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JOINT OPINION ON THE CRIMINAL PROCEDURE CODE OF GEORGIA

based on an unofficial English translation of the Code

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I. INTRODUCTION

II. SCOPE OF REVIEW

III. EXECUTIVE SUMMARY

IV ANALYSIS AND RECOMMENDATIONS

1. Preliminary Remarks

2. Preventive Measures

3. Plea-bargaining

4. The Jury System

5. The Right to a Fair Trial

5.1 The Pre-trial Phase

5.2 Proceedings in Closed Session

5.3 Trials in Absentia

5.4 Equality of Arms

5.5 Recusal and Replacement of Judges

5.6 The Presumption of Innocence and the Right not to Incriminate Oneself

5.7 Other Fair Trial-related Issues

6. Torture, Inhuman and Degrading Treatment

7. Victims' Rights

8. Interferences with Private Life, Home and Correspondence

9. Other Issues

Annex 1: Criminal Procedure Code of Georgia *(provided as a separate document)*

I. INTRODUCTION

1. *On 4 April 2014, the Chairman of the Parliament of Georgia sent a request to the Director of the OSCE/ODIHR, asking for a review of the Criminal Procedure Code of Georgia.*
2. *By letter of 9 April 2014, the Director of the OSCE/ODIHR confirmed the OSCE/ODIHR's readiness to review the Criminal Procedure Code for compliance with OSCE commitments and international rule of law standards.*
3. *On 25 April 2014, given the Council of Europe's expertise in this area, the Chairman of the Parliament of Georgia informed the Director of the Directorate General of Human Rights and the Rule of Law of the Council of Europe of his request for the review to be conducted jointly with the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DG I) of the Council of Europe.*
4. *This Joint Opinion has been prepared in response to the above-mentioned requests.*

II. SCOPE OF REVIEW

5. This Joint Opinion analyzes the Criminal Procedure Code of Georgia (hereinafter "the Code") against the background of its compatibility with relevant international standards and OSCE commitments. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the criminal law system of Georgia.
6. This Joint Opinion is based on an unofficial English translation of the Code, which can be found in Annex 1 to this document. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe (hereinafter "The Directorate") would like to make mention that this Joint Opinion is without prejudice to any written or oral recommendations and comments to the Law or related legislation that the OSCE/ODIHR or the Directorate may make in the future.

III. EXECUTIVE SUMMARY

8. The OSCE/ODIHR and the Directorate believe that the Code is generally compliant with international standards and relevant good practice. Improvements are still needed, however, to reduce the risk of excessive plea-bargaining and sentencing disparities and to enhance the rights of the accused in the pre-trial and trial phase, as well as with respect to trials *in absentia*. In order to further improve its compliance with international standards, it is recommended as follows:

1. Key Recommendations:

A. To amend key provisions on preventive measures, in particular as regards pre-trial detention, as follows:

- 1) differentiate in Article 198 par 2 of the Code that reasonable suspicion shall exist for both the offence committed and possible evasion of justice/commission of crimes; [par 13]
- 2) supplement Article 206 by requiring courts to reason their decisions on preventive detention, including why less far-reaching measures would not suffice; the latter should also be a necessary part of the prosecution's motions described in the same article; [par 17]
- 3) consider introducing automatic and periodic judicial review of the conditions for prolonged detention on remand; [par 18]

B. To amend key provisions on plea-bargaining as follows:

- 1) Limit plea-bargaining to less serious crimes and enhance safeguards for the defendant in these circumstances; [pars 21-22]
- 2) remove the possibility for judges to actively inquire into the possibility of plea-bargaining (Article 209 par 2); [par 23]

C. To reconsider the role of juries in sentencing or involve judges in the process of giving reasons for sentencing; [par 28]

D. To specify in Article 114 par 4 that accepting evidence from witnesses not cross-examined by the defence should be a measure of last resort if alternative means are inappropriate or impracticable, and that such evidence shall be corroborated by other evidence; [par 34]

E. To require that closure of a court session under Article 182 shall only take place if it is considered necessary by the court, and should only be ordered for the particular evidence, witnesses or issues at hand; alternative measures should be contemplated first, including in cases involving state secrets; [par 43]

F. To remove trials *in absentia* from the Code, or, at a minimum, increase safeguards for persons convicted by such trials; [pars 47-48]

G. To include a detailed provision on when and under which circumstances it would be in the public interest to withhold evidence from the defence; [par 56]

H. To ensure that in cases where the recusal of a judge or panel is requested,

a judge or panel independent of the judge in question shall decide on such motions; [par 59]

- I. To expand the obligation not to express oneself on guilt or innocence of a defendant under Article 25 par 3 to include police and prosecutors; [par 61]
- J. To clarify in Article 4 par 2 that the threat of inflicting torture or ill-treatment shall also be impermissible; [par 72]
- K. To increase victims' rights to information, assistance and compensation; [par 80]

2. Additional Recommendations:

- L. To specify in Article 205 that courts shall not order pre-trial detention in cases where the suspect is already detained for a different offence; [par 15]
- M. To add abuse of powers provisions to the list of offences under Article 210 par 5 which may not be affected by a plea-bargain with the defendant; [par 24]
- N. To clarify the purpose peremptory strikes of jurors and to require jurors to state immediately when they have reason to believe that their impartiality may be in doubt; [par 26]
- O. To introduce the possibility for the jury, in complex cases, to make factual findings on a list of specific elements of a crime, rather than on the crime as a whole; [par 29]
- P. To specify in Article 104 par 1 that, as an exception to the rule of non-disclosure of information, participants in legal proceedings may disclose certain information for the purposes of seeking legal advice; [par 31]
- Q. To amend Article 111 as follows:
 - 1) compulsory measures in response to resistance against investigative action shall only be permissible if the actions are lawful; [par 33]
 - 2) require a court decision for all surgical or other means of medical examination that cause considerable pain, and to prohibit such methods or examinations if they violate Article 3 of the ECHR; [par 74]
- R. To amend Article 120 as follows:
 - 1) introduce an exception to the rule allowing investigators to restrict individuals from communicating with others at a

place of search and seizure for the purposes of seeking legal advice; [par 32]

2) reconsider the right for primary examination of seized items by the prosecution; [par 35]

- S. To expressly provide that in case of personal searches (Article 121 par 4), only individuals of the same sex shall be present, and to require that forensic examination under Article 111 par 9 should also be carried out by an officer of the same sex; [pars 37-38]
- T. To require prior consent of a person undergoing forensic examination under Article 147 par 3, where he/she is required to undress/reveal intimate body parts, or where photos of injuries are taken; [par 39]
- U. To consider addressing in the Code the issue of fair trials during hearings exceptionally held outside a courtroom; [par 44]
- V. To add to the tasks of the presiding judge under Article 25 the duty to ensure that the rights of the defendant are safeguarded and oblige the judge to remind the defendant of the right not to testify during trial (Article 74); [pars 51 and 63]
- W. To require courts to ensure in a pro-active manner that victims of sexual violence are not confronted with alleged perpetrators during trial and on courtroom premises; [par 53]
- X. To require the removal of the accused during hearings only if it is necessary in the interest of witness protection, while ensuring that the rights of the accused are safeguarded; courts should not rely exclusively on anonymous witness statements for convictions; [par 54]
- Y. To clarify in Article 83 that the prosecution should be under a continuous obligation to share information spontaneously with the defence, and that the defence is under such an obligation only to the extent that fair notice is required; [par 55]
- Z. To allow for the reading of contradictory witness statements under Article 243 par 2 without the need to prove probable cause that the witness was forced, threatened, intimidated or bribed; [par 57]
- AA. To ensure that the use of interrogation procedures during the investigation phase from the 1998 Code under Article 332 be swiftly abolished to ensure consistency of such procedures with the rest of the Code; [par 58]
- BB. To clarify the procedure for replacement of judges under Articles 183-184, and to increase procedural safeguards for such replacements; [par 60]
- CC. To specify that a decision not to participate in an investigative experiment under Article 130 shall not be held against the accused; [par 62]

