidence' more broadly - as 'prima facie evidentiary material' - does its use with regard to the application of coercive measures make sense and this should perhaps be made clearer in the proposed addition.

Article 165

38. The proposed amendment to paragraph 1 modifies the definition of arrest to remove the link to such a deprivation of liberty being linked to 'places and manner as provided by law'. The aim is to put the emphasis on the deprivation of liberty rather than the place where it occurs. As such, it is probably a better reflection of the notion of 'arrest or detention' found in Article 5(1)(c) of the Convention, with such a deprivation being preliminary to a person being subsequently detained on remand by a court. However, the nature of the modification is still potentially problematic as the new definition effectively makes the 'subsequent placement' in those places and manner a prerequisite for the arrest and that would be inconsistent with Article 5(3) of the Convention which a judicial assessment as to whether or not a continued deprivation of liberty is appropriate. It might be better, therefore, if the inserted text was 'a view to subsequent placement' rather than just 'subsequent placement' so that there is no sense of that placement being automatic.

39. The proposed changes to paragraph 2 concern the circumstances when an arrest can take place. Thus, the proposed addition to point 1 introduces a requirement of reasonable suspicion on top of the specification of the sanction to which the offence in question is subject. This is entirely appropriate.

40. There is also nothing problematic about the authorisation of arrest in the new points 4 and 7 for either someone following the overturning of his/her acquittal who then seeks to evade a sentence of imprisonment or someone in connection with extradition proceedings since this is consistent respectively with Article 5(1)(a) and Article 5(1(f) of the Convention.

41. However, it is far from evident that the new authorisation of arrest of 'persons who committed crimes against audience' and 'persons in respect of whom will be advanced the accusation' in points 5 and 6 is consistent with the Convention since there should be nothing automatic about deprivation of liberty for 'crimes against audience' – which is taken to mean crimes committed before a court itself – or in connection with the advancing of an accusation, with such a deprivation for the latter only being allowed under Article 5(1)(b) if the persons concerned did not come to court for this purpose when summoned. Furthermore, the latter provision might mean that, once a case is ripe for indictment, an arrest would be possible even though the crime is not punishable with a custodial sentence over one year and thus conflict with the prohibition on this in points 1 of paragraph 2 of the

present provision. The appropriateness of these two authorisations for arrest thus needs to be reconsidered.

42. It should also be noted that paragraph 2, although it aims at listing the persons who can be arrested, introduces grounds for arrest and thereby causes confusion with the content of Article 166 of the Code. Thus, the first paragraph of Article 166, point 1 of paragraph 2 of the present provision and paragraph 5^1 of Article 166 concerning the possibility of arresting a person with the objective of identification is not listed under the persons who can be arrested. Overall, the present provision seems to be more misleading than clarifying. In particular, there appears to be confusion between persons and reasons for arrest which does not follow a systematic or logical pattern. There is a need for the distribution between Articles 165 and 166 to be improved.

43. The proposed amendment to point 1 of paragraph 3 reflects the transfer of the reasonable suspicion requirement to point 1 of paragraph 2 but it is not clear what the replacement of that requirement by 'a report on detention' since that concept is not found in any of the other provisions of the Code or the proposed amendments. There is a need, therefore, to clarify what is intended and, in particular, who is to prepare such a report.

44. The addition to point 2 of paragraph 3 usefully clarifies the arrests to which an ordinance of the criminal investigation authority is applicable and thus is appropriate. This is equally true of the proposed amendment of point 3 of paragraph 2 as regards a decision of a court. Nonetheless, it is unclear why the arrest in the case of point 6 of paragraph 2 requires only an order (or ordinance) of the investigating authority but for the cases covered by points 3, 4 and 5 of paragraph 2 a judicial order is required. There might be a clear reason for such a differentiation but this is not clearly visible from a reading of the provision and paragraph 3 should be clarified in this regard.

45. It should be noted that, while there is an elaborating provision in the following Articles for points 1, 5 and 7[17], there is none for points 2, 3, 4 and 6.

Article 166

46. The proposed deletion from paragraph 1 removes an unnecessary duplication with the text in point 1 of paragraph 2 of Article 165 of the Code and is thus not inappropriate.

