

Chapter 8: Investigation of a Criminal Offense

Part 1: Initiation, Suspension, and Discontinuation of a Criminal Investigation

General Commentary

Under the MCCP, the initiation, suspension, and discontinuation of a criminal investigation carry specific requirements to make them official. This is not the practice in every state around the world. In states that do require an official action, the requirements are often based on a more strict interpretation of the principle of legality, entailing that each stage has a specific legal meaning. To initiate, suspend, or discontinue an investigation, one requirement is the issuance of a written decision, on which a high premium is placed in many states. The drafters of the Model Codes concluded that, in the context of the MCCP, a similarly high premium should be placed on both the principle of legality and the requirement of written decisions as a means of ensuring that the actions taken in the course of the investigation will be properly recorded. In many post-conflict states, investigation records have not been properly maintained and files have been lost. Consequently, a suspect could sit in detention awaiting trial while the office of the prosecutor and the prison have little or no information about the suspect. This problem could lead to a gross impingement of the suspect's fundamental human rights, such as the right to trial without undue delay (Article 63), and inadvertently contribute to prison overcrowding, another feature of many post-conflict states. It is therefore imperative that significant attention be given to the issue of record keeping in the course of the criminal investigation. Obvious resource constraints—such as a lack of pens and paper, which is, unfortunately, all too common in post-conflict states—should be taken into account by national authorities and international assistance providers. Providing the basic resources to facilitate record keeping is vital in ensuring the efficient administration of justice and safeguarding the rights of the suspect or the accused.

Reference should be made to Figures 4 and 5 in the annex, which set out the procedure of criminal investigation in a diagrammatic format.

Article 90: Purpose of a Criminal Investigation

The purpose of a criminal investigation is to:

- (a) investigate information or reports that raise a suspicion that a criminal offense has been committed;
- (b) uncover, preserve, and collect evidence of criminal offenses;
- (c) establish, with regard to a specific criminal offense, if a suspect can be identified; and
- (d) determine whether sufficient reasons exist for the prosecution of a suspect of a criminal offense.

Article 91: Conduct of a Criminal Investigation

1. The criminal investigation is conducted by the prosecutor and by the police, under the direction and supervision of the prosecutor.
2. The prosecutor may issue his or her directions to the police orally, in writing, or by other technical means of communication.
3. The prosecutor may be present during all investigative actions carried out by the police.
4. The prosecutor may, of his or her own accord, undertake investigative measures, provided for under the MCCP or the applicable law, that are ordinarily undertaken by the police.
5. The police may undertake investigative measures without the prior direction of the prosecutor in urgent cases, as provided for in Article 93.
6. In the course of a criminal investigation, the police must:
 - (a) follow the directions of the prosecutor in carrying out actions and measures aimed at uncovering and apprehending the suspect and in collecting the evidence and other relevant information for criminal proceedings;

- (b) provide, without delay, to the prosecutor the following:
 - (i) notification of all investigative actions undertaken, whether undertaken as a matter of urgency under Article 93 or under the direction of the prosecutor, and the results of such actions;
 - (ii) a written report and supplementary information on the investigative action; and
 - (iii) notification of the reasons for the police's inability to undertake a specific action directed by the prosecutor, when such cases occur.
7. Information related to the initiation and conduct of an investigation and its findings is confidential and must not be accessible to third parties, except when otherwise provided for in the M CCP or the applicable law.

Commentary

Paragraph 1: In some states, the police are wholly responsible for the investigation of criminal offenses and the storage of evidence. Once the investigation is over, the police hand over all evidence and the case file to the office of the prosecutor. The office of the prosecutor then decides whether or not the evidence is strong enough to mount a prosecution. If there is enough evidence, the office of the prosecutor is responsible for bringing the case before the court. In other states, the police play a crucial, yet not-so-independent, role in the criminal investigation. The police may act under the direction of either a prosecutor or an investigating judge who is responsible for the creation of the case file and storage of evidence. Under the M CCP, the police act under the direction of the prosecutor.

Paragraph 2: In some legal systems, the prosecutor must issue orders in writing to the police and may issue orders orally only in urgent cases. The benefit of this system is that it provides a record, or “paper trail,” of both the investigation and the communication between the prosecutor and the police. The drafters of the M CCP provided for a more flexible system of communication, where the prosecutor can issue orders in writing, orally, or even by e-mail. To ensure that this system works, institutional cooperation between the office of the prosecutor and the police needs to be nurtured and mechanisms need to be set in place to facilitate interinstitutional cooperation. It may be necessary to draw up protocols, standard operating procedures, codes of conduct, or other agreements to build an effective institutional relationship such as is outlined in the M CCP. Providing details on how the general principles set out in the M CCP would operate in practice might also be required. An interagency steering committee may be helpful in navigating difficulties that arise on an ongoing basis. Building the relationship between the police and the prosecutor may take time, particularly in a state where the office of the prosecutor and the police have never worked together or the police have previously led investigations and, with the introduction of a new regime, must now act under the prosecutor's direction.

Article 92: Reporting of a Criminal Offense

1. Any person may report a criminal offense to the police or to the office of the prosecutor.
2. Public officials are obliged to report to the office of the prosecutor criminal offenses about which they have been informed or about which they learn in the exercise of their duties as public officials.
3. A person may report a criminal offense orally, in writing, or by any technical means of communication.
4. When a criminal offense is reported orally, a record of the reported facts must be made. The record must be read to the person who reported the criminal offense and, when possible, the reporting person must be given the opportunity to sign the record.
5. When a criminal offense is reported via technical means of communication or via written note, an official note must be made by the police or the office of the prosecutor.
6. Where a criminal offense is reported to a court or to an office of the prosecutor outside of the jurisdiction where the criminal offense was allegedly committed, the court or the office of the prosecutor must make an official note and forward the note immediately to the competent office of the prosecutor.
7. Where the police obtain information of a criminal offense, either through the reporting of a crime or through their own activities, they must, without delay and no later than twenty-four hours after obtaining such information, inform the prosecutor and thereafter provide the prosecutor with further reports and supplementary information.
8. Where the police arrest a person found in the act of committing a criminal offense or after pursuit immediately following the commission of a criminal offense, under Article 170 the police must immediately notify the prosecutor of the arrest.

Commentary

Not every criminal offense comes to the attention of the police through a formal, written crime report. The police may, for example, catch a suspect in the act of committing a criminal offense, or they may learn of the criminal offense from a member of the public. For those criminal offenses that are reported, Article 92 provides legal recognition of the reporting of a criminal offense as a first step in the criminal proceedings. Any person is free to report a crime directly to the police or to the prosecutor. This

report may be done in person, in writing (e.g., by letter), or by technical means (e.g., by e-mail). In some instances, the report will be made by a named person; in other cases, it may be anonymous. Paragraph 2 articulates the obligation of public officials to report criminal offenses that they become aware of during the course of their work as a public official. This duty pertains only to those criminal offenses that public officials witness or learn of while acting in an official capacity. This duty is usually found in a state's code of conduct for public officials.

In some states, the criminal procedure code requires citizens to report any criminal offense they witness as a matter of civic duty. Other states require that persons with children under their care (e.g., teachers and day-care workers) report any suspicions of physical or sexual abuse of a child. Neither of these duties is included in the MCCP. The consideration as to whether or not such duties should be included in domestic criminal law is a matter for the individual state and is a question of public policy that should be openly discussed, and decided upon as part of the reform process.

When the particular criminal offense reported to the police or the office of the prosecutor is domestic violence (contained in Article 105 of the MCC), the *Framework for Model Legislation on Domestic Violence*, drafted by the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (UN document E/CN.4/1996/53/Add.2), provides specific guidance on the preparation of a domestic violence crime report (paragraphs 22–25). The framework document also contains useful guidance on the duties of police officers with regard to domestic violence (paragraphs 13–17) and the rights of victims of domestic violence (paragraph 21).

Article 93: Investigative Measures prior to the Formal Initiation of an Investigation

1. Where the prosecutor obtains reliable information that a criminal offense has been committed, either through the report of a crime under Article 92 or in some other way, he or she must direct the police to carry out the urgent necessary measures in accordance with the MCCP, the Model Police Powers Act (MPPA), and the applicable law to:
 - (a) identify and locate the suspect;
 - (b) prevent the suspect or any accomplice from hiding or fleeing;
 - (c) detect and preserve traces of the criminal offense and objects that may serve as evidence of the criminal offense; and
 - (d) gather information that may be of use for criminal proceedings.
2. Prior to informing the prosecutor about a reported criminal offense under Article 92(7) or Article 92(8), the police may, in urgent circumstances, undertake investigative measures without the direction of the prosecutor.

3. After reporting a criminal offense to the prosecutor, under Article 92(7) or Article 92(8), the police may, in urgent circumstances, undertake investigative measures without the direction of the prosecutor.
4. Where the police undertake investigative measures under Paragraph 2 or Paragraph 3, the measures must pursue the aims set out in Paragraph 1(a)–(d) and must be provided for in the MCCP, the MPPA, or the applicable law.
5. Where the police undertake investigative measures under Paragraph 2 or Paragraph 3, the police must immediately notify the prosecutor about such investigative measures.

Article 94: Initiation of an Investigation

1. The prosecutor may, having evaluated the information made available to him or her, initiate an investigation where a reasonable suspicion that a criminal offense has been committed exists.
2. The decision to initiate an investigation must be in writing and must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was initiated;
 - (c) the criminal offense, or offenses, being investigated;
 - (d) the circumstances in which the information about the criminal offense was obtained, including the information provided by the reporting person, if applicable;
 - (e) a description of the circumstances and facts justifying the reasonable suspicion that a criminal offense has been committed; and
 - (f) a description of the evidence and information already collected by the police and the prosecutor.
3. Where an investigation focuses on a specific person or persons where probable cause exists that the person or persons committed the criminal offense under investigation, the written decision to initiate the investigation must contain the name or names of the person or persons being investigated and a description of the facts justifying the probable cause.
4. The prosecutor may, at any time, reconsider a decision to initiate an investigation, based on new facts or information.
5. The written decision of the prosecutor to initiate an investigation must be sent to the chief prosecutor.