- DD. To indicate in Article 44 that counsel shall not be required to carry out clients' instructions violating professional ethics or laws [par 64]
- EE. To consider introducing protection for whistleblowers in the Code; [par 65]
- FF. To improve procedural guarantees for *amicus curiae* briefs under Article 55; [par 66]
- GG. To consider reducing the types of costs which may be paid by a defendant under Article 90; [par 67]
- HH. To allow motions to be re-filed under Article 93 where new circumstances emerge; [par 68]
- II. To amend Article 94 as follows:
 - 1) allow parties to give their views on third party comments; [par 69]
 - 2) require publication of decisions on motions; [par 70]
- JJ. To specifically mention the obligation to publish written judgments in Article 278; [par 71]
- KK. To stipulate under Article 101 that judges shall have the power to refer allegations of torture or ill-treatment to a prosecutor; [par 73]
- LL. To clarify that in cases of suspected torture or ill-treatment, forensic examination under Article 144 par 2 cannot be left to the initiative of the interested party; [par 75]
- MM. To include additional specific protection for child victims in the Code; [par 81]
- NN. To include specific provisions aimed at ensuring prevention of direct contact between perpetrators and victims of violence against women and domestic violence and to allow such victims to choose the gender of the criminal justice official dealing with them; [par 82]
- OO. To permit evidence related to the sexual history and conduct of the victim only when it is relevant and necessary; [par 83]
- PP. To introduce the possibility of judicial review of decisions not to prosecute in cases involving alleged torture or ill-treatment, with safeguards against abuse; [par 85]
- QQ. To clarify the applicability of provisions related to telegraphic messages/communications (Articles 112 par 4 and 135 par 3) to e-mail correspondence; [par 86]
- RR. To shorten the period of validity of search warrants under Article 112 par 3; [par 85]

- SS. To consider adding ‘individuals permanently residing with him/her’ to the definition of a close relative under Article 3 par 2; [par 88]
- TT. To outline rules on general and investigative jurisdiction in the Code itself; [par 87]
- UU. To add references to confirmation (as an alternative to an oath) foreseen by the Code to Articles 3 par 19 and 115 par 1 on witnesses; [par 90] and
- VV. To modify Articles 159-161 on dismissal of the defendant from his/her workplace to ensure that employer is heard and that his/her wishes are taken into account; courts should also explain in the decisions why less restrictive measures are not possible [par 91].

IV. ANALYSIS AND RECOMMENDATIONS

1. Preliminary Remarks

9. International standards in the area of Criminal Procedure are to be found in relevant international human rights instruments such as the International Covenant on Civil and Political Rights (hereinafter “ICCPR”)¹ and the European Convention on Human Rights (hereinafter “ECHR”).² Of particular relevance are standards on the right to liberty (Article 9 ICCPR, Article 5 ECHR) and the right to a fair trial (Article 14 ICCPR, Article 6 ECHR). OSCE commitments also emphasize the importance of the independence of the judiciary and of legal practitioners (Copenhagen 1990, pars 5.12 & 5.13; Moscow 1991, pars 19 & 20), as well as guarantees related to the right to liberty (Moscow 1991, par 23).
10. In addition, a number of soft law standards are of importance, including General Comment 32 of the United Nations (UN) Human Rights Committee on the right to equality before courts and tribunals and to a fair trial³, the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁴ as well as relevant Council of Europe Recommendations, such as Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing⁵ and Council of Europe Committee of Minister Recommendation 2000 (19) on the

¹ International Covenant on Civil and Political Rights, adopted on 16 December 1966, acceded to by Georgia on 3 May 1994.

² Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, ratified by Georgia on 20 May 1999

³ UN Human Rights Committee, General Comment 32, available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>

⁴ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter ‘UN Declaration on Victims of Crime’), UN General Assembly Resolution of 29 November 1985, A/RES/40/34, available at <http://www.un.org/documents/ga/res/40/a40r034.htm>.

⁵ Council of Europe Committee of Ministers Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing.

role of public prosecution in the criminal justice system.⁶

11. Overall, the Code takes into account the standards laid down in universal and regional human rights instruments and international documents on matters of criminal procedure. A number of areas of improvement may be identified, however. This Opinion will outline these in relation to specific areas of criminal procedure.

2. Preventive Measures

12. The Code sets out a number of so-called ‘preventive measures’ which can be taken by courts for the purposes of ensuring a defendant’s appearance in court, preventing his/her further criminal activities, and to ensure the execution of judgments (Article 198 par 1). Such measures include among others, bail, personal guarantees (concerning behaviour and appearance of the defendant), agreements of residence and due conduct, and pre-trial detention (Article 199 par 1). Article 38 on rights and obligations of the defendant, in its par 12 underlines that “detention as a preventive measure shall not be imposed upon a defendant unless there is a risk that the defendant will flee, will continue to be engaged in criminal activity, will exert pressure on witnesses, will destroy evidence, or if there is the danger of non-execution of [a] judgment.” Article 198 par 2 reiterates this and sets out that in order to apply detention or any other preventive measure, probable cause must be established with regard to these actions. Moreover, according to Article 198 par 4, detention can be ordered only if the purposes outlined in par 1 of this provision cannot be achieved by less restrictive means.
13. In accordance with Article 5 of the ECHR, a person may be detained in the context of criminal proceedings for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence. This particular reasonable suspicion is not reflected correctly in Article 198 par 2, which only relates to the need for probable cause in relation to absconding, engagement in criminal activities, including witness and evidence tampering, or the danger of non-execution of judgments. To ensure that individuals are only detained before trial in cases where there is a reasonable suspicion of them having committed a crime, it is recommended to specify in Article 198 par 2 the need for reasonable suspicion/probable cause both with regard to having committed the crime, and with regard to possible actions to evade justice or commit additional crimes.
14. While Articles 200-205 outline each individual preventive measure respectively, Article 206 deals more specifically with the application, replacement and revocation of a preventive measure. Article 206 par 6 describes the contents of rulings on preventive measures.
15. Article 205 par 2 states that the overall term of pre-trial detention may not exceed 9 months. In cases where one defendant is accused of several crimes

⁶ Council of Europe Committee of Minister Recommendation 2000 (19) on the role of public prosecution in the criminal justice system.

involving different sets of facts, pre-trial detention should not be ordered if the defendant is already in detention on suspicion of having committed a different crime. For this reason, it would be advisable to specify in Article 205 that in such cases, courts may only order pre-trial detention at a time when a defendant is not already in detention for a different crime, or if his/her period of detention is about to come to an end. In cases of numerous crimes with numerous sets of facts, the assessment of the likelihood of evading justice or of committing another crime should be done at this time. This is important to ensure that deprivations of liberty are always adequate and justified (see also pars 17-18 *infra*).

16. Article 5 par 3 of the ECHR requires prompt judicial review of the reasons justifying detention or calling for the release of the suspect. Moreover, Article 9 par 3 of the ICCPR specifies that it shall not be the general rule that persons awaiting trial shall be detained in custody. Judges must examine all the facts arguing for or against the fact that a departure from the rule of respect for individual liberty is in the public interest.⁷
17. As the ECtHR has held, “[i]t is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.”⁸ In particular, courts should be prompted to consider the least far-reaching preventive measures first.⁹ Currently, while Article 198 par 3 requires the prosecution to specify why less far-reaching measures are not possible, Article 206 par 5 outlining the contents of the prosecution’s motion does not contain this. Moreover, par 6 of this provision states that rulings on preventive measures shall “indicate the purpose and person” they apply to, but does not require a proper statement on the reasons for detention, in particular why less far-reaching measures will not suffice for the intended purposes (even though Article 198 par 4 requires courts to make this assessment). In order to reduce the risk of arbitrary detention, it is recommended that the prosecution should, in its application to apply preventive measures contemplated in Article 206 pars 2 and 5, be required to state explicitly why a less far-reaching preventive measure would not suffice. Equally, and more importantly, it is recommended that the courts should, in their decisions on preventive measures contemplated in Article 206 par 6, be required to state explicitly the reasons for a detention order, and why detention, rather than a less far-reaching measure, is necessary. With regard to the information on appeals procedures laid down in Article 206 par 6, it is assumed that this includes information on the deadline for appeals.
18. Under Article 5 of the ECHR, the requirement for the existence of a legal basis for detention on remand extends to the whole period for which detention continues. Courts must continuously review the on-going detention of persons pending a verdict with a view to ensuring release when circumstances no longer

⁷ See *Letellier v France*, ECtHR judgment of 26 June 1991, appl. no. [12369/86](#), par 35.

⁸ See *Tase v. Romania*, ECtHR judgment of 10 June 2008, appl. no. [29761/02](#), par 41.

⁹ See e.g. *Ambruszkiewicz v. Poland*, ECtHR judgment of 4 May 2006, appl. no. [38797/03](#), par 32; *Lloyd and others v. United Kingdom*, ECtHR judgment of 1 March 2005, appl. no. [29798/96](#), pars 112 & 113.

justify a deprivation of liberty.¹⁰ Circumstances may alter and, while grounds for detention may exist in the initial stages of an investigation, these may no longer be applicable at a later stage. In cases where pre-trial detention has been ordered, the competent authorities should thus submit the case for judicial supervision (which must be as rigorous as that at the initial examination) at regular intervals.¹¹ It is therefore recommended to consider introducing in the Code an automatic and periodic judicial review of the conditions for prolonged detention on remand.