47. The proposed addition to paragraph 5 elaborates on the way in which the existing term 'the moment of his/her deprivation of liberty' is to be understood, making it clear that this should be seen as the beginning and not the end of the process. In most instances this is unlikely to be particularly significant for determining when the permitted 72 hours of deprivation of liberty commences but the proposed addition is nonetheless likely to limit the scope for uncertainty on this issue and is thus appropriate. However, it would also be appropriate for this provision to state that the period of arrest should be no longer than is strictly necessary as there could be a violation of Article 5(1) of the Convention if a person is detained beyond that point even though the 72 hours limit had not been exceeded.

48. The proposed additions to paragraph 7 are consequential on the main underlying change embodied in the Amendments and are not in themselves problematic.

[17] Articles 166, 171 and 172.

49. However, there is a need to clarify the effect of an aspect of the unamended content of paragraph 7, namely, the requirement that the request for detention on remand of the arrested shall be submitted 'at least 3 hours before the expiry of the terms of arrest'. It seems questionable that a detained person could be brought before the court and a hearing held on this issue within such a period. If that is not possible, does the provision then allow some addition to be made to the 72 hours period? For example, what would happen if the term of the 72 hours ends during the night and the request for detention on remand is filed just 3 hours before that period ends? Will the hearing before the court be held at night or will the person remain arrested until the following day? There may actually be no problem but the operation of this provision in practice should, at least, be clarified.

Article 168

50. This is not a new provision but it should be noted that it is not clearly stated a reasonable suspicion is required for the authorisation given for arrest in respect of 'a person caught while committing a crime or who tried to hide or escape immediately after having committed a crime', notwithstanding the reference to 'a person suspected' in the heading for this provision. This omission ought to be rectified, not only to bring it into line with Article 5(1)(c) of the Convention but also to protect those carrying out such arrests since the present formulation would necessarily render an arrest unlawful if no crime was in fact committed.

Article 172

51. The proposed insertion of an entirely new provision[18] relates to arrest in connection with extradition[19] remedies a lacuna in the existing Code and is generally appropriate. However, paragraph 4 is unclear as to whether the 6 hours limitation on arrest for extradition in the case of Moldovan citizens and persons granted the right of asylum relates to the period to establish that fact or the period following the establishment of that fact. The latter seems to be the natural construction of the provision but is hardly justifiable once the person's status is actually known whereas the former is potentially too strict a limit for the task involved.

Article 173

52. This provision has not been amended but the arrangements concerning 'incommunicado detention' in paragraph 4 - which allows the notification of the fact and place of the arrest to relatives or other persons the detained person indicates to be postponed up to 72 hours 'in exceptional cases' and under 'special circumstances' to secure the confidentiality of the following stage of the investigation - requires some clarification. In particular, can a detained person in such a case contact a lawyer of his/her own choice and if not, will a duty appointed lawyer act in his/her defence? Certainly, delaying the communication of a person's detention to family members or other persons could impede his/her enjoyment of effective assistance by lawyer. The reference to 'exceptional cases' and 'special circumstances' should, therefore, if not already defined elsewhere, be more narrowly drawn to avoid excessive use of 'incommunicado detention'. Furthermore, although this provision requires the 'consent of the investigating judge', it should also be specified that a decision to adopt incommunicado detention in a given case should be motivated with regard to the need, the adequacy and the proportionality of its use.

[18] A previous Article 172 was deleted in 2006.
[19] The provision is misleadingly headed in the English translation 'Detention for extradition'.

Article 175

53. Paragraph 2 of the unamended provision sets out the reasons for which the procedural coercive measures - described as 'preventive measures' in Chapter II of Title V of the Code - can be used. These reasons are appropriate but they are repeated again in paragraph 1 of Article 176 and this seems unnecessary, particularly as the reasons would be more helpfully linked for those applying the Code to the grounds for using preventive measures set out in the latter provision.

54. The proposed deletion of 'suspect' from paragraph 4 is consequential upon the exclusion of the possibility of deprivation of liberty – whether in the form of house arrest, detention on remand or provisional release on bail – that can be applied to suspects as opposed to the accused or the defendant and is not, as such, problematic.

55. The proposed deletion of 'suspect' from paragraph 5 dealing with provisional release is necessarily consequential upon the exclusion discussed in the preceding paragraph and is similarly not problematic.

Article 176

56. The proposed deletion of 'suspected' from paragraph 2 is also consequential upon the exclusion of the applicability of certain preventive measures to suspects and is again not problematic.