Commentary

Article 94 provides for the formal initiation of a criminal investigation. It may be noted that under the M CCP, an investigation is opened into a criminal offense rather than against a specific person initially (even where the investigation may focus on a specific person during the early stages).

A formal initiation of a criminal investigation is not required under domestic criminal law in many states. In other states, an investigation requires an official “opening.” The drafters of the Model Codes thought it preferable to provide for such an official opening under the M CCP. This requirement adds to the overall aims of creating a documentary record and cataloging all the steps in the investigation stage.

Paragraph 1: Reference should be made to Article 1(40) for the definition of *reasonable suspicion*.

Paragraph 3: It may be noted that the standard of proof for the opening of an investigation into a criminal offense under Paragraph 1 is lesser than that for the opening of an investigation into a particular person for the commission of a criminal offense. Reference should be made to Article 1(36) for the definition of *probable cause*.

Article 95: Grounds Barring the Initiation of an Investigation

1. The prosecutor must not initiate an investigation into a criminal offense where:
 - (a) jurisdiction over the criminal offense cannot be asserted under Articles 4–6 of the MCC; or
 - (b) the investigation and prosecution of the criminal offense are barred by statutory limitations under Article 9 of the MCC.
2. Where an investigation focuses on a specific person or persons against whom probable cause exists that the person or persons committed a criminal offense, the prosecutor may not initiate an investigation where:
 - (a) jurisdiction over the person to be investigated cannot be asserted under Article 7 of the MCC;
 - (b) jurisdiction over the person to be investigated cannot be asserted because the person has been tried for the criminal offense and has been convicted or acquitted under Article 8 of the MCC; or
 - (c) the person to be investigated has died.

Commentary

Paragraph 1: Where a criminal offense is not within the jurisdiction of the court, meaning that the court does not possess territorial, extraterritorial, or universal jurisdiction over the criminal offense in question under Articles 4–6 of the MCC, the prosecutor must not initiate the investigation. In addition, when the prosecutor finds that the prosecution is barred by the statutory limitations contained in Article 9 of the MCC, an investigation cannot be initiated. Reference should be made to the commentaries to Articles 4–6 and Article 9 of the MCC for further discussion on jurisdiction and statutory limitations, respectively.

Paragraph 2: The initiation of an investigation into a criminal offense for which there is a likely suspect may be barred where the court does not have personal jurisdiction over the suspect under Article 7 of the MCC, where the *ne bis in idem* principle applies to that person, or where that person has died. For a discussion on the meaning and scope of personal jurisdiction and *ne bis in idem* (otherwise known as *double jeopardy*), reference should be made to Articles 7 and 8 of the MCC, respectively.

Article 96: Discretion of the Prosecutor to Decide Not to Initiate an Investigation

1. At the discretion of the prosecutor, he or she may decide not to initiate the investigation where:
 - (a) there is sufficient evidence that a criminal offense has been committed, but the evidence against a suspect is insufficient and there is no reasonable possibility of finding additional evidence; or
 - (b) there are substantial reasons to believe that an investigation would not serve the interests of justice.
2. The prosecutor must take into account the interests of the victims and the witnesses to the criminal offense in deciding not to initiate an investigation under Paragraph 1(b).
3. A decision not to initiate an investigation under Paragraphs 1(a) and 1(b) must be sent to the chief prosecutor and must be confirmed in writing by the chief prosecutor in order to be valid.

Commentary

Paragraph 1(b): This paragraph gives the prosecutor the power not to initiate a prosecution that not serve the “interests of justice.” This phrase is not defined in the MCCP, nor is a finite list of instances in which a case should not be continued articulated. Instead, the provision gives discretion to the prosecutor to determine when he or she should not initiate a case in the interests of justice. Some experts consulted during the Model Codes consultation process had concerns that such a ground would open the door to abuse in that a prosecutor could, for example, dismiss a case upon political grounds. This was not the intention of the drafters of the MCCP in including such a provision, because dismissing a case upon political grounds would be improper. Instead, Paragraph 1(b) provides a mechanism, which will only be used in rare and exceptional circumstances, to enable the prosecutor not to pursue cases where it would not be fair or just to do so. The prosecutor must balance the interests of the victim, the suspect, and society at large and use his or her discretion to determine if, based on any compelling interest or the totality of the circumstances, pursuit of the case would not result in justice. To this end, the prosecutor may consider factors such as the seriousness of the criminal offense and the extent of harm caused by it; the history, character, and condition of the suspect; the impact of the noninitiation of proceedings on the confidence of the public in the criminal justice system; the impact of the noninitiation of proceedings on the safety or welfare of the community; the victim’s opinion on the noninitiation of proceedings; and any exceptionally serious misconduct of the police in the investigation, arrest, or detention of the suspect.

Article 97: Suspension of an Investigation

1. During the investigation, the prosecutor may, having evaluated the information made available to him or her, suspend the investigation where:
 - (a) the suspect becomes mentally incapacitated after the commission of the criminal offense or is suffering from a serious disease;
 - (b) the suspect has evaded the administration of justice and cannot be located;
 - (c) other circumstances exist that temporarily prevent the successful prosecution of the suspect; or
 - (d) it is in the interest of justice to suspend the investigation.
2. The decision to suspend an investigation must be in writing and must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was suspended;
 - (c) the particular criminal offense(s) being investigated;

- (d) where an investigation focuses on a specific person or persons under Article 94(3), the name of the person(s) being investigated; and
 - (e) the reasons justifying the suspension of the investigation.
3. Prior to the suspension of an investigation, all obtainable evidence regarding the criminal offense must be gathered and stored securely by the prosecutor.
 4. The written decision of the prosecutor to suspend an investigation must be sent to the chief prosecutor.
 5. A decision to suspend an investigation under Paragraphs 1(c) and 1(d) must be confirmed by the chief prosecutor in order to be valid.
 6. The prosecutor must issue a decision to resume the investigation where the reasons underlying the suspension of the investigation cease to exist.
 7. The decision to resume the investigation must be in writing and must state:
 - (a) the fact of the resumption of the investigation;
 - (b) the reasons for the resumption of the investigation; and
 - (c) the date of the resumption of the investigation.
 8. The written decision of the prosecutor to resume an investigation must be sent to the chief prosecutor and must be confirmed by the chief prosecutor in order to be valid.

Commentary

Just as the initiation of an investigation requires a written decision on the part of the prosecutor, so does the official suspension of an investigation. Paragraph 1 sets out the grounds upon which the prosecutor may suspend an investigation. Where the suspect becomes temporarily mentally ill or contracts some other serious disease or where the suspect has evaded justice (meaning that he or she cannot be found by the authorities), these are valid grounds for suspension. As with the initiation of the investigation, the written decision must be sent to the chief prosecutor. Where the case is suspended based on Paragraph 1, the chief prosecutor must validate the suspension.

The prosecutor obviously cannot predict how long the suspension will last. The prosecutor will need to keep track of the suspect's mental state, serious illness, or any other issue that precluded the continuation of the investigation. Once these circumstances are no longer applicable, the investigation can be resumed. The resumption of an investigation must be officially declared by a written decision transmitted to the chief prosecutor who must confirm it in order for it to be valid.

Both the suspension and the resumption of an investigation have implications for the statutory limitation pertaining to the particular criminal offense or offenses. Reference should be made to Article 12 of the MCC and its accompanying commentary.

Paragraph 1(d): Reference should be made to the commentary to Article 96(1)(b).

Article 98: Discontinuation of an Investigation

1. At any time during the investigation, the prosecutor must discontinue the investigation of a criminal offense when he or she establishes, having evaluated all the information and evidence collected, that there is insufficient evidence that a criminal offense has been committed.
2. At any time during the investigation, the prosecutor must discontinue the investigation of a suspect when he or she learns that any of the reasons barring the initiation of investigation under Article 95(2) exist.
3. At any time during the investigation, the prosecutor may discontinue the investigation of a suspect under the grounds set out in Article 96(1).
4. The decision to discontinue an investigation must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was discontinued;
 - (c) where an investigation focuses on a specific person or persons under Article 94(3), the name of the person being investigated; and
 - (d) the reasons justifying the discontinuation of the investigation.
5. The written decision of the prosecutor to discontinue an investigation must be sent to the chief prosecutor and must be confirmed by the chief prosecutor in order to be valid.
6. The prosecutor may, at any time, reconsider a decision to discontinue an investigation based on new facts or information and can, in accordance with Article 94, reinstate an investigation.

Commentary

Once an investigation has been officially initiated, it must continue until an indictment is presented under Article 195 unless it is either suspended or officially discontinued. The discontinuation of an investigation, like initiation and suspension, requires a written decision of the prosecutor that must be submitted and confirmed by the chief prosecutor. The grounds for discontinuation outlined in Paragraph 2 are identical to the grounds for noninitiation of an investigation under Article 95(2). Where the prosecutor discovers that any of these circumstances are present, he or she must immediately discontinue the investigation. The prosecutor has discretion to discontinue the investigation under the grounds set out in Paragraph 4, which are identical to those found in Article 96(1).

Paragraph 3: Reference should be made to the commentary to Article 96(1)(b) for a discussion of the grounds for discontinuing an investigation. In some legal systems, a prosecutor may also have the power to discontinue a case once an indictment has been confirmed and even during a trial. This is done by way of motion before the court on the grounds that the case should be dismissed in the “interests of justice.” In some states, the judge has the power, on his or her own motion, to discontinue a case once the indictment has been confirmed. This sort of provision would come into play only in very rare cases. Such provisions have not been included in the MCCP, given the potential for their abuse in a post-conflict state, where the criminal justice system may be nascent or issues relating to corruption may exist within the legal system. Some experts consulted during the drafting of the MCCP were of the view that such a power could politicize the criminal justice system if a judge or prosecutor moves to dismiss a case on political grounds.

Article 99: Notification of a Victim on the Decision to Initiate, Suspend, or Discontinue an Investigation

1. The prosecutor must inform the victim of a criminal offense when the prosecutor has initiated, decided not to initiate, suspended, or discontinued an investigation or renewed an investigation after suspension.
2. Notification must be made as soon as possible, and no later than fifteen working days after the prosecutor has made a written decision to initiate, not initiate, suspend, renew, or discontinue an investigation.
3. Notification must include the information that the victim has the right to appeal the decision to the chief prosecutor within six months.
4. Notification must be made in accordance with Article 75(1), and must be done in a manner that prevents undue danger to the safety, well-being, and privacy of those who provided information to the prosecutor or to the police and in a manner that does not obstruct the investigation.