3. Plea-bargaining

19. The Code provides for an open system of plea-bargaining and co-operation bargaining (Article 218) which are applicable to all charges, even the most serious ones such as murder or terrorism charges. It extends to bargaining as to the charge as well as the sentence (Articles 209-213). Georgia is one of only a few countries in the OSCE and Council of Europe region to adopt this kind of plea-bargaining system. Most other countries have adopted a variety of “consensual” mechanisms for resolving cases, but they usually apply only to offenses that are considered to be less grave. For example, in certain countries plea-bargaining is only possible for offences punishable by prison sentences of up to 5 years (Italy, France), 6 years (Spain), or even 10 years (Russian Federation). In Germany, where defendants can bargain with the judge over an in-court confession, the procedure is applicable to all crimes, but the bargaining only relates to the extent of the sentence, not to the charge. Most of the above procedures do not include charge-bargaining, which is typical of U.S. plea-bargaining.
20. Unlike U.S. federal plea-bargaining, however, the trial judge in Georgia is very involved in the procedure and actually asks the defendant whether he or she is interested in plea-bargaining the case and may even bring up the discussion *ex parte*, such as in a jury trial (Article 230 par 3). Also in contrast to US plea-bargaining, the Georgian judge is obliged to actually inspect the file and make sure that the charges are substantiated, the proposed sentence legal and fair, and that the admission of charges was made voluntarily (Article 213 par 3). Although the prosecutor must consult and inform the victim of a plea-bargain, the victim may not appeal the agreement (Article 217 par 2).
21. While some of the above aspects of plea-bargaining under the Code are welcome, e.g. the obligation for the judge to scrutinize the file, it is noted that the plea-bargaining system does not contain adequate safeguards against excessive pressure on the accused in cases with high maximum punishment. Such undue pressure on the accused may make it likely that he or she will seek

¹⁰ See *I.A. v France*, ECtHR judgment of 23 September 1998, appl. no. [28213/95](#), par 111.

¹¹ Monica Macovei, *The right to liberty and security of the person - A guide to the implementation of Article 5 of the European Convention on Human Rights*, Human rights handbooks, No. 5, Council of Europe, 2002, p. 58-59; *Herczegfalvy v. Austria*, ECtHR judgment of 24 September 1992, appl. no. [10533/83](#), par 75. See also *Giorgi Nikolaishvili v. Georgia*, ECtHR judgment of 13 January 2009, appl. no. 37048/04, par 75.

to avoid a trial. It is therefore recommended that Georgia reserve plea-bargaining to certain less serious crimes, e.g. those punishable by fines, or at a maximum, by deprivations of liberty of no more than 5 or 6 years.

22. It is also recommended that additional, more specific safeguards be introduced for plea-bargains, which may include, for example, a requirement that the judge should make sure that the plea agreement is not the result of deception, entrapment or lacking information on rights; an obligation for judges to verify with defendants that they have been provided with adequate legal counsel throughout the process, as well as information concerning his/her rights, including on the privilege against self-incrimination, the right to remain silent, the presumption of innocence and the burden of proof on the prosecution of proving the crime beyond reasonable doubt.
23. The suggestion in Article 209 par 2 that a court can actively promote plea-bargaining during trial and before the conclusion of the defence's case¹² could potentially suggest a predisposition to bias on the part of the trial court, as the trial court could be seen to be assuming from the outset that the defendant has, in fact committed the act in question. Given that this could potentially lead to a failure to respect the presumption of innocence, it is recommended that this provision be reconsidered.
24. The prohibition of entering into plea agreements which limit the defendant's right to demand criminal prosecution against relevant persons in cases of torture, inhuman or degrading treatment in Article 210 par 5 is to be welcomed. However, to ensure the effectiveness of this provision, it is recommended that Article 210 par 5 be expanded to specify that plea-bargaining shall also not limit a demand that an official be prosecuted for behaviour that alternatively could be prosecuted under abuse of powers provisions (which are often used as an alternative to prosecutions based upon torture).

4. The Jury System

25. In the Georgian system (Articles 221 to 223 of the Code), juries are selected from a jury pool. In the selection process ahead of the trial, jurors may recuse themselves if they give reasons for this and the judge approves, and the parties may comment on those reasons. Additionally, the parties may file motions to remove potential jurors at their discretion (though not for discriminatory reasons) through so-called 'peremptory strikes', the number of which may be augmented in cases where charges entail possible life sentences, or in cases involving multiple defendants.
26. The aim of jury selection is to secure a jury that is (as far as possible) impartial. However, this aim is not stated in the above provisions. If a system of peremptory strikes after questioning is considered necessary, it is recommended to clarify that these procedures should be used to ensure that a jury's objective impartiality is not open to doubt. In this context, it is noted that Article 223 par

¹² Cf. also articles 197 (1) e, 219 (2) and 230 (3).

7 states that a juror “may raise a motion on self-recusal” towards the competent judge by indicating a reason that prevents him/her from exercising juror duties. To enhance the impartiality of jurors, it is recommended to specify in Article 223 that in cases where potential jurors have reason to believe that their subjective or objective impartiality may be in doubt, they are obliged to make this known to the judge immediately.¹³

27. In Georgia, juries decide on the guilt or innocence of defendants in criminal trials (see Article 256), and are also involved in deciding on the level of punishment which those who are convicted should receive (Articles 264 and 265). The jury makes recommendations, which bind the judge, to impose punishment at the higher or lower end of the spectrum of punishment available in the Criminal Code. There are two problems with this system. First, there is no obligation to provide reasons for the level of punishment imposed (Article 265 par 3). This leaves it unclear to the defendant why he or she is receiving a particular level of punishment. Second, since juries consist of persons with no legal background, it may be questioned whether this system will ensure consistency of sentencing, since jury members may apply sentences based on personal views, or due to influences of the mass media. European standards require both reasoning of sentence levels imposed and the avoidance of unwarranted disparity in sentencing.¹⁴
28. A variety of options may be considered to address this issue. One possibility would be to leave sentencing fully to the judges.¹⁵ Another would be to involve judges and jury members together in sentencing decisions, with a responsibility for the judges to provide the reasoning of the level of punishment imposed.¹⁶ In order to ensure consistency and properly reasoned decisions on sentencing, it is recommended to reconsider the prominent role of juries in the sentencing process and to consider leaving sentencing decisions to judges, or, alternatively, to involve judges in the process of deciding on and giving reasons for sentencing.
29. The instructions to the jury by the judge, as provided in Article 231 par 4, are fairly general in nature. To ensure that in the end, the judgment passed by the jury provides a clear and detailed reasoning as to the findings, the jurors need to be aware of the key elements of the crime, particularly in cases involving complex and serious crimes. This may be achieved, for example, through directions or guidance provided by the presiding judge to the jurors, which may include a list of precise and unequivocal questions on matters of fact.¹⁷ In this way, the accused will be able to understand the reasons for the verdict, either directly, or via the responses that the jury gives to specific and detailed

¹³ Cf. *Holm v Sweden*, ECtHR judgment of 25 November 1993, appl. no. [14191/88](#).

¹⁴ See Explanatory Report to Recommendation No. R (92) 17 of the Committee of Ministers to member states concerning consistency in sentencing, available at [http://www.coe.int/t/dghl/standardsetting/prisons/Recommendation%20R%20\(92\)%2017_E.pdf](http://www.coe.int/t/dghl/standardsetting/prisons/Recommendation%20R%20(92)%2017_E.pdf), par E (1) and (2).

¹⁵ See e.g. Article 103 of the Montana Code of Criminal Procedure.

¹⁶ See e.g. Article 355 et seq., French Criminal Procedure Code.

¹⁷ *Ibid.*

questions posed by the judge, the prosecution, and/or the accused¹⁸, which would be attached to and form an integral part of the judgment. The Georgian system does not require the jury to follow and respond to detailed questions on the different elements of the crime to be posed. This is not remedied by the appeals process, which does not look at the facts of a case *de novo*.¹⁹ It is recommended to introduce the possibility for the judge, in complex cases, to require the jury to make factual findings on a list of specific elements of the crime, rather than just on (each of the) charges as a whole. This process may be supported via a list of specific questions to guide the jury in reaching its findings.