57. The proposed additions to paragraph 3 introduce an explicit reasoning requirement for the decisions by criminal investigation authorities and courts on the necessity of applying any preventive measure, together with an articulation of the various issues to be considered and those that should not, and underlines the need to consider the specifics of the individual case. All the issues listed are potentially relevant and the general approach now set out in the provision is entirely consistent with that laid down in the case law of the Court. These additions are, therefore, entirely appropriate but it needs to be borne in mind that it will be their use in a given case that will determine whether or not there has been a violation of Article 5(3) of the Convention and the recasting of the Code certainly cannot preclude the possibility of formulaic decision-making by judges.

Article 177

58. The proposed addition to paragraph 1 would make the reasoning requirements that will be set out in the amended Article 176 of the Code applicable to an order by a prosecutor applying preventive measures and is appropriate.

59. Similarly, the proposed addition to paragraph 1^1 would make the reasoning requirements that will be set out in the amended Article 176 of the Code applicable to an order by a court applying preventive measures and is also appropriate.

60. The proposed addition to paragraph 2 underlines the exceptional nature of the use of detention on remand, to be applied only when no other preventive measure can be effectively applied. This is consistent with the case law of the Court and is thus entirely appropriate.

61. It is noted that the unamended paragraph 2 requires three of the preventive measures listed in paragraph 3 of Article 175 of the Code to be imposed only by a court. This is appropriate as the

Court has consistently held that a prosecutor is not a judicial officer for the purpose of Article 5(3) of the Convention[20].

62. However, it should be noted that two other such measures have direct implications for the exercise of rights under the Convention, namely, interdiction to leave the locality and interdiction to leave the country which would respectively affect rights under Article 2(1) of Protocol No. 4 to liberty of movement within the territory of a State and Article 2(2) of Protocol No. 4 to freedom to leave any country. The imposition of such measures can nonetheless be justifiable restrictions on all these rights and the use of the first two by non-judicial persons such as a prosecutor has also been considered compatible with the rights concerned[21]. The availability under Article 312 of the Code of judicial review over the application of such preventive measures is, however, a necessary safeguard against abuse of the power to impose them.

63. There is a need to clarify whether the requirement that a court give reasoning extends to the Supreme Court as the absence of a power for it to justify an order for detention on remand led to a finding of a violation of Article 5(1) of the Convention in *Levinţa v. Moldova (no. 2)*[22]. The proposed amendments to this provision do not address the issue of whether the power of the Supreme Court has been extended and there is a need, therefore, for a further amendment to it or some confirmation that it has been addressed in other legislation so as to be sure that the problem that arose in the *Levinţa* case has been satisfactorily resolved.

Article 178

64. This provision has not been amended but it would benefit from some revision to its drafting. Thus, the definition of the interdiction to leave the locality starts by stating that it consists of the 'obligation to appear before the criminal investigating authority or the court' and 'not to hinder the criminal investigation and examination of the case in court' yet these are discrete obligations[23] which are not necessarily linked to the prohibition on leaving a certain place of residence. Similarly, the prohibition on leaving the locality does need to be linked with the 'obligation not to abscond'. Some simplification of this provision would thus be appropriate.

Article 179

65. Paragraph 4 is not really necessary since it only advances the content of Article 181.

Article 185

66. The proposed deletion of ‘suspect’ from paragraph 1 and points 1-3 of paragraph 2 is consequential upon the aim of the Amendments to exclude the possibility of using detention on remand for such persons and is not problematic.

67. The proposed addition of a new point 4 for paragraph 2 extends the situations in which detention on remand may be used, namely, to that where the defendant being at liberty would pose ‘a risk for security and public order or is likely to cause mass disorder’. This is consistent with the case law on Article 5(3) of the Convention elaborated by the Court and, although this proposed addition is thus

[20] See, e.g. , *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999.
[21] See, e.g., *Landvreugd v. Netherlands*, no. 37331/97, 4 June 2002 and *Poninski v. Poland* (dec.), no. 28046/95, 10 February 2000.
[22] No. 50717/09, 17 January 2012, at paras. 33-35.
[23] See, e.g., point 1 of paragraph 5 of Article 66 of the Code.

not problematic, it should be borne in mind when applying it that there is no case where the Court has found this ground to have been validly invoked. It would be appropriate, therefore, to qualify this addition to ensure that those seeking to apply it appreciate that really exceptional circumstances must exist and that its use is unlikely to be upheld unless particularly serious crimes are involved.