Commentary

Article 74 of the MCCP obliges the prosecutor to take reasonable steps to keep the victim informed of the progress of a case. The prosecutor should make his or her best efforts to inform the victim about the initiation, suspension, renewal, or discontinuation of a case. No means are specified as to how the victim should be notified. This will

depend on the individual circumstances of a state. In some states, there may be a postal service, although typically in a post-conflict state, the postal service is not functioning or reliable. In this case, the prosecutor should endeavor to make telephone or personal contact with the victim. These options may be difficult, however, if the victim does not have a phone or lives far from the prosecutor's office. Notice of the decision may be hand-delivered to the residence of the victim by an employee of the office of the prosecutor.

Any notification, whether written or oral, must not reveal information that would jeopardize the safety, well-being, or privacy of any person who has provided information to the police. In accordance with Article 75(3), where the prosecutor fails to effectively notify the victim or there are defects in the notification process, these problems will not affect the progress of the investigation or, later, the trial. Reference should be made to the commentaries to Articles 74 and 75 for a fuller discussion on the notification of victims.

Article 100: Appeal by a Victim on the Decision Not to Initiate an Investigation or on the Discontinuation of an Investigation

1. Upon receipt of the notification of the prosecutor's decision not to initiate or to discontinue an investigation, the victim may file a written appeal with the chief prosecutor.
2. The victim may appeal the decision of the prosecutor within six months of receipt of notification of the decision of the prosecutor not to initiate or to discontinue the investigation.
3. Upon consideration of the written appeal of the victim, the chief prosecutor may confirm the decision of the prosecutor or may order another prosecutor to initiate or continue the investigation.

Commentary

A victim of a criminal offense may be dissatisfied with the fact that the prosecutor has not initiated an investigation or initiated an investigation but later decided to discontinue it. Article 100 gives the victim the opportunity to challenge the decision of the prosecutor through a written appeal to the chief prosecutor. The chief prosecutor should consider the written appeal and decide whether to confirm the decision of the prosecutor or hand the investigation over to another prosecutor to initiate an investigation or resume an investigation that has been discontinued.

Article 101: Retention, Security, and Storage of Information and Evidence Relating to the Criminal Investigation

The prosecutor is responsible for the retention, storage, and security of all information, evidence, and physical material obtained in the course of an investigation until it is formally tendered into evidence in court. Evidence and physical material collected by the police in the investigation of a criminal offense must be transferred to the prosecutor without delay, unless otherwise ordered by the prosecutor.

Commentary

The responsibility to maintain and store all the materials that were gathered during the investigation falls on the prosecutor under the M CCP. Where the police have collected evidence, they must forward the relevant evidence and information to the prosecutor along with a written report. The prosecutor will retain the evidence until it is presented in court at the trial and officially tendered as evidence. At this point, the responsibility for maintaining the evidence falls on the court.

In order to store and secure the evidence in advance of the trial, the office of the prosecutor must have proper secure space, often known as the *evidence room*. The police may also have an evidence room in which to store evidence before handing it over to the prosecutor. It is important that there also be provision for the storage of sealed documents—such as documents related to witness protection (see Article 152), witness anonymity (see Article 160), or cooperative witnesses (see Article 166)—and other sensitive information or items in a room that has restricted access and is under lock and key. These documents or items should be stored separately from the general file on the particular criminal case.

Generally, it is good practice to have standard operating procedures to address issues such as who has access to the evidence room, who has access to the evidence, and the steps required to gain access.

Part 2: Records of a Criminal Investigation

Section 1: Records of Investigative Actions Undertaken by the Police or the Prosecutor

Article 102: Written Record of Actions Undertaken in a Criminal Investigation by the Police and the Prosecutor

1. The police and the prosecutor are required to keep a written record of each action undertaken in the course of the criminal investigation at the same time that the action is undertaken or, if this is not possible, immediately afterward.
2. Where the police execute an order or a warrant of the court, the police must make a written record of their actions in executing the order or warrant.
3. The police must deliver a copy of the written record of any action undertaken by them, including the execution of an order or a warrant, to the prosecutor as soon as possible after the action has been taken, and no later than forty-eight hours.
4. The written record must include:
 - (a) the name of the prosecutor or the identification number of the police officer taking the action;
 - (b) the place where the action is being undertaken;
 - (c) the date and time when the action begins and ends, and any interruptions in undertaking the action;
 - (d) the first names and surnames of persons present and the status in which they are present;
 - (e) the name of the suspect or the accused in the criminal case or the case number, if one has been assigned; and
 - (f) where a party to the action is vested with rights under the MCCP, the fact that the person undertaking the action informed the party of his or her

rights. The fact of whether the person exercised his or her rights must also be noted in the written record, along with the signature of the person verifying that he or she has been permitted to exercise his or her rights. If the person refuses to sign the record, the reasons for this must be noted in the record.

5. The written record must contain the essential information about the implementation and content of the action undertaken.
6. If objects or documents are seized in the course of the implementation of the action, this must be indicated in the record and the articles taken must be attached to the record or the place where they are kept must be identified.
7. In conducting actions such as the search of premises or persons, information that is important with regard to the nature of the action or for establishing the identity of certain articles (such as description, dimensions, and size of the articles or traces that have been left or the placing of identifying labels on articles) must also be entered in the record.
8. Any sketches, drawings, layouts, photographs, films, or other technical recordings that are made must be entered into the record and attached to the record.
9. The record must be kept up-to-date and nothing in it may be deleted, added, or amended. Corrections to the record must be noted at the end of the record.

Commentary

A lack of accurate record keeping and evidence cataloging and storage hinders the efficiency of an investigation and may affect the ability of the prosecutor to compile a strong case against an accused person. Keeping an accurate record is also important from the perspective of protecting the rights of suspects and the accused, particularly the right to defend oneself (Article 65) and the right to adequate facilities to defend oneself (Article 61). To adequately defend the accused, the defense should have access to records of actions taken during the investigation, the findings of these actions, and any evidence that may have been gathered, subject to the exceptions to disclosure set out in Chapter 10, Part 3, and elsewhere in the M CCP.

It is important to establish a system and structure of investigative record keeping. Article 102 provides general principles and requirements that could be supplemented by a standard operating procedure or memorandum of agreement between the police and the prosecutor on the recording of investigative acts and the transmission and storage of written records and evidence obtained in the course of these acts. Article 102 places a general requirement on the police and the prosecutor to record in writing all actions taken in the course of the investigation and for the written record of those actions to be put in the case file in the possession of the prosecutor (as per Article 101). Any evidence that is adduced during the investigative action by the police will be submitted to the prosecutor under Article 91.

Section 2: Records of the Questioning of a Suspect

General Commentary

It is imperative that accurate recording of the questioning of a suspect be undertaken. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a record of all interrogations of suspects be kept (Principle 23). This requirement has also been expressed by the United Nations Human Rights Committee (General Comment no. 13, paragraph 11).

Article 103: Audio or Video Recording of the Questioning of a Suspect

1. Where a suspect is being questioned, every reasonable effort must be made to audio or video record the questioning, in accordance with the following procedure:
 - (a) the suspect must be informed, in a language he or she fully understands and speaks, that the questioning is to be audio or video recorded and that he or she may object if he or she so wishes;
 - (b) the fact that this information has been provided and the response given by the suspect concerned must be noted in the record;
 - (c) the suspect may, before replying, speak in private with his or her counsel, if counsel is present;
 - (d) if the suspect refuses to be audio or video recorded, the procedure in Article 104 must be followed;
 - (e) the suspect must be informed on tape of his or her rights under Article 107;
 - (f) in the event of an interruption in the course of questioning, the fact and the time of the interruption must be recorded before the audio or video recording ends as well as the time of resumption of the questioning;
 - (g) at the conclusion of the questioning, the suspect must be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish; and
 - (h) the time of conclusion of the questioning must be noted.

2. The following facts must be noted on tape for the record:
 - (a) the time when and place where the questioning took place;
 - (b) the name of the person(s) who conducted and recorded the questioning, the name of the suspect, his or her counsel, if present, and any prosecutor, interpreter, or other person present during all or part of the questioning;
 - (c) the name of any appropriate adult present in accordance with Article 109; and
 - (d) the name of any responsible person present in accordance with Article 329.
3. The questioning must be transcribed as soon as feasible after the completion of the questioning. A copy of the transcript must be placed in the case file.
4. The audio- or videotape must be copied as soon as feasible after the completion of the questioning. One copy of the tape must be used for the purposes of transcription, and the other copy must be given to the suspect or his or her counsel.
5. A copy of the transcript of the questioning must be given to the suspect, in addition to the audio- or videotape, as soon as feasible after the completion of the questioning.
6. Upon the request of the prosecutor, the transcript and the copied audio- or videotape may be withheld from the suspect until the prosecutor has formally initiated the investigation under Article 94.

Commentary

Article 103 sets out the procedure to follow when an interview is audio or video recorded. Every reasonable effort should be made to ensure that an interview is recorded in this manner. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that “the electronic (i.e., audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. . . . Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recordings of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions” (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *12th General Report*, CPT/Inf [2002], paragraph 36, page 15). A similar statement has been made by the United Nations Special Rapporteur on Torture (UN document A/56/156, paragraph 39[f]) and the United Nations Committee against Torture (UN document A/51/44, paragraph 65[e]), and, further-

more, is contained in the African Commission on Human and Peoples' Rights Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (paragraph 28). Obviously, there are serious financial implications in the resourcing and upkeep of electronic or video recording equipment and facilities and in the transcribing or copying of tapes. In a post-conflict state, where resources are often limited, a written record may be the only option. Where it is not possible to electronically or videographically record the interview, the procedure set out in Article 104 should be followed.

As Paragraph 2 provides, it is particularly important that those persons present must be identified for the record. The United Nations Special Rapporteur on Torture has noted that in order to address concerns surrounding torture or cruel, inhuman, or degrading treatment (including the later investigation of allegations of such mistreatment), "each interrogation should be initiated with the identification of all persons present" (UN document A/56/156, paragraph 39[f]).