5. The Right to a Fair Trial

5.1 The Pre-trial Phase

30. Although the criminal charges are not determined at the pre-trial stage of the proceedings, the steps taken at this stage have a direct influence on the conduct and fairness of the subsequent proceedings.²⁰ This means that the fair trial rights under Article 6 ECHR are also relevant to the pre-trial phase. Some issues at the pre-trial phase are of concern in this context.
31. Under Article 104, prosecutors/investigators have the duty to ensure that information relevant to an investigation is not disclosed. To this end, they may oblige participants in criminal procedures not to disclose information without their permission. This power seems overbroad, and should not prohibit disclosure to a legal adviser in the preparation of the defence, particularly as the guarantees of Article 6 of the ECHR may already be applicable even though an individual is not yet charged with any offence.²¹ It is recommended to introduce an exception for disclosure for the purposes of obtaining legal advice in Article 104 par 1.
32. Similarly, with respect to Article 120 (search and seizure), the execution of a warrant under par 3 allows investigators to restrict the individuals at the place of search and seizure to leave, communicate with one another, or with others. The latter may raise some concerns under Article 6 par 1 of the ECHR, should this restriction also apply in cases of persons wishing to contact their legal representative. It is recommended to amend Article 120 par 3 to include

¹⁸ See e.g. ECtHR's decision of 15 November 2001, appl. no. 54210/00, in which the Court had noted that the prosecution and the accused had been afforded the opportunity to challenge the questions put to the jury, and were able to ask the president of the court to put one or more additional questions to the jury. The numerous (768) questions put by the President of the Assize Court had "formed a framework on which the decision had been based", and the Court found that the precise nature of the questions had "sufficiently offset the fact that no reasons were given for the jury's answers". Since these answers were included in the Assize Court's judgment, the reasoning of the judgment was thus considered sufficient to meet the requirements of Article 6 par 1 of the ECHR.

¹⁹ Cf. *Taxquet v. Belgium*, ECtHR judgment of 16 November 2010, appl. no. [926/05](#), par 92.

²⁰ *Vera Fernández-Huidobro v. Spain*, ECtHR judgment of 6 January 2010, appl. no. [74181/01](#), pars 108-114.

²¹ *Deweert v Belgium*, ECtHR judgment of 27 February 1980, appl. no. [6903/75](#), par 41-47.

exceptions for cases such as contact with a legal representative and to specify that restrictions to this right shall only be permissible in exceptional cases and where this is in the interests of justice.

33. With respect to Article 111 par 7 on compulsory measures in case of resistance towards investigative action, it is recommended, for the sake of clarity and legality, to specify that such measures shall only be permissible in case the investigative action is lawful.
34. When interrogating witnesses outside of court during the investigation stage, Article 114 par 4 of the Code allows for the interrogation of a witness without prior notice to, and in the absence of the defence, if this is in the interest of justice and following a decision by a judge. Testimony given under such circumstances will be considered as inadmissible evidence at trial, “if it is possible to have that witness examined again”. This means that if this witness is not examined again, then this interrogation will be considered admissible, even though it was conducted without the defence having had the possibility to question the witness. Although a safeguard is included in Article 118 par 3, whereby this testimony cannot be the only ground for conviction, this practice is nevertheless of concern. If permissible at all, such types of interrogations should be a measure of last resort where all alternative forms of interrogation are considered inappropriate or impracticable²² and should only be accepted by a court if corroborated by other evidence.²³ It is thus recommended to introduce into Article 114 par 4 the requirement that accepting evidence from a witness who has not been cross-examined by the defence at any stage of the proceedings shall be a measure of last resort; that if it is used, the court should establish that all alternative means are inappropriate or impracticable, and that it should be corroborated by other evidence.
35. Under Article 120 par 10, the prosecution shall have the right for primary examination of an object, item, substance or document containing information seized based on the motion of the defense. Why this is so is not clear, and appears to contradict the principle of equality of arms protected by Article 6 ECHR; in principle, if the defense requests investigators to conduct search and seizure activities, the defense should also have the right to see the results of such actions first (and should then of course share them with the prosecution). It is recommended to reconsider this right of primary examination of the prosecutor of seized items in Article 120 par 10.
36. Although Article 121 par 4 on personal searches very usefully states that searches shall be conducted by individuals of the same sex, and that only individuals of the same sex shall participate in it, this does not exclude the possibility of persons of the opposite sex being present during such searches (i.e. without conducting it, or participating in it).²⁴ In addition, the provisions of the Code regarding “forensic examination” (Articles 144 to 148) do not address the specific situation of victims of sexual offences and child victims

²² *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR judgment of 15 December 2011, appl. nos. [26766/05](#) and [22228/06](#), par 119.

²³ *Mirilashvili v. Russia*, ECtHR judgment of 11 December 2008, appl. no. [6293/04](#), par 217.

²⁴ Cf. *Valasinas v. Lithuania*, ECtHR judgment of 24 July 2001, appl. no. [44558/98](#), par 117.

who may be particularly traumatized. Many countries have developed specific protocols and specialized evidence collection kits for the collection of evidence when investigating rape or other forms of sexual abuse.²⁵ More specifically, in the case of sexual offences, individuals may be required to undress for the purposes of forensic medical examination.

37. It is recommended to expressly provide that in case of personal searches, only individuals of the same sex shall be present. Moreover, forensic examination should only be carried out by an officer of the same sex as the suspect/defendant/witness.
38. Moreover, while Article 111 par 9 of the Code states that, upon an individual's request, the expert and the investigating party shall be of the same sex as the person under examination, it does not expressly state that prior consent of the examinee is required, and it is recommended to supplement this provision accordingly.
39. Article 147 par 3 of the Code states that "[t]aking of a sample, which causes serious pain, may be allowed only in exceptional cases, and with approval of a person, from whom the sample shall be taken". Also here, it should be explicitly stated that any process whereby individuals are obliged to undress, and where this reveals intimate parts of the body, should, as a rule, also not be allowed unless the person to be examined expresses his/her prior consent. Such provisions could also be supplemented to provide that photos of victims' injuries are taken only with victims' consent.²⁶

5.2 Proceedings in Closed Session

40. According to Article 182 par 1 of the Code, court sessions shall be open and public. Paragraph 3 of this provision provides that the court may hold fully or partially closed hearings on a number of grounds, including the protection of personal data, of a professional or commercial secret; the protection of the interests of a juvenile, or if a special measure of protection for a participant and his/her family member is applied that requires closing of a court session. Other reasons for closing sessions are to protect the interests of victims of trafficking in human beings, or of violent crime, or if a person whose private correspondence shall be revealed does not consent to this. Although it is possible under international standards to hold closed hearings, the system for closed hearings in the Code is not formulated sufficiently narrowly to ensure compliance with Article 6 ECHR.
41. First, considering the importance of public hearings both to the defendant and

²⁵ See pages 55-58 of the UN Handbook on Effective Police Responses to Violence against Women (2010), available at http://www.unodc.org/documents/justice-and-prison-reform/Handbook_on_Effective_police_responses_to_violence_against_women_English.pdf.

²⁶ See page 71 of the 2014 UNODC Blueprint for Action: an Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women, available at http://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf.

to the public's confidence in the justice system, closure to the public of a trial, or part of it, should only take place where it is strictly required by the circumstances of the case.²⁷ Article 182 appears to treat it as essentially optional and up to a decision of the court and does not specify the exceptional nature of closed hearings, and the fact that they shall be 'necessary' to safeguard other rights or interests. Second, in keeping with the principle of necessity, it should be noted that the court should, rather than closing a hearing, or part of it, always first look for alternative means other than closure.²⁸ Article 182 does not set this requirement either.

42. In addition, Article 182 par 2 provides that "[t]he material containing state secrets shall be considered by the Court *in camera*." However, as the ECtHR has held, the mere presence of classified information in a case file does not automatically imply a need to close a trial to the public, without balancing openness with national security concerns: before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest, and must limit secrecy to the extent necessary to preserve such an interest.²⁹
43. It is therefore recommended that Article 182 specify that closure to the public of a trial, or of part of a trial, shall only take place where it is considered by the court to be necessary given the specific circumstances at hand, and only for the particular evidence, witness or issue at hand, and not for the entire trial. Moreover, before closing a court hearing to the public, the court should always first consider alternative measures, including in cases where material containing state secrets is concerned.
44. Additionally, a separate issue may arise where a court hearing is held in a location different from a regular courtroom, which may sometimes be necessary or expedient for the pursuit of the trial. This issue is not addressed by the Code, which, however, also does not appear to exclude this possibility. Trials held outside regular courtrooms, for example in penitentiary institutions, pose a serious obstacle to the public character of proceedings, and courts are thus required to take compensatory measures so as to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.³⁰ It is recommended to consider addressing the issue of trials held in locations other than regular courtrooms specifically in the Code, in the manner outlined above.

²⁷ *Welke and Biłek v. Poland*, ECtHR judgment of 1 March 2011, appl. no. [15924/05](#), par 74; *Martinie v. France*, ECtHR judgment of 12 April 2006, appl. no. [58675/00](#), par 40.

²⁸ *Krestovskiy v. Russia*, ECtHR judgment of 28 October 2010, appl. no. [14040/03](#), par 29.

²⁹ *Belashev v. Russia*, ECtHR judgment of 4 December 2008, appl. no. 28617/03, par 83.