68. There is a need, however, to clarify whether the cases in which the existing points 1 -3 of paragraph 2 authorise the use of detention on remand, namely, lack of permanent residence in the Republic of Moldova, unknown identity and failure to observe conditions attached to other preventive measures or infringement of the domestic violence ordinance - are independent grounds for such use or must be fulfilled in addition to those set out in Article 176 of the Code. The former interpretation would not be consistent with the Convention given the limited grounds on which the Court considers detention on remand can be used consistently with Article 5(3) of the Convention. There is reason for uncertainty on this issue not only because the formulation of paragraph 2's opening phrase, at least in the English translation, gives the impression that the criteria in Article 176 are discrete from those in points 1-4 of paragraph 4. Insofar as the circumstances referred to in points 1-3 are independent justifications for the use of detention on remand, they would need to be deleted from this provision in order to ensure compliance with the requirements of the Convention. However, this does not mean that the existence of such circumstances could not be relevant considerations when determining whether the admissible grounds for the use of detention on remand can be relied upon in a particular case.

69. The proposed amendment to paragraph 3 imposes an obligation to consider the application of less restrictive preventive measures than detention on remand and restates what is implicit in paragraph 1 of Article 176 of the Code that an investigating judge or a court can impose all the measures listed in its Article 175. The aim is undoubtedly to make it clear that the use of detention on remand should only occur if no other preventive measure is considered capable of addressing the justifications for imposing any such measure. However, the proposed text does not actually use that formulation and it would be better if more explicit language were used[24]. The drafting of the proposed amendment should thus be reframed accordingly.

70. The proposed amendment to paragraph 4 makes arrangements for the hearing of a cassation appeal against an order applying detention on remand where the Supreme Court is the court concerned. Such a possibility might be necessary to comply with the requirements of Article 5(4) of the Convention and is thus appropriate.

Article 186

71. The proposed deletion of 'suspect' from paragraph 1 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

72. The proposed recasting of paragraph 2 is designed to set 30 days as the initial period of detention on remand and 12 months as the total period of any such detention in a given case, whether such remand is ordered before or during the trial stage of proceedings. Subject to the point already made that it cannot be assumed in all cases that detention on remand for 12 months would be compatible with Article 5(3) of the Convention, this provision - particularly when read with the limits in Part 5 on the

[24] *Cf.* the use of the phrase 'when other alternative preventive measures cannot be applied' in the amendment proposed for Part 3 of Article 186.

authorised periods for prolongation - adopts an approach that is compatible with the requirements of the Convention. The proposed recasting is thus appropriate.

73. The proposed recasting of paragraph 3 is designed to regulate the circumstances in which the prolongation of the initial detention on remand is permissible and does so in a manner that underlines that this is exceptional and requires the existence of the grounds set out in the preceding provisions for the use of such detention to be established and articulated. To this extent, the proposed recasting of this provision is consistent with the requirements of Article 5(3) of the Convention and is thus appropriate.

74. However, points 1-3 of Part 3 specify the length of the prolongation permitted in three different cases as being 8, 12 and 4 months depending on respectively whether the offence carries a maximum penalty of 15 years' imprisonment, the offence carries a maximum penalty of 25 years or life imprisonment or the alleged offender was a juvenile. Of these periods, the only change introduced by the Amendments relates to the 8 month period which represents a proposed increase from 6 months originally found in the Code. This change is not in itself problematic but all three periods could pose problems of compliance with the Convention if there was no inhibition on the full period specified be used, even though each of them is formulated as a maximum. Use of the full period, or even a significant portion of it, could result in a failure to consider whether there is a need for the prolonged detention on remand and in particular to take account of changing circumstances. Thus, detention on remand because of concern about obstructing the establishment of truth may cease to be justifiable once statements have been taken from all the potential witnesses and this could occur long before the expiry of the prolonged period of detention[25]. This is rightly recognised in Article 11(6) of the Code[26] and appropriately addressed in paragraphs 5 and 7 of the present provision[27].

75. It should be noted that the provision for a prolongation up to 12 months in paragraph 2 appears to be potentially in conflict with the opening sentence of paragraph 2 since that provides for a maximum total detention on remand of 12 months and the use of the maximum period of prolongation would necessarily exceed that maximum. It is assumed that such a conflict is not intended but the present formulation of the provision could confuse those applying it and it ought to be revised to avoid that risk.

76. The proposed amendment to paragraph 6 seems designed to make mandatory the requirement that any request for a prolongation of detention on remand be made 5 days before the existing period expires. This would assist the preparation of arguments against any such prolongation and is, in principle, appropriate. However, the formulation of the text being added - at least in the English translation - is not entirely clear because of the use of a double negative in the sentence and the statement that 'the remand shall be prolonged' only with reference to compliance with the notice requirement, which is clearly not the only consideration relevant to a prolongation decision. The formulation of the proposed amendment should thus be reviewed and amended to remove the scope for confusion.