Article 104: Written Record of the Questioning of a Suspect

1. Where circumstances prevent the questioning of a suspect being audio or video recorded, a written record of the questioning must be made.
2. The record must note:
 - (a) why audio or video recording of the questioning of the suspect was not conducted;
 - (b) the date and place of the questioning;
 - (c) the start and end time of the questioning;
 - (d) the fact that the suspect being questioned has been informed of his or her rights under Article 107;
 - (e) the substance and content of the questioning, meaning any questions asked of the suspect and his or her answers and any other information provided by the interviewer(s) or the suspect;
 - (f) any interruptions in the course of questioning and the time of the interruption and the time of resumption of the questioning;
 - (g) the name of the person(s) who conducted and recorded the questioning, the name of the suspect, his or her counsel, if present, and any prosecutor, interpreter, or other person present during all or part of the questioning;
 - (h) the name of any appropriate adult present in accordance with Article 109; and

- (i) the name of any responsible person present in accordance with Article 329.
3. At the conclusion of the questioning, the suspect must be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish. This statement must be noted as part of the record of questioning.
4. The suspect must be given the opportunity to read or have read to him or her the questioning record and to indicate if and how he or she considers it inaccurate.
5. The record must be signed by all persons present during the questioning. Where a person has not signed the record, the reasons for this must be noted.
6. A copy of the written record must be placed on the case file. A copy must also be made available to the suspect; however, the written records may be withheld until after the prosecutor has initiated the investigation under Article 94.
7. The record of the questioning must be placed in the case file.

Commentary

In the absence of equipment or facilities to audio or video record the questioning of a suspect, a written record must be made. This record must be as comprehensive as possible, noting both questions asked by the interviewer and answers elucidated from the suspect. Where it is not possible to take verbatim notes of the interview, the record must accurately record the statements of the suspect and must contain the exact wording of key statements made by the suspect. As with Article 103, crucial facts regarding the interview must be recorded in order to effectively safeguard the rights of the suspect to be free from torture or cruel, inhuman, or degrading treatment (set out in Article 58 of the M CCP). Date and place of questioning, start time and end time, interruptions and resumptions (which will be relevant for assessing whether Articles 106 and 107 have been respected), and the names of all persons present are crucial facts to include in the record, in addition to the substance of the questions asked and the answers received during the course of the questioning. At the end of the questioning, the suspect must be given the opportunity to read, or have someone read verbatim to him or her, what the record contains. The suspect must also be given the opportunity to make a clarifying statement at the end of questioning that must be included in the record. All persons must sign the record to attest to, first, their presence during the interview and, second, the accuracy of the interview record. The suspect and his or her lawyer must have access to the record under the disclosure obligations contained in Article 204. If the defense wishes to raise allegations of torture before disclosure obligations begin, the defense must be given access to the record.

Section 3: Records of the Questioning of Other Persons

Article 105: Written Record of the Questioning of Other Persons

1. A written record must be made of formal statements made by any person who is questioned in connection with an investigation.
2. The record must note:
 - (a) the date, time, and place of questioning;
 - (b) the fact that the person has been informed of his or her right to freedom from self-incrimination and that the questioning will be recorded and may be used as evidence in the proceedings;
 - (c) the fact that, where the person being questioned is a victim of a criminal offense, the victim has been informed of his or her interests under Articles 72–79 and Articles 99–100;
 - (d) the substance and content of the interview, meaning any question asked of the person and answers received and any other information provided by the person; and
 - (e) the names of the person(s) who conducted and recorded the questioning, the person being questioned, his or her counsel, if present, and any prosecutor, interpreter, or other person present.
3. The record must be signed by all persons present during the questioning. Where a person has not signed the record, the reason for this must be noted.
4. The record of the questioning must be placed in the case file.

Commentary

A written record of an interview with a person other than the suspect will suffice. If, however, facilities and equipment to audiotape or videotape the interview exist, they may be used (in which case a procedure similar to that outlined in Article 103 could be followed). Electronic recording will probably be beyond the resource capacity of a post-conflict state, which is why the MCCP provides for the written record of statement made by a person other than the accused.

Part 3: Collection of Evidence

General Commentary

Part 3 contains a wide range of modalities for investigating a criminal offense. Some of the modalities provided for in Part 3 are forensic (e.g., Article 142 on physical examinations and Article 145 on autopsies); some are regular investigative techniques found in criminal procedure codes around the world (e.g., questioning of suspects and other persons, search of premises or a dwelling and seizure of property under Articles 118–121, and search of persons under Articles 122–125), while others are more novel and highly technical (e.g., expedited preservation of computer data and telecommunications traffic data under Article 128; expedient preservation of property and freezing of suspicion transactions under Article 132; identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129; and covert and other technical measures of surveillance or investigation under Article 135).

Having an external authorization mechanism for certain investigative acts is standard practice in most states, although where this authorization comes from varies from state to state. In some states, an investigating judge may have the power to authorize these measures, while in other states, a prosecutor or a senior police officer (in states where the investigation is completely police led) may have the power to order many investigative acts. In many states, and under the MCCP, the judiciary is responsible for overseeing the majority of investigative measures. Judicial authorization provides an important oversight mechanism for investigative acts that are intrusive or that impinge upon the rights of persons. In a small number of instances, the prosecutor is responsible for overseeing the investigative action (e.g., expedited preservation of computer data and telecommunications traffic data under Article 128; expedient preservation of property and freezing of suspicion transactions under Article 132; identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129; and covert and other technical measures of surveillance or investigation under Article 135).

Permission to undertake many of the acts contained in Part 3 is usually sought through a warrant or an order from a competent court or judge. Warrants and orders differ only with regard to who can apply for them. A *warrant*, as defined in Article 1(46), is an order of the court issued after the written *application*, defined in Article 1(2), of either the prosecutor or the police to undertake a particular investigative measure. An *order*, as defined in Article 1(34), is an order of the court that is issued after a written *motion*, defined in Article 1(32), of the prosecutor or the defense. Both warrants and orders are sought by filing a motion with the registry of a competent trial court.

Part 3 addresses the range of measures requiring a warrant or an order and a number of measures that do not require a warrant or an order. Where a provision relates to a measure requiring a warrant or an order, the relevant article sets out the mechanism for applying for and granting warrants and orders. In many articles, there is also extensive treatment of how the particular investigative measure should be carried out and, in

some cases, supervised by the court. The MCCP contains more details on the implementation of investigative measures than many criminal procedure codes. In fact, the level of detail contained in the MCCP is similar to what might be contained in standard operating procedures or implementing or clarifying regulations that accompany the criminal procedure code. The inclusion of extra detail on the implementation of investigative measures was deliberate. In a post-conflict state, standard operating procedures or implementing or clarifying regulations may not exist or may take a long time to draft. In the absence of such legislation, the drafters considered it important to include a greater level of detail, particularly with regard to the implementation of complex investigative measures, such as covert surveillance, or other measures that previously may not have been carried out in accordance with best practice or with due regard for human rights standards, such as those for search and seizure and physical examination of persons. The provision of additional guidance on the implementation of complex or sensitive investigative acts is particularly important in a post-conflict context where some criminal justice actors may not have implemented such provisions previously.

In addition to providing an adequate level of detail in Part 3, the drafters paid particular attention to creating adequate procedural safeguards to protect the human rights of the individual while providing sufficient powers to investigate crime. During the drafting of Part 3, significant input was received from human rights advocates, legal scholars, police officers, prosecutors, judges, and defense counsel. The drafters were equally cognizant of the need for adequate record keeping and a “paper trail” of investigative measures in the drafting of Part 3; consequently, numerous reporting requirements have been integrated into the various articles.

Many of the methods for collecting evidence contained in Part 3, such as covert surveillance (Articles 134–140) and search and seizure of a computer (Article 130), require highly trained investigative staff. Before a post-conflict state considers implementing such investigative tools, the availability of qualified and trained personnel to implement them should be taken into consideration. It is also important to consider the cost of implementing these provisions.

Section 1: Questioning of Suspects, Victims, and Other Persons

Article 106: Guiding Principles on the Questioning of All Persons

1. Questioning under Article 106 means the solicitation of information from any person.
2. The aim of questioning a person in the course of a criminal investigation is to obtain accurate and reliable information in order to discover the truth about matters under investigation.

3. Questioning must be conducted with full respect for the rights and dignity of the person being questioned.
4. Questions must be asked in a clear, distinct, and precise manner.
5. Persons being questioned must be free from coercion, violence, or threat of violence or oppression or any form of torture or cruel, inhuman, or degrading treatment or coercion. In particular, in questioning a person, it is forbidden to:
 - (a) require the person being questioned to stand;
 - (b) place a hood over the person being questioned;
 - (c) expose the person being questioned to persistent or excessive noise;
 - (d) deprive the person being questioned of adequate sleep, food, or water;
 - (e) impair the person's freedom to form his or her own opinion and to express himself or herself by means of the administration of drugs or hypnosis;
 - (f) impair the person's memory or his or her ability to understand;
 - (g) threaten the person with measures not permitted by law; or
 - (h) promise something to the person being questioned that is not permitted by law.
6. In any period of twenty-four hours, a person being questioned must be allowed a period of at least eight continuous hours during which that person may rest and will not be questioned, transported from one detention center to another, or subjected to any interruption in connection with the investigation. The period of rest may not be interrupted or delayed unless there are reasonable grounds to believe that further questioning is necessary to avoid an imminent risk of harm to persons or the imminent serious loss of or damage to property.
7. Short breaks from interviewing must also be provided at intervals of approximately two hours, subject to the interviewing police or prosecutors' discretion to delay a break if there are reasonable grounds to believe that further questioning is necessary to avoid an imminent risk of harm to persons or the imminent serious loss of or damage to property.

Commentary

General reference should be made to Amnesty International's publication *Combating Torture: A Manual for Action*, which discusses relevant safeguards for persons in custody, including during questioning, in chapter 4. Reference may also be made to section 7.5 (pages 174–79) of Amnesty International's *Understanding Policing: A Resource for Human Rights Activists*, which contains a general discussion on police techniques in interviewing persons.