³⁰ *Riepan v. Austria*, ECtHR judgment of 14 November 2000, appl. no. 35115/97, pars 28-29; *Hummatov v. Azerbaijan*, ECtHR judgment of 29 November 2007, appl. no. [9852/03](#), par 144.

5.3 Trials in Absentia

45. Article 189 of the Code pertains to trials *in absentia*. It spells out that “[s]ubstantial consideration of a case without the defendant’s participation may be permissible only if the defendant is avoiding appearing before the court. In this case defence counsel’s participation shall be mandatory.”
46. International standards do not exclude trials in absentia *per se*. However, the accused has a right to a public hearing, which necessarily implies the right to an oral hearing; after all, without being present, “it is difficult to see how an accused could exercise the specific rights associated with the right to a fair trial, i.e. the right “to defend himself in person”, “to examine or have examined witnesses” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court””.³¹ The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 ECHR.³² Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he or she has waived his right to appear and to defend him- or herself or that he or she intended to escape trial.³³
47. Article 189 does not foresee that the court should establish, upon finding that the defendant is absent, that a summons was effectively served on the defendant.³⁴ Without an effective summons, the defendant may not even be aware of the proceedings, which would violate his or her right to a public hearing. Moreover, even where a valid summons has been issued, a defendant who was absent during the trial should have the right to have the case re-started, unless he or she was represented by a lawyer of his or her choosing at the trial³⁵ or has explicitly waived his or her right to appear, or the court establishes that he or she intended to escape trial. Although Articles 292 par 3 and 297 (f) of the Code do grant a right to appeal *in absentia* verdicts, and appear to allow for a fresh review of the facts in such cases, providing the person convicted *in absentia* merely with the right to appeal, as opposed to an actual re-trial, would essentially deprive the individual of one of the court instances that are accorded to other defendants.
48. The simplest way to remove the challenges associated with trials *in absentia* would be to remove the concept of such trials from the Code, and it is recommended that consideration be given to this approach. If, however, it is

³¹ *Colozza v. Italy*, ECtHR judgment of 12 February 1985, appl. no. [9024/80](#), par 27. See also sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 ECHR.

³² *Hermi v. Italy*, ECtHR judgment of 18 October 2006, appl. no. 8114/02, pars 58-59; *Sejdovic v. Italy*, ECtHR judgment of 1 March 2006, appl. no. 56581/00, pars 81 and 84.

³³ *Sejdovic v. Italy*, ECtHR judgment of 1 March 2006, appl. no. [56581/00](#), par 82.

³⁴ Cf. Council of Europe in Resolution (75)11 on the *Criteria Governing Proceedings Held in the Absence of the Accused*.

³⁵ Cf. e.g. Netherlands CPC, Articles 278-280.

decided not to remove trials *in absentia* from the Code, it is recommended that courts be required to establish, in the absence of the defendant, that the summons sent to the defendant was effectively served before proceeding with the case. In addition, it is recommended that it be specified that the defendant has the right to a re-hearing of the case (and not merely an appeal) if he or she was absent during the trial, unless he or she was represented by a lawyer of his or her own choosing or has explicitly waived his or her right to appear, or if the court establishes that he or she intended to escape trial.

5.4 Equality of Arms

49. Article 6 ECHR has been interpreted by the European Court of Human Rights as including the principle of equality of arms between the parties; this requires that “each party be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”.³⁶
50. At the outset, it is noted that in the Code, the role of the judge in ensuring equality of arms between parties is very limited (see Article 23 and Article 25 par 2 on the role of the judge in particular), and most of the initiative to ensure that this principle is upheld must come from the parties. Although this adversarial system is generally recognized under international standards, it should be noted that there remains a risk in such systems, especially where defence counsel does not fulfill their duties properly, that the rights of the defendant are not sufficiently safeguarded.
51. There is, generally speaking, a significant imbalance in power between the prosecutor, who has the backing of state resources, and the defendant, who does not necessarily have similar financial or other means. It is therefore recommended that consideration be given to adding to the tasks of the presiding judge, for example in Article 25, that he or she should ensure that the rights of the defendant, including equality of arms, are sufficiently safeguarded during the trial.
52. In the interest of witness protection, it may sometimes be necessary to prevent a defendant from being present when a witness is heard, for example if it is necessary to keep the witnesses’ identity secret because there are genuine fears of retaliation against him or her. In addition, it has been recognized by the European Court of Human Rights that in cases involving sexual offences, “account must be taken of the right to respect for the private life of the perceived victim.”³⁷ The ECtHR has accepted that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.³⁸ In securing the

³⁶ *Foucher v. France*, ECtHR judgment of 18 March 1997, appl. no. [22209/93](#), par 34.

³⁷ *S.N. v. Sweden*, ECtHR judgment of 2 July 2002, appl. no. [34209/96](#), par 47.

³⁸ *Ibid.*

rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.³⁹

53. With respect to cases of sexual violence, the only provision in the Code is that of Article 182 par 3 (d), which allows the court to partially or fully close hearings when dealing with cases involving trafficking in human beings or sexual crimes. While this provision is welcome, it does not include any reference to the need for measures to be taken during the trial to ensure that the alleged victim is not confronted with the alleged perpetrator, which can be a traumatic experience for the victim. Closing the trial would not achieve this aim. It is recommended to include specific reference in the Code to the need for the court to ensure, in a pro-active manner, that alleged victims are not confronted with alleged perpetrators in cases involving sexual violence either during the trial or on the courtroom premises, whilst ensuring, at the same time, that the rights of the defence are sufficiently safeguarded. This could take the form of enabling victims to testify in the courtroom without being present, or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, as described in Article 243 of the Code, for example.⁴⁰
54. In this context, it is noted that Article 40 of the Code provides that a judge may deny the defendant the right to be present at the examination of a witness during the trial or pre-trial proceedings if one of the special measures for witness protection is applied. Although this provision is understandable from the perspective of the protection of witnesses, it on the other hand places insufficient emphasis on the rights of the accused. Decisions to protect the anonymity of witness should themselves be justified by reasons which are relevant and sufficient, and where a decision is taken to remove the accused from the courtroom during the questioning of a protected witness, sufficient procedural safeguards should be put in place to ensure that the rights of the accused are adequately protected.⁴¹ In addition, courts should not rely exclusively or to a decisive extent on evidence obtained through testimony of anonymous witnesses.⁴² It is thus recommended to specify in Article 40 that a court should only order the removal of the accused if it deems this necessary in the interests of witness protection, and that where removal of the accused from the courtroom is ordered, it should ensure that sufficient safeguards are in place for the protection of the rights of the accused, including, where appropriate,

³⁹ Ibid.

⁴⁰ See Article 56 par 1 (i) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), signed by Georgia on 19 June 2014, available at <http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf>. For a more detailed discussion, see OSCE/ODIHR Opinion on the Draft Amendments to the Legal Framework on Preventing and Combating Domestic Violence in Georgia (17 December 2013), available at http://www.legislationline.org/download/action/download/id/5049/file/241_DV_GEO_17%20Dec%202013_en.pdf

⁴¹ *Al Khawaja and Tahery v. United Kingdom*, ECtHR judgment of 15 December 2011, appl. nos. [26766/05](#) and [22228/06](#), par 147; see also ODIHR Legal Digest, Par 7.1.1 (in particular pages 172-172).

⁴² *Kostovski v. Netherlands*, ECtHR judgment of 20 November 1989, appl. no. 11454/85, par. 44-45.

ensuring the presence of his or her attorney or the ability to listen to the testimony from another location. In addition, the Code should specify that courts should not rely exclusively or to a decisive extent on anonymous witness statements when convicting a defendant.

55. Under Article 83 par 6, the parties are obliged to present to each other and to the court, no later than five days prior to the pre-trial hearing, all the information available in their possession which they intend to submit as evidence. The obligation to share information does not end there, but should be a continuous one, as appears to be foreseen by Article 83 par 1.⁴³ However, it should be clear from the wording of this provision that the prosecution is under an obligation to share all information spontaneously, and that the defence should be under an obligation only to the extent that fair notice is required for the prosecutor to allow further investigations to take place. It is recommended to amend Article 83 accordingly.
56. It is also noted here that the entitlement to disclose 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 reprisals, or to keep secret certain police methods of criminal investigation, which must be weighed against the rights of the accused.⁴⁴ In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, as a general principle, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 par 1 of the ECHR.⁴⁵ Moreover, in order to ensure that the accused receives a fair trial, any limitation of the rights of the defence must be sufficiently counter-balanced by procedures followed by the judicial authorities.⁴⁶ It is recommended that a detailed provision regarding the withholding of evidence in the public interest be introduced into the Code which allows for an adequate analysis by a court of whether material should be withheld in the public interest.
57. The right to question the credibility of witnesses with contradictory statements made before and during trial also appears to be problematic. Article 243 par 2 restricts the right to read out contradictory witness statements to cases where there is “a probable cause that the witness was forced, threatened, intimidated or bribed.” This provision thus do not allow for the possibility to read out contradictory statements in other circumstances, e.g. in the case of a dishonest witness, acting in his or her own interests. Such restriction may have a negative impact on the right to question the veracity of witness statements, and, therefore, the broader right to cross-examine them. It is recommended that the wording of Article 243 par 2 should be amended to allow for the reading and

⁴³ See e.g. United States Federal Rules of Criminal Procedure, Rule 16 (c).