[25] See, e.g., *I A v. France*, no. 28213/95, 23 September 1998 and *Kauczor v. Poland*, no. 45219/06, 3 February 2009.
[26] See para. 23.
[27] On paragraph 7 of the present Article, see para. 78.

77. It should also be noted that the need to review every 30 days the imposition of detention on remand requires a good 'alert system' and a compatible workload for the prosecutors and judges concerned so that this important safeguard for liberty is properly implemented.

78. The proposed amendment to paragraph 7 requires consideration when deciding on any request for prolongation of remand of whether the grounds for initially ordering detention on remand were borne out in practice and whether less restrictive preventive measures could be used instead. This is consistent with the requirements of Article 5(3) of the Convention and is thus entirely appropriate.

79. The proposed deletion of paragraphs 8, 9 and 10 is a consequence of the removal of the distinction formerly in the Code between ordering detention on remand before and during the trial stage. This deletion is, therefore, not problematic.

80. The proposed deletion in paragraph 11 is consequential to changes to earlier ones made in the present provision and is not problematic. The proposed addition is designed to make it clear that the requirements of the present provision also apply to appeal in cassation and is thus appropriate.

81. The proposed addition to paragraph 12 - adding 'or lead' to 'conducted' is consequential on the proposed introduction of paragraph 4 of Article 40 of the Code concerning jurisdiction over requests for preventive measures and is not problematic.

82. The proposed amendment to paragraph 13 makes arrangements for the hearing of a cassation appeal against an order prolonging detention on remand where the Supreme Court is the court concerned. As with the proposed amendment to paragraph 4 of Article 185 of the Code, such a possibility might be necessary to comply with the requirements of Article 5(4) of the Convention and is thus appropriate.

Article 188

83. The proposed deletion of ‘suspect’ from paragraphs 1, 2 and 7 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

Article 190

84. The proposed addition to this provision that, as well as the prosecutor, the arrested person or his/her lawyer may request the investigating judge or the court to order his/her release under judicial control or on bail at any time during the criminal proceedings is an appropriate device to encourage review of the continued necessity for a deprivation of liberty and is consistent with Article 5(3) of the Convention.

85. However, there is a need to clarify whether the English translation is entirely accurate since it only refers to 'arrested person' and not the 'remanded person', which is not only out of line with the location of the provision between Articles 189 and 191 of the Code that cover both arrest and remand but it would also run counter to the requirements of Article 5(3) of the Convention since it is during detention on remand that it is more likely that circumstances will change to make the deprivation of liberty unjustified. There is a need, therefore, to clarify the scope of the provision and, if the English translation is accurate, to modify it to include remanded as well as arrested persons.

Article 191

86. The proposed deletion of 'suspect' from paragraphs 2 and 4 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

87. The existing provision in paragraph 2 that precludes provisional release of an accused, defendant who 'has a non-extinct criminal record for serious, especially serious or exceptionally serious crimes' is inconsistent with Article 5(3) of the Convention since it is not an admissible ground for detention on remand recognised by the Court and is tantamount to an automatic exclusion of someone from consideration from release, which the Court has condemned on a number of occasions[28]. This part of the provision should, therefore, be deleted but this does not mean that the existence of such a record could not be a relevant consideration as to the other reasons for refusing provisional release under judicial control.

Article 192

88. The proposed change in paragraph 3 of the 'proposal' for detention etc to the 'request' is consequential on the general approach of the Amendments and is not problematic.

Article 193

89. The proposed addition of the possibility of subjecting a person whose provisional release has been revoked to house arrest as well as detention on remand is consistent with the approach required under Article 5(3) of the Convention of applying the least restrictive measure required to address legitimate concerns with respect to the person concerned.

Article 194

90. The proposed deletion from paragraph 4 of the possibility of the application or request for bail to be returned or transferred to state ownership being determined the participation of 'the prosecutor, the accused, the defendant, the convicted, the acquitted' is entirely appropriate as this could otherwise result in both the denial of the rights of access to court and to equality of arms as required by Article 6(1) of the Convention.

91. The proposed addition to paragraph 4 of the stipulation that the failure of the legally summoned parties to attend the hearing will not prevent the examination of the application or request is not problematic in principle. However, this addition will need to be applied with care so that it does not result in prejudice to persons who cannot attend the hearing for a justified reason[29].