Paragraph 2: Paragraph 2, which states that the aim of questioning is to obtain accurate and reliable information, is particularly applicable to the questioning of a suspect. In some states, police or prosecutors work under the false assumption that the purpose of questioning a suspect is to obtain a confession. This often leads to the use of torture; cruel, inhuman, or degrading treatment; coercion; or acts of violence in order to force a confession. Paragraph 2 is derived from European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (*12th General Report*, CPT/Inf [2002], page 15, paragraph 35). CPT considers it important that the aim of questioning be made clear and furthermore that interviewing officers receive training on this standard.

Paragraph 3: This paragraph articulates a general principle that all the rights of the person being questioned should be respected as well as the particular right to be treated with dignity and respect. This right is found in the International Covenant on Civil and Political Rights (Article 10[1]).

Paragraph 5: The principles set out in Paragraph 5 are related to the right to freedom from torture or cruel, inhuman, or degrading treatment set out in Article 58. Reference should be made to Article 58 and its accompanying commentary. The principles contained in Paragraph 5 are also related to a person's right to freedom from self-incrimination and the right not to be compelled to testify against oneself or to confess guilt (see Article 57 and its accompanying commentary). Paragraph 5 expands the scope of the protections contained in Articles 58 and 61 by requiring that a person being questioned not be subjected to violence, the threat of violence, or oppression. Any act of hitting, striking, pushing, or otherwise interfering with the body of a person being questioned is prohibited. Threats to hurt the detainee are also prohibited. The concept of *oppression* contained in Paragraph 5 refers to the arbitrary exercise of the power of the interviewer.

Paragraph 5 provides some examples of inappropriate and unlawful questioning techniques, but this is not an exhaustive list. Unfortunately, the means and methods employed to commit violent, oppressive, coercive or cruel, inhuman, and degrading acts are many and varied. It is therefore impossible to capture all such means and methods. The first four examples have been used in several states as unofficial questioning techniques. Some states have used "wall standing," forcing a person to remain for hours in a "stress position," spread-eagle against a wall, with his or her fingers high above the head and his or her feet back, causing the person to place the full weight of the body on the toes and fingers. The European Court of Human Rights, in the case of *Ireland v. United Kingdom* (application no. 5310/71 [1978], ECHR 1 [January 18, 1978]), found that this method of questioning is contrary to a person's right to freedom from inhuman treatment, as is the hooding of a person during an interview, exposing the person to loud or persistent noise, and depriving the person of sleep, food, or water (paragraphs 167 and 168). Drugging a person or hypnotizing that person is impermissible, as are other means to impair the memory. In addition to threatening a person with violence or with other unlawful measures, one may not attempt to induce a person to give information by promising him or her something (for example, a bribe) that is impermissible under the applicable law.

Paragraph 6: As mentioned in the commentary to Paragraph 5, Article 58 provides that all persons have the right to freedom from torture or cruel, inhuman, or degrading treatment. Paragraph 5 prohibits certain conduct in questioning that is contrary to Article 61. Paragraph 6 adds to the list of prohibited conduct during questioning contained in Paragraph 5 by ensuring that a person being questioned is not subject to sleep deprivation. Sleep deprivation has been found to be a form of inhuman treatment under international human rights law by the European Court of Human Rights (*Ireland v. United Kingdom*, application no. 5310/71 [1978], ECHR 1 [January 18, 1978], paragraph 167). In the majority of cases, Paragraph 6 applies to persons who have been arrested, not to witnesses. An arrested person can be detained pending a hearing before a judge under Article 175, and therefore he or she is more likely to be questioned over a twenty-four-hour period than is a witness, who is free to leave at any time and who is not usually questioned for such an extended period as referred to in Paragraph 6.

Paragraph 7: It may be noted that any person including a suspect, who has not been arrested or detained under the MCCP is not compelled to succumb to questioning by the police and is free to leave at any point during the questioning.

Article 107: Questioning of a Suspect

1. Where the police or prosecutor question a suspect, prior to questioning, the person must be informed that he or she is a suspect in criminal proceedings.
2. The police or the prosecutor must inform a suspect prior to questioning, in a language the suspect speaks and understands, of the following rights to which he or she is entitled:
 - (a) the right to silence and not to incriminate himself or herself;
 - (b) the right to presence of counsel of the suspect's choice;
 - (c) the right to consult with counsel before and during the questioning; and
 - (d) the right to have the assistance of an interpreter, free of any cost, if the suspect cannot understand or speak the language being used for questioning, and such translations that are necessary to meet the requirements of fairness.
3. If the suspect exercises his or her right to counsel, the police or prosecutor must postpone or interrupt the questioning until counsel arrives or until two hours have passed. If, after two hours, counsel cannot be reached and the suspect does not select another counsel, or where counsel has not arrived, the police or the prosecutor may question the suspect. In exigent circumstances, where imminent danger to the lives of persons is present, the police

may, upon the verbal authorization of the deputy prosecutor, begin or continue to question a person even before counsel arrives.

4. The police or the prosecutor must inform a suspect prior to questioning that any statement that he or she makes during the questioning may be recorded and used in evidence against him or her later in the proceedings.
5. The police or the prosecutor must give the suspect the opportunity to dispel the grounds for suspicion against him or her and to assert facts in his or her favor at some point during the questioning.

Commentary

The questioning of a suspect may take place at any time. Article 107 applies to the questioning of all suspects, including those who have not been arrested or detained as well as those who have been arrested or detained and are at a police station or a detention center. Every time the suspect is questioned, the procedure set out in Article 107 must be repeated.

In addition to the requirements contained in Article 107, the questioning of a suspect must be recorded in accordance with Article 106, Article 103, or Article 104. Reference should be made to Articles 103 and 104 and their accompanying commentaries.

Paragraphs 1 and 2: Police and prosecutors should be given a simplified and standardized way to deliver the warnings contained in Paragraphs 1 and 2.

Article 108: Questioning of Deaf or Mute Persons

1. If a person being questioned is deaf or mute, a person who knows how to communicate with the deaf or mute person being questioned should be invited to act as an interpreter between the deaf or mute person and the police or prosecutor.
2. Where no interpreter is present, and where the person being questioned is deaf, he or she must be asked questions in writing.
3. Where no interpreter is present, and where the person being questioned is mute, he or she may answer the questions posed in writing.

Commentary

If a suspect appears to be deaf or mute, the police or the prosecutor must treat the person as such, in the absence of clear evidence to the contrary. Where possible, a person who knows sign language or who understands how to communicate with a deaf or mute person must be invited by the police or prosecutor to be present during the interview. Ordinarily, this person will be a member of the deaf or mute person's family.

Article 109: Questioning of Mentally Disordered or Mentally Vulnerable Persons

1. If the person being questioned is mentally disordered or otherwise mentally vulnerable, he or she must be interviewed in the presence of an appropriate adult.
2. An "appropriate adult" means:
 - (a) a relative, guardian, or other person responsible for the care or custody of a mentally disordered or otherwise mentally vulnerable person;
 - (b) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police; or
 - (c) failing these, some other responsible adult age eighteen years or over who is not a police officer, employed by the police, or employed by the office of the prosecutor.

Commentary

The term *mentally disordered or otherwise mentally vulnerable* is used as a generic term to denote a person who suffers from a mental illness or other mental incapacity such that he or she may not understand the significance of what is said during an interview or the questions asked or their answers. If a person appears to be mentally disordered or otherwise mentally vulnerable, the police or prosecutor should allow an appropriate adult to be present during the interview. Ideally, this person would be someone who is known to the person being questioned, such as a family member or guardian. Alternatively, a person with experience dealing with mentally ill persons, such as a social worker or mental health professional, may be invited to be present during the interview. Failing that, an independent third party not associated with the police must be invited to be present during the course of the questioning.

Article 110: Questioning of Victims and Other Persons

1. The police or the prosecutor must inform a victim or any other person prior to questioning that he or she is not obliged to answer individual questions by which he or she would incriminate himself or herself.
2. The police or the prosecutor must inform a victim or any other person that the questioning will be recorded and may be used as evidence in the proceedings.
3. A victim or another person being questioned may choose to have his or her lawyer present during the course of the questioning and may consult with his or her lawyer before and during the questioning.
4. The police or the prosecutor must inform a victim of his or her right to be notified of the progress of the case under Article 75, of any proceedings under Article 75, of the possibility of participating in the proceedings under Article 76, and of the victim's right to appeal a decision of the prosecutor not to initiate or to discontinue an investigation under Article 100.
5. Where the victim indicates a desire to be notified under Articles 74 and 75, the police or the prosecutor must take the name and contact information of the victim.
6. The questioning of a female victim of a sexually related offense or domestic violence must be conducted by a female police officer or prosecutor, where available, unless the victim does not object to a male police officer carrying out the questioning.

Commentary

In the course of an investigation, the police or prosecutor may interview the victim, witness, or any other person. The person being questioned is entitled to the right to freedom from self-incrimination set out in Article 57 of the MCCP and should be made aware of this right at the beginning of questioning. The person must also be made aware that the police will record the questioning (in compliance with Article 105) and that this evidence may be used in future proceedings. Where the person being interviewed is a victim, he or she must be informed of his or her right to be notified of the progress of the case under Articles 74 and 75. As a matter of good practice, it is advisable for the police to provide the victim with a full list of his or her rights under Articles 72–79 and Article 100 of the MCCP in order to ensure that these rights can be understood and exercised.

A female victim of a sexual crime or of domestic violence must, where possible, be interviewed by a female police officer. An interview can be an intimidating event for a victim; experience in states around the world has demonstrated that female victims are more comfortable with and often provide information that is more detailed to female police officers or prosecutors. In a post-conflict setting, where there is a shortage of criminal justice personnel in the first place, it may be difficult to find a female police officer every time a female victim is interviewed, but this standard should be worked toward as a matter of good investigative practice.