⁴⁴ *Doorson v. the Netherlands*, ECtHR judgment of 26 March 1996, appl. no. [20524/92](#), par 70.

⁴⁵ *Van Mechelen and Others v. the Netherlands*, ECtHR judgment of 23 April 1997, appl. no. [21363/93](#), par 58.

⁴⁶ *Doorson v. the Netherlands*, ECtHR judgment of 26 March 1996, appl. no. [20524/92](#), par 72, and *Van Mechelen and Others v. the Netherlands*, ECtHR judgment of 23 April 1997, appl. no. [21363/93](#), par 54.

comparison of contradictory witness statements without the need to prove a probable cause that the witness was forced, threatened, intimidated or bribed.

58. It is noted here that according to Article 332 in Chapter XXX on Transitional and Final Provisions, interrogation during investigation shall be administered according to the procedure provided in Criminal Procedure Code of Georgia of February 20, 1998, until 31 December 2015. The 1998 Criminal Procedure Code utilized a different system than the current adversarial system, and thus this form of interrogation does not fit well, and in a certain manner contradicts the principles of the new Code. It is recommended that the use of the procedure for interrogations during investigations from the 1998 Criminal Procedure Code be swiftly abolished, so that it is consistent with the rest of the Code.

5.5 Recusal and Replacement of Judges

59. In certain circumstances, the accused may wish to ask for the removal of one or more of the judges dealing with his or her case for fear of a lack of impartiality. The rule on this issue in Article 64 par 2 (a), according to which “a decision on the motion for challenge of a judge” shall be made by the judge “examining the case individually” is problematic, as is the rule in Article 64 par 2 (c) in which the panel considering the case decides on its own recusal. In case the judge, or judicial panel, whose recusal was requested by one of the participants, decides not to withdraw, such decision may jeopardize the appearance of impartiality of the court. This is not in line with the practice in other European States, which usually require that requests for a judge’s recusal shall be settled by another judge (as done in Article 64 par 2 (b), in cases where a judge sitting on a panel is challenged) or by a separate panel of judges or by a higher court, but not by the respective judge him- or herself.⁴⁷ It is, therefore, recommended that another judge or a panel of the court independent of the respective judge be authorized to decide on recusal in all cases covered by Article 64 of the Code.
60. It is also not clear how the procedure for replacement of judges unable to participate foreseen in Article 183 and 184 would work. In particular, these provisions do not specify whether this would require an alternate judge to have been present throughout the case, or whether it would be possible to appoint other judges as well. It also does not appear to be required to reason the decision or possible to appeal it, as required by international standards.⁴⁸ It is recommended to clarify the procedure for replacement of judges in Articles 183 and 184, and to require reasoned decisions on replacements which can be appealed.

⁴⁷ See, for instance, Articles 670 and 674 of the Criminal Procedure Code of France; Article 40 of the Criminal Procedure Code of Italy; Section 27 of the Criminal Procedure Code of Germany; Article 42 par 2 of the Criminal Procedure Code of Poland; Article 35 par 1 of the Criminal Procedure Code of Moldova; Article 67 of the Criminal Procedure Code of Romania; Chapter 4, Article 15, section 3 of the Code of Judicial Procedure of Sweden.

⁴⁸ *Moiseyev v. Russia*, ECtHR judgment of 9 October 2008, appl. no.. [62936/00](#), pars 172-185.

5.6 The Presumption of Innocence and the Right not to Incriminate Oneself

61. In its jurisprudence under Article 6 par 2 of the ECHR, the ECtHR has emphasized the importance of respect for the presumption of innocence by requiring that relevant public officials do not pronounce themselves on the guilt or innocence of individuals until such time as this matter has been dealt with by a competent court.⁴⁹ This refers to statements by judges, but equally, to statements by other public officials, such as police officers and prosecutors.⁵⁰ Article 25 par 3 provides that “prior to rendering the judgment or any other final court decision, the judge shall have no right to express his/her opinion regarding the guilt or innocence of the defendant (the convicted person).” Consideration should be given to expanding the obligation not to pronounce oneself on the guilt or innocence of a defendant before a court has reached its verdict to include police officers and prosecutors, either in Article 25 par 3, or in other relevant provisions of the Code.
62. As the European Court of Human Rights has stated, “the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 [ECHR]”.⁵¹ These rights do not mean that the State may not, where necessary and with appropriate safeguards, use compulsory powers to obtain ‘real’ evidence, i.e. material which has an existence independent of the will of the suspect (such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purposes of DNA testing).⁵² In some cases, however, the active participation of an accused is required to establish certain evidence, for example in Article 130 on conducting an investigative experiment. It is recommended to amend Article 130 to specify that the refusal to participate in such experiments shall not be held against the accused.
63. Although Article 38 par 4 includes the provision that the defendant has the right to remain silent, and the defendant is reminded of this right at the arrest stage (Article 38 par 2), it is not explicitly stated that the defendant is reminded of this right at the criminal trial under Article 74 (testimony of the defendant). This could lead to situations where the defendant is called to testify and does not (fully) realize that he or she is not obliged to answer questions. It is recommended that a specific provision requiring the court to remind the defendant of his/her right not to testify when called upon to do so at the trial is included in Article 74.

⁴⁹ *Ilgar Mammadov v. Azerbaijan*, ECtHR judgment of 22 May 2014, appl. no. [15172/13](#), par 125-128; *Allenet de Ribemont v. France*, ECtHR judgment of 10 February 1995, appl. no. [15175/89](#), par 32-37; *Ismoilov and others v. Russia*, ECtHR judgment of 24 April 2008, appl. no. [2947/06](#), par 160-170; cf. *Daktaras v. Lithuania*, ECtHR judgment of 10 October 2000, appl. no. [42095/98](#), par 39-45.

⁵⁰ *Ibid.*

⁵¹ *Saunders v United Kingdom*, ECtHR judgment of 17 December 1996, appl. no. [19187/91](#), par 68.

⁵² *Ibid.* par 69.

5.7 Other Fair Trial-related Issues

64. In the general part of the Code (Chapter I), Article 44 par 1 states that “defence counsel shall have no right to act contrary to the accused’s instructions”. This statement is too absolute, in that it may require counsel to act in violation of professional ethics if so instructed by the accused, and is therefore overly broad. It is recommended to insert language into Article 44 par 1 that is similar to that of par 2.7 of the Code of Conduct for European Lawyers⁵³: “[s]ubject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of his client and must put those interests before his own interests or those of fellow members of the legal profession.”
65. On a related note, consideration should be given to including, for example in Article 50 of the Code, protection for ‘whistleblowers’, i.e. individuals releasing confidential or secret information, although under an official or other obligation to maintain confidentiality or secrecy, on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law.⁵⁴ Considering the vital role played by such individuals in informing the public of wrongdoing, it is recommended that consideration be given to introducing protection for whistleblowers who are acting in good faith into the Code.
66. Article 55 allows for the introduction of *amicus curiae* briefs by interested persons not party to the trial “to assist the court in evaluating issues”. Although such briefs are a potentially useful instrument to ensure the consistent application of the law, it is important to ensure that the introduction of such briefs does not place any party at a disadvantage, particularly at the first instance stage, where it is up to the parties to determine what evidence is submitted. While Article 55 does specify that the purpose of such briefs shall not be the support of one of the parties, it is recommended that consideration should be given to improving procedural guarantees for *amicus curiae* briefs. It would be helpful to include in Article 55 some information on who may commission such briefs (whether the court itself or a party), and to provide the parties with an opportunity to respond to the arguments made in an *amicus curiae* brief, for example through cross-examination. Moreover, Article 55 should specify how the court will assess whether a brief supports one of the parties to the trial, and what the effect would be if this were found to be the case (possibly the brief would be disregarded⁵⁵).
67. Chapter XII of the Code deals with procedural terms and costs. A wide range of costs of the trial may be imposed on the parties, including the defence, under

⁵³ Council of Bars and Law Societies of Europe, *Code of Conduct for European Lawyers*, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

⁵⁴ See the 2004 *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, available at <http://www.osce.org/fom/38632?download=true>.