Article 195

92. The proposed addition to paragraph 3 of a power for the prosecutor to replace detention on remand or house arrest with a non-custodial measure or to revoke the remand and release the person concerned where it is believed that such detention or arrest is no longer justified or reasons serving the application or prolongation of either measure has lapsed has the potential to prevent violations of Article 5(3) of the Convention from occurring by ending deprivations of liberty that are no longer justified. It does not matter for the purposes of the Convention that the termination of any such deprivation of liberty is not effected by the judicial body that imposed it.

[28] See, e.g., *Caballero v. United Kingdom* [GC], no. 32819/96, 8 February 2000, *Boicenco v. Moldova*, no. 41088/05, 11 July 2006 and *Piruzyan v. Armenia*, no. 33376/07, 26 June 2012.
[29] *Cf. Martinie v. France* [GC], no. 58675/00, 12 April 2006.

93. However, the welcome for the proposed amendment must be qualified in two respects. Firstly, the termination of the deprivation for the reasons stipulated is expressed, in the English translation at least, as a power rather than a duty and, if those reasons exist, there should be no discretion about bringing it to an end. Secondly, the power to terminate the deprivation of liberty does not mean that the person concerned will be free of all restrictions as there will also be the possibility for the prosecutor to impose other preventive measures. Not only, is this power not specified to be clearly subject to the need for the grounds set out in Article 175 of the Code to exist so as to justify the imposition of such measures but, as has already been noted, the conferment of the power on a prosecutor - as opposed to a court - to impose them would not be consistent with the Convention[30]. This proposed amendment thus needs to be modified so as to take account of these concerns. Indeed, it should be framed in the obligatory form found in the related amendment to paragraph 6 of Article 11[31].

94. Furthermore, it should be noted that, in the English translation at least, the existing provision about release by the investigating judge or a court where a deprivation of liberty is no longer justified is also expressed as a discretion rather than an obligation and, for the reasons already given, this is incompatible with the requirements of Article 5(3) of the Convention. This aspect should, therefore, be amended accordingly.

Article 196

95. The proposed amendment to paragraph 2 makes arrangements for the hearing of a cassation appeal against a decision of a court on the application, prolongation or replacement of a preventive measure where the Supreme Court is the court concerned. Such a possibility might be necessary to comply with the requirements of Articles 5(4) and 13 of the Convention - depending on the nature of the measure involved - and is thus appropriate.

Article 307

96. The proposed deletion of this provision is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

Article 308

97. The proposed additions to paragraph 1 elaborate the way in which a prosecutor should prepare a request for the application or prolongation of detention on remand or house arrest. In particular, it links the making of such a request explicitly to the relevant grounds and conditions set out in Articles 176 and 186 and requires the supporting material and evidence to be attached to it. These change have the potential to ensure that requests are only made when there is a real necessity for them and thus contribute to fulfilling the requirements of Article 5(3) of the Convention. The proposed additions are thus entirely appropriate.

98. The proposed deletion of the last sentence of paragraph 1 reflects the fact that the proposed introduction of the entirely new paragraph 1^1 embodies a much more exacting requirement for ensuring that the accused or his/her lawyer has all the argumentation and supporting material and evidence relating to a request for the application or prolongation of detention on remand or of house arrest and can thus prepare the case to resist such a request. Thus, there is a requirement to provide

[30] See para 61.
[31] See para. 23.

the request and materials to the accused or his/her lawyer before submitting them to the investigating judge and, in the event of this not proving possible, the investigating judge is required to give the accused or his/her lawyer enough time to prepare before the hearing. This new provision has the potential to ensure that the procedural requirements arising from Article 5(3) of the Convention are fulfilled - particularly as paragraph 6 of Article 185 requires requests for prolongation to be submitted at least five days before a remand term is due to expire - but this could be undermined where the request and materials cannot be provided by the prosecutor to the accused or his/her lawyer before submission to the investigating judge if the latter takes too restrictive an approach to the application of the concept of 'enough time'[32]. Nonetheless, the proposed new paragraph 1^1 is, in principle, compatible with the requirements of Article 5(3).

99. The proposed recasting of paragraph 2 would allow for the possibility of hearing requests for the use or prolongation of detention on remand or house arrest in the accused's absence where he or she has absconded and for the hearing of witnesses. Neither additions are problematic, particularly as there is also provision for the participation of the accused's legal representative in his/her absence, or of an appointed lawyer should there be no such representative, and the testimony of witnesses could be important in a determination as to whether or not the use of detention on remand or of house arrest was justified[33]. This proposed recasting of Part 2 is thus not problematic.