Section 2: General Provisions on Investigative Measures

Article 111: General Provisions on the Issuance of Warrants and Orders

1. Except as otherwise provided in the MCCP, a warrant or an order from a competent judge must be obtained prior to executing the following measures:
 - (a) search of premises and dwellings;
 - (b) search of a person and objects in his or her possession;
 - (c) search of a vehicle;
 - (d) seizure of a computer and access to computer data;
 - (e) a production order;
 - (f) temporary seizure of proceeds of crime or property used in or destined for use in a criminal offense;
 - (g) covert and other technical measures of surveillance and investigation;
 - (h) physical examination;
 - (i) DNA analysis;
 - (j) examination of the mental state of a suspect or an accused;
 - (k) autopsy and exhumation; and
 - (l) unique investigative opportunity.
2. Applications for the warrants and orders listed in Paragraph 1 may be submitted at any stage during the proceedings.
3. All warrants and orders must be written and issued in duplicate, of which one copy is kept with the registry.

4. When determining whether to grant a warrant or an order, the competent judge must do so in accordance with the principle of proportionality.
5. Where the warrant or order is requested by the prosecutor or the police, the original warrant or order must be kept by the prosecutor and added to the case file. The results of the investigative measures taken under Articles 118–146 must also be added to the case file.

Commentary

Paragraph 2: It is important to emphasize that, although the measures listed in Paragraph 1 are contained in the section on criminal investigation, they may be employed at a later stage of the proceedings. For example, a judge may order any of these measures during the confirmation hearing or during the trial, as provided for in Article 112(5).

Paragraph 4: Domestic and international courts have determined that the *principle of proportionality* means that there is a rational connection between the aim of a particular measure and the means used to pursue it, and that a fair balance must be struck between the demands of the general interest of the community in combating criminality and the requirements of the protection of the human rights of the person subject to a particular measure of criminal investigation.

Article 112: General Provisions on the Application for Warrants and Orders

1. The prosecutor may submit an application for any of the warrants or orders set out in Articles 118–146.
2. The police may submit an application for the warrants set out in Articles 119, 123, 128, and 129 only when carrying out urgent measures prior to the initiation of an investigation under Article 94 and during the investigation in exigent circumstances where the time it would take to seek a warrant or an order through the prosecutor could result in the loss of evidence.
3. The defense may request an order under Articles 131, 141, 144, and 145.
4. A victim may request an order under Article 133.

5. During a confirmation hearing under Article 201 or during a trial or an appeal, the court may order any of the measures set out in Article 111 under the court's power to order the production of additional evidence under Article 239.
6. Applications for warrants and orders must be written, except as otherwise provided for in the MCCP.

Article 113: General Provisions on the Execution of Warrants and Orders

1. Any warrant or order issued by a judge may be executed anywhere in [insert name of state] without further formal requests to other trial courts.
2. A warrant or order issued by a judge must identify by name or official capacity the person or persons authorized to execute the warrant or order.

Article 114: General Provisions on the Seizure of Objects and Documents

1. Under the conditions set out in the MCCP and in the applicable law, during a criminal investigation, the police are authorized to seize:
 - (a) objects or documents specified in a search warrant or an order issued by a competent judge;
 - (b) objects or documents with regard to which probable cause exists that they represent evidence of a criminal offense;
 - (c) objects or documents with regard to which probable cause exists that they were used in, acquired by, or came into existence through a criminal offense;
 - (d) objects that police have reason to believe are intended for use in an attack or to inflict injury upon a person;
 - (e) objects that police have reason to believe may endanger the general safety of the public or property; and
 - (f) objects that are subject to mandatory seizure or prohibited under the applicable law.

2. A record of all objects or documents seized during the criminal investigation must be made upon seizure. The record must include:
 - (a) a description, accompanied by a photograph, when possible, of the objects or documents seized;
 - (b) the date, time, and place of the seizure;
 - (c) the identity of the person from whom the objects or documents were seized;
 - (d) the identity of the authorized official who seized the objects or documents; and
 - (e) the reasons for seizure.
3. The record of all objects or documents seized during the criminal investigation must be signed by the authorized official who seized the objects or documents.
4. A copy of the record must be given to the person from whom the objects or documents were seized.
5. The seized objects or documents must be taken immediately to the prosecutor, along with the written record as detailed under Paragraph 2.
6. The prosecutor must order that objects or documents wrongfully seized be returned to their owner immediately or, if return is not immediately feasible, that the objects or documents are placed in storage, in accordance with Article 101, until such time as they can be returned to their owner.
7. Seized objects must be properly managed so as to prevent loss of value or deterioration in physical condition.
8. Seized objects and documents must be returned to the person from whom they were seized or to the owner as soon as the reasons for their seizure in criminal proceedings cease to exist, unless otherwise provided for in the MCCP or in the applicable law.
9. A person whose property has been seized during a criminal investigation may appeal the seizure under Article 295.

Commentary

Article 114 underscores the importance of handling, storing, managing, and record keeping by the police with regard to seized objects and documents. In many post-conflict states, poor records are kept of items seized. In addition, in some states, items may be lawfully seized but not returned to their rightful owner, as should be required by law. Moreover, objects or documents seized are often not properly dealt with; seized items should be placed in a bag, wrapped or sealed, and then tagged to identify the

owner and the case. Providing for a comprehensive and systematic methodology for the management of seized objects and documents is important not only for protecting the property rights of victims but also for preventing incidences in which police officers take personal ownership or make personal use of seized objects. Proper management of seized items also facilitates the criminal investigation process and ensures that valuable pieces of evidence are not lost. Article 114 does not provide for such a system but instead sets out broad guidelines on dealing with seized items. In addition to the provisions of the law on seizure of objects and documents, the police and the prosecution service should establish standard operating procedures on record keeping and managing seized objects.

Paragraph 1: Paragraph 1 consolidates the powers provided for in the MCCP and MPPA authorizing the police to seize objects and documents.

Article 115: Inadmissibility of Evidence Obtained without a Warrant or an Order

1. Where a warrant or an order is required under the MCCP for the execution of any of the measures under Part 3 of Chapter 8 and the measure was executed without a warrant or an order from a competent judge, the evidence obtained in the execution of such a measure is inadmissible as evidence before the court.
2. Where validation of a competent judge is required for a measure executed without a prior warrant or an order, and such measure is not validated by a judge in accordance with the MCCP, the evidence obtained in the execution of such a measure is inadmissible as evidence before the court.

Commentary

The MCCP contains two general exclusionary rules with regard to investigative actions under which evidence may be automatically deemed inadmissible as evidence at trial. The first rule, dealt with under Article 115(1), pertains to actions taken without a warrant or order from the court, where a warrant or order is required under the MCCP. Included under this exclusionary rule is the situation where the police or prosecutor have obtained a warrant or order but in undertaking the investigative action go beyond what is permitted in that order or warrant. In this case, the actions that went beyond the parameters of that which was specified in the warrant or order would be deemed to have been undertaken without a warrant. The second exclusionary rule, addressed under Article 115(2), pertains to a situation where the police or the prosecutor under-

takes an investigative action without a warrant, where a warrantless search is allowed under the MCCP (e.g., a search without a warrant under Article 120[1]). Under the MCCP, all such investigative actions require validation by a judge. Where no validation of a particular investigative action is obtained, any evidence obtained is inadmissible as evidence at trial.

It must be noted that Article 115 does not apply to the breach of the specification of a warrant, as when a warrant is executed outside of the hours specified in the warrant by the judge. Where the specifications of the warrant are breached, this will not automatically result in the exclusion of evidence, but the court should consider whether the evidence should be excluded under Article 115. Reference should be made to Article 115 and its accompanying commentary for a discussion of this discretionary exclusionary rule.

Section 3: Gathering Information from Suspects, Victims, and Other Persons

Article 116: Provisional Detention of Persons on the Scene of a Criminal Offense

1. The police may detain any person found at the scene of a criminal offense where there is reason to believe:
 - (a) that the person could provide information relevant to the criminal investigation; and
 - (b) that gathering information from the person at a later time would be impossible or would significantly delay the proceedings, or would cause other difficulties.
2. Detention under Paragraph 1 may last no longer than necessary to ascertain the name and address of the person who is provisionally detained and any other relevant information. Detention may not last longer than six hours.

Article 117: Taking of Photographs and Fingerprints of Arrested Persons and Other Persons

1. The police may photograph and take fingerprints of an arrested person.
2. The prosecutor may authorize the police to release the photograph for general publication, where it is necessary to establish the identity of the arrested person or in other cases where the release is important for effectively conducting the investigation.
3. If it is necessary to identify whose fingerprints have been found on certain objects, the police may take the fingerprints of persons who were likely to have come into contact with such objects.

Commentary

It is common practice for police to photograph and take the fingerprints of arrested persons. What happens to the photographs and fingerprints after they have been taken is more of an issue. Fingerprints may be tested against those found at the scene of a crime and used as evidence at trial; a photograph may be used to assist in identifying the suspect in a case. All these measures may be executed by the police without a warrant or other authorization. Authorization is required, however, when a photograph of a suspect is released to the general public. Because of the potential infringement upon the suspect's rights to privacy and to presumption of innocence, photographs may be released only where the prosecutor decides that the photograph is necessary either to establish the suspect's identity or to continue to conduct the investigation effectively.

Under Article 117, the police are allowed to take fingerprints without a warrant from both suspects and persons whom the police believe may have left fingerprints at the scene of the crime.

The MCCP does not address the issue of use of personal data such as photographs or fingerprints in the long term. Legislation on data protection is necessary to lay out the relevant rules on the use of fingerprints and photographs, including their storage and retention, who can access them, and whether they can be shared with other agencies or other states.

Section 4: Search and Seizure

General Commentary

The search of premises or a dwelling, whether the home of a person or the place of work, constitutes an invasion of privacy and is permissible only to ensure an effective criminal investigation. Section 4 was drafted in such a way as to balance individual rights, such as the right to privacy with criminal investigation needs. Section 4 was drafted with the input of police officials, human rights advocates, and academics with expertise in criminal investigative methods and is also based on research conducted on the search and seizure laws of many nations, in an effort to distill the best practices standards. This section contains all the information usually found in a criminal procedure code and more: certain elements of it are commonly seen in a standard operating procedure (SOP) or implementing/clarifying regulation on search and seizure. (Section 3 does not, however, contain tactical guidance on planning, reconnaissance, preparation, briefing, and the manner in which the search will be conducted that is often found in an SOP or implementing/clarifying regulation.)