⁵⁵ Cf. Rule 37 of the Rules of the Supreme Court of the United States, available at <http://www.supremecourt.gov/ctrules/2010Rulesofthecourt.pdf>

- Article 90.⁵⁶ Unless the total amounts involved are very low, this may serve to encourage guilty pleas to avoid the risk of costs being imposed even in the absence of guilt, as well as unnecessary plea-bargaining. This could hamper the right to a fair trial. It is recommended to consider reducing the types of costs which may potentially be paid by the defendant under Article 90.
68. Regarding procedures for motions and reasoning of decisions on motions during trial, it is noted here that Article 93 par 4 seems too strict in providing that “[a] motion which has already been decided upon may not be considered again in the same court”. New circumstances may arise, and new evidence may emerge, which may justify making a renewed motion on the same issue. Article 93 par 4 should thus be deleted or amended to provide for the possibility of introducing a motion again in such cases.
69. Article 94 par 3 provides that interested third parties may also be asked to comment on a motion. It is not explicitly stated whether the parties may give their views on such third party comments, which may have an impact on the fairness of the proceedings. It is recommended to add an explicit provision ensuring that the parties may give their views on such comments in Article 94 par 3.
70. Under Article 94 par 5, the author of a motion shall be notified of the court’s decision on the motion. This provision omits to mention that the parties should also be notified of the decision and should receive a copy of it. This should be specifically mentioned in Article 94 par 5. In addition, it is recommended that decisions on motions should be made public.
71. It is noted here that Article 278 provides for copies of the written judgment to be delivered to the parties and participants in the proceedings, but does not make any provision for the judgment’s publication. Generally, written judgments should be published to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial. Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others.⁵⁷ It is recommended that specific provision be made for the publication of written judgments, including any legitimate exceptions to the principle of publicity, in Article 278, or in a separate provision.

⁵⁶ The costs contemplated by Article 90 (1) are: the cost for the services of a defence attorney; the cost for the appearance and services of an expert; the cost for the appearance and services of an interpreter; the cost for the appearance of a witness; the cost related to the storage and transportation of material evidence; the cost of the investigative action funded from the state budget and conducted based on the motion of the defendant or his/her defence counsel; copying cost of information submitted by the prosecution to the defence; the cost of the appearance of jurors and their participation in the trial and the cost for the collection of evidence. Article 90 (2) provides that “[a]n expert or an interpreter shall not be reimbursed if they receive a state salary for their services”.

⁵⁷ *Raza v. Bulgaria*, ECtHR judgment of 11 February 2010, appl. no. [31465/08](#), par 53.

6. Torture, Inhuman and Degrading Treatment

72. Chapter III speaks of general principles of criminal procedure. Within this chapter, Article 4 par 2 prohibits “torture, violence, cruel treatment, deception, medical treatment, hypnosis, as well as by means affecting the memory or mental state of a person” and notes that the “[t]hreat or promise of an advantage not envisaged by law shall be impermissible.” In line with ECtHR jurisprudence⁵⁸, it is recommended to clarify in Article 4 par 2 that the threat of inflicting torture or inhuman or degrading treatment shall also be impermissible.
73. To give effect to this principle, and in accordance with States’ positive obligations under Article 3 ECHR to adequately investigate allegations of ill-treatment⁵⁹, it is recommended to specify in Article 101 (which deals with the information on a crime for the initiation of an investigation) that judges have the power to refer newly revealed facts arising during the course of judicial proceedings, including allegations of torture or ill-treatment, to a prosecutor.
74. Article 111 sets out general rules for conducting investigative actions. Par 8 of this provision states that exceptionally, surgical or other methods and means of medical examination that cause considerable pain may be applied if the respective person gives consent; in the case of minors under 16 years of age or mentally ill persons, this consent may be provided by their parents. The infliction of ‘considerable pain’ set out in this provision requires reconsideration. The Article seems to suggest that ill-treatment resulting from “medical examination”, meaning non-medically justified intervention potentially falling within the scope of Article 3 of the ECHR may be authorised by a parent in certain circumstances. It is highly doubtful whether rights under Article 3 ECHR can be waived in this manner. In any event, it is not clear how such procedures would be consistent with the ethical standards of healthcare professionals. If Article 111 par 8 is deemed necessary, it is recommended to require that the actions contemplated by it should always be dependent upon a court decision (for a parent’s consent to the possible infliction of ill-treatment upon a minor cannot be treated as adequate authorisation); it should also be made clear that any such intervention must not cause humiliation or suffering such as to amount to treatment prohibited by Article 3 ECHR.
75. Under Chapter XVII on other procedural actions, Article 144 outlines grounds for conducting forensic examination. Par 2 of this provision specifies that forensic examination “shall be conducted on the initiative of the party”. However, the prosecutor must seek, as a positive obligation, to secure evidence of ill-treatment inflicted in places of detention.⁶⁰ Discharge of this duty may require prompt intervention by forensic examiners. It is recommended to

⁵⁸ *Selmouni v. France*, ECtHR judgment of 28 July 1999, appl. no. [25803/94](#), par 101; *Gäfgen v. Germany*, ECtHR judgment of 1 June 2010, appl. no. [22978/05](#), par 91; *Harutyunyan v. Armenia*, ECtHR judgment of 28 June 2007, appl. no. [36549/03](#), par 63.

⁵⁹ See e.g. *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR judgment of 13 December 2012, appl. no. [39630/09](#), par 182-185.

⁶⁰ *Tanrikulu v. Turkey*, ECtHR judgment of 8 July 1999, appl. no. [23763/94](#), par 104; *Gül v. Turkey*, ECtHR judgment of 14 December 2000, appl. no. [22676/93](#), par 89.

consider amending Article 144 par 2 to clarify that in cases of suspected ill-treatment, forensic examination cannot be left to the ‘initiative’ of the interested party.

7. Victims’ Rights

76. Under international standards, victims enjoy a number of rights in criminal proceedings. These include the right to compassionate treatment, including respect for their dignity⁶¹ and involvement in the investigation to the extent necessary to safeguard their legitimate interests.⁶² They have the right to have their views and concerns presented and considered at appropriate stages of the proceedings, without prejudice to the accused and consistent with the relevant national criminal justice system.⁶³ Victims also have the right to information about their role and the scope, timing and progress of the criminal case, especially where serious crimes are involved and where they have requested such information.⁶⁴ Specifically, they have the right to be informed of the decision to prosecute or not to prosecute⁶⁵, to be informed of the decision to appeal or not to appeal⁶⁶ and to have access to court documents.⁶⁷
77. Regarding redress, victims should be able to obtain prompt redress for harm suffered both in terms of restitution and compensation⁶⁸; offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants⁶⁹ and victims have the right to access mechanisms of justice that are expeditious, fair, inexpensive and accessible.⁷⁰ Unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims should be avoided.⁷¹ States should also take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, by protecting them, as well as their families and witnesses testifying on their behalf, from intimidation and retaliation.⁷² States should also ensure that victims receive the necessary material, medical, psychological and social assistance⁷³ and that they are informed of the availability of health and social services and other relevant

⁶¹ Article 4, UN Declaration on Victims of Crime.

⁶² *Hugh Jordan v the United Kingdom*, ECtHR judgment of 4 May 2001, appl. no. 24746/94, para 109.

⁶³ Article 6(b), UN Declaration on Victims of Crime; UN ECOSOC, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, UN Doc E/Res/2005/20 (2005), article 21.

⁶⁴ Articles 5 and 6(a), UN Declaration on Victims of Crime; *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Article 19.

⁶⁵ *Kelly and Others v the United Kingdom*, ECtHR judgment of 4 May 2001, appl. no. [30054/96](#) pars 118, 136.

⁶⁶ *Gorou v Greece*, ECtHR judgment of 20 March 2009, appl. no. [12686/03](#), pars 37–42.

⁶⁷ *Öğür v Turkey*, ECtHR judgment of 20 May 1999, appl. no. [21594/93](#) par 92.

⁶⁸ Article 4, UN Declaration on Victims of Crime.

⁶⁹ *Ibid.*, Article 8.

⁷⁰ *Ibid.*, Articles 4 and 5.

⁷¹ *Ibid.*, Article 6(d).

⁷² *Ibid.*, Article 6(d).