100. The proposed recasting of paragraph 4 is partly consequential upon the other proposed amendments to this provision and partly consequential upon the introduction into the Code of a warrant as distinct concept from other judicial decisions, orders and rulings[34]. This proposed recasting is not problematic.

101. The proposed addition of 'or prolong' in paragraph 5 serves to bring it into line with the application of this provision as a whole to both the initial requests for the use of detention on remand or house arrest and subsequent requests for the prolongation of such use. As such, the proposed addition is not problematic.

Article 309

102. The proposed deletion of ‘the suspect’ from paragraph 1 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

Article 310

103. The proposed deletion of ‘the suspect’ or "of the suspect' from paragraphs 2, 3, 5, 6 and 7 are again consequential upon the exclusion of the applicability of certain preventive measures to suspects and is also not problematic.

Article 311

104. The proposed deletion of ‘suspect’ from paragraph 1 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

Article 312

[32] *Cf. Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.
[33] A complaint in respect of this was raised but subsequently withdrawn in *Sarban v. Moldova*, no. 3456/05, 4 October 2005.
[34] See para. 16.

105. The proposed addition to paragraph 1 is consequential upon the extension of the Supreme Court's competence to examine appeals in cassation in order to implement proposed amendments to Articles 185(4) and 186(13) of the Code[35] and, as such, is not problematic.

106. The proposed deletion of 'the suspect' or "of the suspect' from paragraph 2 is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is not problematic.

107. The proposed amendment to paragraph 2 to provide that the absence of an accused who is not detained and his/her legal representative shall not prevent the examination of an appeal in cassation relating to the judicial review of the lawfulness of detention on remand where two invitations to attend proceedings have been issued to the accused and his/her legal representative or where the accused has been 'announced to be searched' is not problematic as regards Article 5(4) of the Convention in the first situation as it is not applicable where a person is not actually detained. However, Article 5(4) is applicable where a person has absconded after being subjection to a decision ordering his/her detention[36] and so the issuing of two invitations would not be a defence if an order for detention on remand had previously been issued against the person' announced to be searched'. Moreover, although Article 5(4) does not apply where a person is no longer detained, such a person can still rely on Article 13 of the Convention to challenge the legality of his/her former detention and the application of the bar being proposed would need to be applied with some caution since the issuing of two invitations does not necessarily mean that there could not be justifiable reasons for a non-attendance at the hearing. Nonetheless, the proposed restriction is not, in principle, problematic.

108. The proposed addition to paragraph 2 of the possibility of witnesses being invited to the hearing so long as their absence would not obstruct the examination of an appeal in cassation is potentially problematic since this could exclude the possibility of calling some witnesses who might have relevant testimony and thus operate as a constraint on the ability of the court concerned to determine whether the deprivation of liberty was justified[37]. There is a need, therefore, to review the scope of this limitation so that the fulfilment of the requirements of Article 5(4) of the Convention are not impeded.

109. The proposed addition to paragraphs 5 and 7 of 'an arrest prolongation warrant' are merely consequential both upon the introduction into the Code of a warrant as distinct concept from other judicial decisions, orders and rulings[38] and the distinction between the initial detention on remand and its prolongation. These proposed additions are not problematic.

110. However, there is a need to clarify whether the English translation's use of 'arrest warrant' and arrest prolongation warrant' is apt since these provisions seem concerned with the use of detention on remand and house arrest rather than the arrest regulated by Articles 165 to 174 of the Code. Furthermore, it is noted that paragraph 1 of Article 170 and paragraph 5 of Article 175 use the term 'remand warrant'. It would be appropriate, therefore, to ensure that no such terminological confusion exists in the original text and, if it does, to remedy it appropriately.

[35] See paras. 70 and 82.
[36] See *Van der Leer v. Netherlands*, no. 11509/85, 21 February 1990.
[37] See, e.g., *Chahal v. United Kingdom* [GC], no. 22414/93, 15 November 1996.
[38] See para. 16.

111. The proposed replacement of the requirement in paragraph 7 to send a warrant 'without delay' rather than 'in the same day' does not seem to involve any substantive difference and could entail the warrant being sent more speedily. This change is thus not problematic. Furthermore, the proposed deletion of 'suspect' is consequential upon the exclusion of the applicability of certain preventive measures to suspects and is also not problematic.