Unauthorized search of premises or a dwelling is criminalized under Article 110 of the MCC. Reference should be made to Article 110 of the MCC for a discussion on the scope and meaning of this criminal offense.

Subsection 1: Search of Premises and Dwellings

Article 118: General Provisions on the Search of Premises and Dwellings

1. Entry into and search of premises or a dwelling may be executed when:
 - (a) probable cause exists that a specific person has committed a criminal offense; and
 - (b) probable cause exists that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) seizure or preservation of traces of a criminal offense or objects relevant to the investigation of the criminal offense.
2. Except as otherwise provided for in Article 120, a warrant is required for entry into and search of premises or a dwelling.

Commentary

Each state has developed jurisprudence on the meaning of *premises* and *dwellings* in the context of a search. The terms *premises* and *dwellings* under the MCCP are taken to mean private and business premises and all types of dwellings, including unconventional dwellings, such as vehicles and boats modified for living and sleeping, and other temporary dwellings (e.g., hotel rooms) or permanent dwellings. Land can also be considered a premises. A vehicle found on or in premises or dwelling that is the subject of a warrant may be searched as part of the premises or dwelling. (This warrant should be distinguished from one used to search a vehicle under Article 127, in which the search is directed solely at the vehicle rather than the premises on which the vehicle is located.) No warrant is needed for searches of public places (where a person has no reasonable expectation of privacy).

Reference should be made to Article 1(36) for the definition of *probable cause*.

Article 119: Search of Premises and Dwellings under a Warrant

1. An application for a search warrant may be submitted orally or in writing to the competent trial court.
2. An oral application for a search warrant may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
3. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication. The elements required in a written warrant, detailed under Paragraphs 5 and 6, must be orally relayed to the competent judge.
4. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the search warrant and for placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
5. Where a written application for a search warrant is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) a description and location of the premises or dwelling that is the subject of the application for a search warrant;

- (c) the particular criminal offense(s) to which the application relates and the alleged perpetrator(s) of the criminal offense(s);
 - (d) a statement declaring whether the purpose of the search warrant is for locating a suspect or his or her accomplices or for locating evidence of the criminal offense. Where the search warrant is sought in order to locate evidence of the criminal offense, the application must outline the specific evidence sought;
 - (e) the facts that substantiate the probable cause that the suspect, his or her accomplices, or evidence traces of the criminal offense will be found at the designated premises or dwelling; and
 - (f) a request that the competent judge issue a search warrant in order to find the person(s) or evidence as described in Subparagraph (d).
6. An application for a search warrant may also contain:
- (a) a request that the search warrant be executable at any time of day or night, where probable cause exists that the execution of the search warrant at any time of day or night is necessary for the effective execution of the warrant or for the safety of the persons involved in the search; or
 - (b) a request that the executing authorized official execute the warrant without prior presentation of the warrant, where there is probable cause that the evidence sought may be easily and quickly tampered with, removed, or destroyed if not seized immediately, or where there is a danger to the safety of persons involved in the search, or other persons, if the warrant is presented.
7. The competent judge may issue a search warrant upon the consideration of the oral or written application, where the criteria set out in Article 118 are met.
8. The warrant must contain the following:
- (a) the name of the issuing court and the signature of the competent judge who issued the search warrant;
 - (b) the time, date, and place of issuance, where the search warrant has been obtained through an oral request;
 - (c) the name and details of the person to whom the warrant is addressed and the title or rank of the person(s) authorized to execute the warrant;
 - (d) the purpose of the search;
 - (e) the name and description of the person or persons being sought or a description of the evidence of the criminal offense being sought;
 - (f) a description of the dwelling or premises to be searched, including the address, ownership, and any other means of identification;

- (g) a direction that the warrant must be executed between the hours of 6:00 a.m. and 9:00 p.m., or, where authorized by the court, a direction that the warrant may be executed at any other time;
 - (h) authorization for the executing authorized official to enter the premises without giving prior notice, where relevant;
 - (i) a direction that the warrant and any objects or documents seized should be delivered to the prosecutor without delay;
 - (j) an instruction that the resident of premises or a dwelling to be searched is entitled to notify his or her lawyer and that the search must be postponed for a maximum of two hours after counsel has been informed about the search, except where exigent circumstances exist or where his or her lawyer cannot be reached; and
 - (k) the expiration date of the warrant.
9. A search warrant is valid for fourteen working days, beginning on the date it was issued, except as otherwise specified by the judge in the warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained without a valid warrant is inadmissible at trial.

Article 120: Search of Premises and Dwellings without a Warrant

1. Entry into, search of, and seizure of property from premises or a dwelling can be executed without a search warrant where:
- (a) a resident over the age of eighteen years old of the premises or dwelling voluntarily consents to a search;
 - (b) the entry and search are necessary to safeguard or preserve the scene of a criminal offense;
 - (c) the police are in hot pursuit of a suspect who enters the premises or dwelling;
 - (d) there is an immediate danger to the safety or security of a person or persons in the premises or dwelling; or

- (e) there is an immediate danger that the person to be apprehended at the premises will flee or that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge.
2. A search without a warrant under Paragraph 1(a) may be conducted only when the resident confirms his or her consent to the search by signing a waiver prior to its commencement. The resident may revoke his or her consent at any time during the search, whereupon the search must be terminated immediately.
 3. Where a search is conducted without a warrant for the reasons detailed under Paragraph 1, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent trial court.
 4. The competent judge must determine whether the search was executed in accordance with the MCCP, and in particular whether the conditions under Article 118 and under Paragraph 1 of Article 120 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, he or she must issue an order validating the search without a warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 1) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Article 121: Execution of a Search of Premises or Dwellings

1. The police may use reasonable force to enter premises or a dwelling during a search where:
 - (a) there is no response to the police knocking on the door of the premises or dwelling;
 - (b) the resident or other persons present in the premises or dwelling resist entry;
 - (c) the premises or dwelling is uninhabited or unoccupied; or

- (d) a substantial risk exists that giving advance notice of entry will result in armed resistance or might endanger the lives or health of people or that the evidence will be tampered with, removed, or destroyed.
2. A reasonable effort must be made to ensure that the search is conducted in the presence of the resident of the premises or dwelling or other persons present at the time the search warrant is being executed.
3. If necessary for the conduct of the investigation, and while the search is being made, the police may prohibit any person present from leaving the premises or dwelling and may require other persons to be present.
4. When a search is executed under a warrant, a copy of the search warrant must be given to the resident of the premises or dwelling at the time the warrant is executed, except if otherwise provided for in the warrant. If no residents are present, a copy of the warrant must be given to any other person present at the premises or dwelling at the time of the search. If no one is present, a copy of the warrant must be left at the premises or dwelling.
5. Upon entry and prior to the search, a resident of the premises or dwelling being searched must be given the opportunity to voluntarily hand over objects sought to the police.
6. A resident of the premises or dwelling being searched must be informed that he or she has the right to notify his or her counsel, who may be present during the search. If the resident demands that counsel be present during the search, the police must postpone the beginning of the search until the arrival of counsel.
7. The postponement of the search under Paragraph 6 may last no longer than two hours after counsel has been informed about the search. In exigent circumstances where there is a substantial risk that postponement under Paragraph 6 will result in evidence being tampered with, removed, or destroyed or will endanger the lives or health of people, or where counsel cannot be reached, the police may begin with the search even before the expiration of the two-hour time limit.
8. Where no residents or persons are present at the time of the search, the police must, where possible, provide for the presence of at least one independent observer, who must sign the record of the search.
9. In executing the search warrant, only objects and documents that relate to the purpose of the search, as set out in the warrant, may be seized.

Commentary

The provisions on the execution of a search were drafted after a comprehensive survey of comparative domestic legislation on search of premises and dwellings. Best practices standards were identified and then integrated into Article 121. Many features of Article 121—such as the requirement that the resident be given a copy of the warrant, the requirement that counsel may be present during the search, and the use of an independent observer where no resident is present—have been integrated into the criminal procedure law of many post-conflict and transitional states. Many experts argue that in post-conflict states, where the police may not have been trusted by the general public or may have routinely violated the rights of the population in the execution of its powers (such as the power to search premises and dwellings), it is important to integrate oversight mechanisms such as the presence of a lawyer or observer at the scene of the search. Thus, Paragraph 8 of this article introduces this safeguard.

Subsection 2: Search of a Person and Objects in His or Her Possession

Article 122: General Provisions on the Search of a Person

1. A search of a person means the examination of the exterior of a person's body, including that person's mouth and hair. Such a search also includes the examination of a person's clothes and other things he or she has on his or her person and the examination of bags, packages, and other objects that a person has in his or her possession or under his or her control at the time of the search.
2. A search of a person may be executed where probable cause exists that the search will result in the seizure or preservation of evidence of a criminal offense.
3. Except as otherwise provided for in Article 124, a warrant is required for a search of a person.

Commentary

It is worth distinguishing a search of a person under Article 122 from other forms of searches. Article 122 does not cover a security search that would be conducted at a police station or detention center when a person is searched upon admission. Nor does

Article 122 cover what is known colloquially as a *stop and frisk* or a *pat down* search, which is a search that may be conducted by police to dispel danger, such as where a person is suspected of carrying a dangerous weapon. A frisk involves the patting of the outer clothing of a person to detect by sense of touch if a concealed weapon or other dangerous items are being carried. This power is not a matter of criminal procedure but of policing law and is dealt with under the MPPA.

A search of a person under Article 122 is also distinct from a physical examination under Article 142. There are great differences among legal systems as to what measures represent a search of a person and what measures constitute a physical examination. For example, in some systems a search of a person relates only to the search of the person's clothes and other items in his or her possession. In other systems, a search of a person may allow the examination of the body of a person, where grounds exist. Under the MCCC, a search of a person covers a full search of the exterior of a person's body, including the person's mouth and hair. A physical examination, in contrast, is classified as a forensic measure under the MCCC, as blood or cells may be taken from the person and the interior of his or her body (i.e., bodily orifices) may be examined. A physical examination is much more intrusive than a search of a person and thus is subject to stricter controls.