⁷³ *Ibid.*, Article 14.

assistance, and are readily afforded access to such services and assistance.⁷⁴

78. Finally, as to compensation, when it is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and their families, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.⁷⁵
79. Chapter VII of the Code focuses specifically on the victims of crimes, and includes provisions on the status of victims and their rights which cover a number of the rights set out in international standards. Article 57 guarantees the victim's rights, *inter alia*, to know the charge brought against the defendant, to testify in respect of damages incurred, to access free copies of court decisions, to be compensated for the costs of participating in proceedings and to request special protection measures. According to Article 58 pars 1 and 3, prosecutors are required to inform victims, in advance, of hearings and court sessions, including those pertaining to plea agreements.
80. However, a number of provisions should be added to bring the Code fully into line with international standards. It is recommended, first, to add a specific requirement for the prosecutor to inform the victim of the decision whether or not to prosecute, and the decision whether or not the prosecutor will appeal. Second, it is recommended that the Code be amended to require that material, medical, psychological and social assistance is delivered to victims and that they are informed, for example by the prosecutor, of the availability of health and social services and other relevant assistance, and are readily afforded access to such services and assistance. Third, consideration should be given to adding a provision on relevant procedures for financial compensation by the State, where such compensation cannot be obtained from the perpetrator(s), to victims and their families, in particular dependants, where victims have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes.
81. Article 317 of the Code provides that the interrogation of an adolescent witness can be conducted in the presence of a teacher or legal representative of the minor. However, the scope of measures to protect child victims and witnesses should be broader and should cover not only the hearing before a judge, but the whole justice process, i.e. from the detection of the crime, the making of the complaint, investigation, prosecution, trial and to post-trial procedures.⁷⁶ In particular, child victims and witnesses, who are of a suitable age to testify, should have their privacy protected as a matter of primary importance. Information related to a child's involvement in the justice process should be protected,⁷⁷ e.g. through maintaining confidentiality and restricting disclosure

⁷⁴ Ibid., Article 15.

⁷⁵ Ibid., Article 12(a).

⁷⁶ See the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009) available at http://www.unicef.org/ceecis/UNDOC-UNICEF_Model_Law_on_Children.pdf.

⁷⁷ See pars 26-28 of the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20, Annex, available at

of information that could lead to the identification of a child who is a victim or witness. It is recommended to include additional specific protection for child victims in the Code.

82. In general, the scope of measures to protect victims should cover not only the hearing before a judge, but the whole justice process, i.e. from the detection of the crime, investigation, prosecution, trial and to post-trial procedures.⁷⁸ In particular, it is recommended that the Code should be amended to put in place special procedures to prevent direct contact between the perpetrators and the victims of violence against women and domestic violence at all stages of criminal investigations and prosecution, unless the victim waives such right or such contact is necessary or useful for the proper conduct of proceedings.⁷⁹ It is also recommended to supplement the Code to also include the right of victims of violence to choose, where possible, the gender of the criminal justice official dealing with them.⁸⁰
83. In addition, Article 54 of the Istanbul Convention⁸¹ requires the adoption of legislative or other measures to ensure that in civil and criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary. Article 72 of the Code does not seem to provide for this limitation. Unless already provided in other legislation, it is recommended that this limitation should be expressly stated in the Code, in order to protect victims from “secondary victimization” (i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim)⁸² during the judicial process.
84. Under Article 106 par 1, victims may appeal the prosecution’s decision to terminate investigations and/or criminal prosecution in a case to a superior prosecutor once. Such “discretionary” prosecution powers, as prescribed by Articles 33 par 6 (g) and 166 of the Code, are common in many Criminal Procedure Codes. They are usually considered to be timesaving and cost-effective alternatives to regular, mandatory investigations and prosecutions. However, in certain cases, it may make sense to allow for additional judicial review of prosecution decisions not to continue investigations or criminal

https://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf.

⁷⁸ See the Model Law on Justice in Matters involving Child Victims and Witnesses of Crime (2009) available at http://www.unicef.org/ceecis/UNDOC-UNICEF_Model_Law_on_Children.pdf.

⁷⁹ See pars 290 and 292 of the Explanatory Report to the Istanbul Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/210.htm>.

⁸⁰ See par 16 (l) of the Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (as adopted by the UN Economic and Social Council Resolution 2010/15) available at <http://www.un.org/en/ecosoc/docs/2010/res%202010-15.pdf>.

⁸¹ *Convention on preventing and combating violence against women and domestic violence*, adopted on 7 April 2011, signed by Georgia on 19 June 2014.

⁸² See par 1.3 of the Appendix to the Recommendation CM/Rec(2006)8 of the Committee of Ministers to CoE member states on assistance to crime victims, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=1011109&>.

prosecution. In particular in cases involving victims who have suffered torture or ill-treatment, effective official investigations in cases falling within the prosecutorial mandate is essential.⁸³

85. In such cases of torture or ill-treatment, it is thus recommended to introduce additional procedural safeguards, such as judicial review of decisions not to prosecute.⁸⁴ There are a number of different ways of introducing such safeguards, including, the possibility of private prosecution⁸⁵, or, as in the legal system of the Netherlands, the possibility of a complaint to the Court of Appeal by an interested party.⁸⁶ At the same time, such additional safeguards should ensure that such a system does not lead to an excessive possibility to re-open cases and respects the discretionary powers of the prosecution service; this could be done by, for example, introducing reasonable time limits for such complaints and by allowing only one such appeal.

8. Interferences with Private Life, Home and Correspondence

86. Articles 112 par 4 and 135 par 3 speak of the possibility of seizure of postal-telegraphic messages (communications) during investigations. It is assumed that this may well also cover electronic communications, including e-mail correspondence, but this could be made clearer in the wording of these provisions. To ensure consistency in legislative provisions, any amendments made would need to be consistent with Articles 137 and 138 on collection of internet and content data. It is recommended to clarify the applicability of provisions in Articles 112 par 4 and 135 par 3 to e-mail correspondence.
87. Under Article 112 par 3, a search warrant is valid for up to 30 days. This seems to be an excessive amount of time, considering the fact that the probable cause upon which it is based may have evaporated or become “stale” over that period of time. This has the potential of interfering unnecessarily with the right to private life protected in Article 8 ECHR. It is therefore recommended to shorten the period of validity of search warrants under Article 112 par 3, for example to a maximum of fourteen days.⁸⁷

⁸³ For Article 2, see e.g., *Nachova and others v. Bulgaria*, ECtHR judgment of 6 July 2005, appl. nos. [43577/98](#) and [43579/98](#), par 110 and *Enukidze and Girvliani v. Georgia*, ECtHR judgment of 26 April 2011, appl. no. [25091/07](#), par 241-243; for Article 3, see e.g. *Dvalishvili v. Georgia*, ECtHR judgment of 18 December 2012, appl. no. [19634/07](#), par 40.

⁸⁴ Cf. Council of Europe Committee of Minister Recommendation Recommendation 2000 (19), par 34, which states that “[i]nterested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.”

⁸⁵ *Ibid.*

⁸⁶ Article 12, Netherlands Code of Criminal Procedure.

⁸⁷ See e.g. the US Federal Rules on Criminal Procedure, Rule 41 (e) (2) (A) (i), which requires that a search warrant specify that it must be executed within a specified time not exceeding 14 days.

9. Other Issues

88. In the General Part of the Code, Article 3 sets out all relevant definitions. Article 3 par 2 of the Code defines a ‘close relative’ as a “parent, adoptive parent, child, adopted child, grandfather, grandmother, grandchild, sister, brother, spouse (including divorcee)”. In view of developments in European societies, it is recommended that consideration should be given to adding ‘individuals permanently residing with him or her’ to the definition of a ‘close relative’ in Article 3 par 2.
89. Under Chapter IV on the prosecutor/investigator, Articles 35 and 36 specify that the Minister of Justice shall determine both general and territorial investigative jurisdiction, the latter based on an application of the chief prosecutor of Georgia. It is not clear why this jurisdiction is not regulated by the Code itself, which would eliminate (or at least substantially reduce) the risk of politicization of jurisdictional decisions. It is recommended to outline rules on both general and investigative jurisdiction in criminal matters in the Code.
90. Article 48 deals with the taking of an oath by a witness, and allows both an “oath” (a religious or non-religious statement in which a witness swears to tell the truth and not to conceal anything) and a “confirmation” (a confirmation *in lieu* of an oath that the witness will tell the truth and will not conceal anything). It is recommended that Article 3 par 20, which provides for a definition of a witness, should stipulate that a person obtains the status of a witness upon taking an oath *or confirmation* (currently this provision only mentions the oath). The same applies to Article 115 par 1, dealing with rules for examining witnesses, which also talks only of an oath.
91. Under Chapter XVII on other procedural actions in the context of investigations, Articles 159-161 allows the dismissal of the defendant from his/her workplace if there is probable cause that the respective position that he/she holds will hinder investigation. These provisions appear to suggest that a court may dismiss an employee irrespective of the wishes of the employer, and make no provision for any less onerous means (e.g. suspension). Such a threat of interference in employment rights may also be seen as an illegitimate inducement to engage in plea-bargaining, possibly negatively affecting the right to a fair trial under Article 6 of the ECHR. It is recommended to modify Articles 159 - 161 to ensure that the wishes of the employer are taken into account, and by requiring that the court explain in its order under Article 160 par 2 why less restrictive means are not possible. It is also recommended to supplement Article 160 to include the right to an oral hearing where the employer may also be heard.

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