112. The proposed replacement in paragraph 8 of 'for preventive arrest' by 'that served the application or prolongation of the arrest' is consequential on the clearer distinction between the two orders concerned and is not problematic.

Article 313

113. The proposed additions to the powers conferred by paragraph 2 will enable an investigating judge, upon request by all interested persons, to release illegally detained persons and 'to release the detained person in violation of the period of detention or arrest'. The former will clearly contribute to giving effect to the requirements of Article 5(4) of the Convention and is appropriate. However, the meaning of the second possibility is not clear but this may be a problem of translation. Thus, while it seems to authorise release notwithstanding a valid period of detention or arrest, such a power is not necessary given the powers in Articles 186, 191, 192, 309 and 312 of the Code. Moreover, the authorisation of release 'in violation of the period of detention or arrest' seems inconsistent with a provision which is supposed to be concerned with 'unlawful actions and acts'. The scope of the second power being conferred, as well as the need for it in addition to the first power, thus needs to be clarified and the former power should be deleted if it proves unnecessary.

Article 341

114. The proposed amendment to paragraph 1 and the proposed introduction of an entirely new Part 6 are consequential upon the introduction into the Code of a warrant as distinct concept from other judicial decisions, orders and rulings[39] and is not problematic.

Article 547

115. The proposed increase in the maximum period of preventive detention of a person whose extradition has been requested from 180 days to 12 months is not, in principle, problematic and reflects the reality of the time that can be required for extradition proceedings. Nonetheless, the setting of this new maximum should not be used as an excuse for not ensuring due diligence in the conduct of those proceedings, the absence of which can result in a violation of Article 5(1)(f) of the Convention[40]. Ensuring such due diligence will require regular review of the conduct of the proceedings.

Summary of recommendations

116. The following provisions require either some modification or clarification as to their effect:

- paragraph 2 of Article 1 (paras. 11 and 12);
- paragraph 3 of Article 1 (para. 13);
- paragraph 3 of Article 3 (para. 15);
- point 3 of paragraph 5 of Article 66 (para. 31);
- paragraph 1 of Article 93 (paras. 36-37);

[39] See para. 16.
[40] See, e.g., *Khudyakova v. Russia*, no. 13476/04, 8 January 2009.

- paragraph 1 of Article 165 (para. 38);
- paragraph 2 of Article 165 (para. 42);
- points 1 and 2 of paragraph 3 of Article 165 (paras. 43 and 44);
- paragraph 5 of Article 166 (para. 47);
- paragraph 7 of Article 166 (para. 49);
- Article 168 (para. 50);
- Article 172 (para. 51);??
- paragraph 4 of Article 173 (para. 52);
- paragraph 1 of Article 177 (para. 63);
- Article 178 (para. 64);
- points 1-3 of paragraph 2 of Article 185 (para. 68);
- point 4 for paragraph 2 of Article 185 (para. 67);
- paragraph 3 of Article 185 (para. 69);
- paragraph 2 of Article 186 (para. 75);
- paragraph 6 of Article 186 (para. 76);
- Article 190 (para. 84);
- paragraph 2 of Article 191 (para. 87);
- paragraph 3 of Article 195 (paras. 93 and 94);
- paragraph 2 of Article 312 (para. 108);
- paragraphs 5 and 7 of Article 312 (para. 109); and
- Article 313 (para. 113).

117. The appropriateness of the following provisions needs to be reconsidered:

- paragraphs 1-3 of Article 40 (para. 27);
- point 15 of paragraph 1 of Article 52 (para. 29); and
- points 5 and 6 of paragraph 1 of Article 165 (para. 41).

118. The application of the following provisions needs to be closely monitored:

- paragraph 25 of Article 6 (paras. 16 and 17);
- paragraph 4 of Article 11 (para. 21);
- paragraph 1 of Article 18 (para. 24);
- paragraph 2 of Article 186 (para. 72);
- paragraph 4 of Article 194 (para. 91);
- paragraph 1 of Article 308 (para. 98); and
- Article 547 (para. 115).

Overall assessment

119. The Amendments embody a considerable advance on the protection of liberty in the criminal process in accordance with the requirements of European standards and, in particular, the Convention. There are no negative features in the objectives being pursued and the suggestions for modification or clarification, as well as the reconsideration of some existing provisions, are only designed to further the proclaimed objectives and to ensure that there is no inadvertent breach of rights under the Convention.

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6 July 2014