Whatever the definition of a search of a person, the most important element is that the legal provisions regulating it adequately protect the rights of the person subject to the search, while allowing for the effective investigation of the criminal offense. The European Court of Human Rights has held that the right to privacy of the individual is taken to encompass the physical integrity of the person (see *X & Y v. The Netherlands*, application no. 8978/80 [1985], ECHR 44 [October 27, 1985]), and therefore the right to privacy must be adequately balanced against the need to conduct an effective criminal investigation by incorporating a range of procedural safeguards. Article 122 seeks to adequately balance the right to privacy against the needs of the criminal investigation. It also seeks to set out a comprehensive framework on body searches rather than merely providing broad principles. In this way, Article 122 lies somewhere between a usual criminal procedure provision on search of persons and a standard operating procedure or an implementing or clarifying regulation, with much more detail than the former and less detail than the latter. Articles 122–125 are based on research on the laws, procedures, and best practices standards of many different states.

An unauthorized search of a person and his or her belongings is classified in the MCC as a criminal offense. Reference should be made to Article 109 of the MCC and its accompanying commentary.

Article 123: Search of a Person under a Warrant

1. An application for a search of a person may be submitted orally or in writing to the competent trial court.

2. An oral request for a search of a person may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
3. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication.
4. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant and placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
5. Where a written application for a search warrant is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the warrant for a search is sought;
 - (c) the particular criminal offense that he or she is suspected of or the evidence sought that is necessary for the investigation;
 - (d) the facts that indicate that the search is necessary;
 - (e) a request that the competent judge issue a warrant for a search in order to find the person or objects, as described under Article 122(2).
6. The competent judge may issue a search warrant upon the consideration of the oral or written application, where the criteria set out in Article 122 are met.
7. The warrant must contain the following:
 - (a) the name of the issuing court and the signature of the competent judge who issued the search warrant;
 - (b) the time, date, and place of issuance, where the search warrant has been obtained through an oral request;
 - (c) the name and details of the person to whom the warrant is addressed and the title or rank of the person or persons authorized to execute the warrant;
 - (d) the purpose of the search;
 - (e) a description of the evidence of the criminal offense or other objects relevant to the investigation of the criminal offense that are being sought;
 - (f) a direction that the warrant and any evidence seized should be delivered to the prosecutor without delay; and
 - (g) the expiration date of the warrant.

8. A search warrant is valid for fourteen working days after the date on which it was issued, except as otherwise specified by the judge in the search warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained without a valid warrant is inadmissible at trial.

Article 124: Search of a Person without a Warrant

1. A search of a person may be executed without a warrant where:
 - (a) a person consents to a search;
 - (b) a person is being arrested or detained and the police have reasonable grounds to believe that:
 - (i) the person is carrying, transporting, or has under his or her possession firearms, explosives, or other weapons or objects that can be used for an attack, self-injury, or injury of other persons, or to aid the person in fleeing the scene; or
 - (ii) the search will result in the preservation of the evidence of a criminal offense and there is an immediate danger the evidence will be tampered with, removed, or destroyed before a warrant could be obtained from a judge.
2. A search without a warrant under Paragraph 1(a) can be conducted only when the person to be searched confirms his or her consent to the search by signing a waiver prior to the search. The person may revoke his or her consent at any time during the search, whereupon the search should be terminated immediately.
3. Where a search of a person is conducted without a warrant under Paragraph 1, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
4. The competent judge must determine whether the search was executed in accordance with the MCCP and, in particular, whether the conditions under Paragraph 1 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, the judge must issue an order validating the search without a warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 1) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Paragraph 1(b): The terms *arrested* and *detained* used in this paragraph may include a person whose movement has been restricted at the crime scene under Article 116 or a person whose movement has been restricted during the search of premises or a dwelling under Article 121.

Article 125: Execution of a Search of a Person

1. A search of a person must be conducted in a respectful manner.
2. A search of a person must be conducted by a person of the same sex as the person being searched. If a police officer of the same sex as the person being searched is not present at the place of the search, the police officer may authorize and instruct any suitable person of the same sex to perform the search.
3. The search must be conducted out of sight and presence of persons of the opposite sex.
4. A record of the search of a person must be made and must include:
 - (a) the name of the person searched;
 - (b) the name of the person who conducted the search; and
 - (c) the name of any other persons present during the search;
 - (d) a list of items seized during the search.
5. The person who was searched must be given a record of the search.

Commentary

Article 125 provides a number of core principles that must be adhered to in executing a search of a person. The search must be conducted respectfully (Paragraph 1), by a person of the same sex as the person being searched (Paragraph 2), and out of sight or presence of persons of the opposite sex (Paragraph 3). In some post-conflict states,

such as East Timor, where there is a lack of female police officers to conduct searches, the only solution possible is for a female who is not a police officer to be deputized by a male police officer to search the female suspect under the instruction of the male police officer, who cannot see the search but is close enough in proximity to direct the person conducting the search.

Paragraphs 4 and 5: As with all investigative acts, an accurate record of the search must be kept. Paragraph 4 lays out the requirements of what should be recorded; Paragraph 5 requires that the person who is searched be given a record of the search. This record will include a list of items that were seized; any seized property must be recorded and properly managed. Reference should be made to Article 114, which addresses the recording and management of seized objects or documents in greater detail.

Subsection 3: Search of Vehicles

Article 126: Inspection of a Vehicle

1. An inspection of a vehicle means a provisional examination of the accessible areas outside and inside the vehicle or other mode of transport, including the driver's and passenger's areas, glove and other compartments, and trunk.
2. The police may perform an inspection of a vehicle without a warrant where:
 - (a) probable cause exists that a criminal offense has been committed; and
 - (b) there is reason to believe that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) the seizure or preservation of evidence of a criminal offense.
3. The police may also perform an inspection of a vehicle without a warrant where:
 - (a) a person in the vehicle is being arrested or detained; and
 - (b) there are reasonable grounds to believe that the person is carrying, transporting, or has under his or her possession firearms, explosives, or other weapons or objects that can be used for an attack, self-injury, or injury of other persons, or to aid the person in fleeing the scene.
4. A record of the inspection must be made and must include:
 - (a) the name of the person whose vehicle was inspected;
 - (b) the name of the person who conducted the inspection;

- (c) the name of any other persons present during the inspection;
 - (d) a list of items seized during the inspection.
5. The person whose vehicle was inspected must be given a record of the search.

Commentary

An inspection of a vehicle involves only a provisional search of that vehicle by the police. No warrant is required where the criteria set out in Paragraphs 2 and 3 are met. A provisional examination of a vehicle is premised on the urgency of the situation. Given that the provisional examination is carried out without a warrant and without judicial supervision, the scope of it is limited. Paragraph 1 refers to the “accessible areas outside and inside the vehicle.” This means that the police cannot dismantle parts of the car in the course of their inspection or authorize a mechanic to do so. An inspection refers to the visual examination of the vehicle’s accessible parts. To dismantle a car, a warrant under Article 127 would be required. Article 127 refers to a “thorough examination of the outside and the inside of the vehicle,” which implies that the vehicle, or parts of it, may be dismantled for further and more comprehensive investigation.

Paragraph 3(a): The terms *arrested* and *detained* used in this paragraph may include a person whose movement has been restricted at the crime scene under Article 116 or a person whose movement has been restricted during the search of premises or a dwelling under Article 121.

Article 127: Search of a Vehicle

1. A search of a vehicle means a thorough examination of the outside and inside of the vehicle or other mode of transport, including the driver’s and passenger’s areas, glove and other compartments, and trunk.
2. A search of a vehicle may be executed when:
 - (a) probable cause exists that a specific person has committed a criminal offense; and
 - (b) probable cause exists that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) seizure or preservation of evidence of a criminal offense.

3. Except as otherwise provided for in Paragraph 9, a warrant is required for a search of a vehicle.
4. An oral request for a search of a vehicle may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
5. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication.
6. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant for a search of a person and for placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
7. Where a written application for a warrant to search a vehicle is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person who owns the vehicle that is the subject of the application for a warrant to search a vehicle;
 - (c) the particular criminal offense in connection with which the application for the search of a vehicle is sought;
 - (d) the facts indicating the probable cause that the search will result in the apprehension of a suspect or an accomplice to the suspect or the seizure or preservation of evidence of a criminal offense; and
 - (e) a request that the competent judge issue a warrant for the search of a vehicle in order to find the intended results of the search described in Paragraph 2(b).
8. The competent judge may issue a warrant to search a vehicle upon consideration of the oral or written application, where the criteria set out in Paragraph 2 are met.
9. A search of a vehicle may be executed without a warrant where:
 - (a) a person in possession of the vehicle consents to a search;
 - (b) there is an immediate danger deriving from the vehicle to the safety or security of persons; or
 - (c) there is an immediate danger that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge.

10. A search of a vehicle without a warrant under Paragraph 9(a) can be conducted only when the person to be searched confirms his or her consent to the search by signing a waiver prior to the search. The person may revoke his or her consent at any time during the search, whereupon the search should be terminated immediately.
11. A record of a vehicle search must be made and must include:
 - (a) the name of the person whose vehicle was searched;
 - (b) the name of the person who conducted the search;
 - (c) the name of any other persons present during the search;
 - (d) a list of items seized during the search.
12. Where a search of a vehicle is conducted without a warrant under Paragraph 9, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
13. The competent judge must determine whether the search was executed in accordance with the MCCP and, in particular, whether the conditions detailed under Paragraph 9 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, the judge must issue an order validating the search without a warrant.
14. The person whose vehicle was searched must be given a record of the search.

Commentary

As discussed in the commentary to Article 126, a search of a vehicle is a broader measure than an inspection of a vehicle and may include the complete dismantling of a car.

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 9) is inadmissible at trial where validation from the judge is not obtained under Paragraph 12.

Subsection 4: Preservation of and Access to Computer Data and Telecommunications Traffic Data

Article 128: Expedited Preservation of Computer Data and Telecommunications Traffic Data

1. A prosecutor may make an order to secure the expeditious preservation of specified computer data and telecommunications traffic data that has been stored by means of a computer or a telecommunications system, where:
 - (a) probable cause exists that a criminal offense has been committed;
 - (b) the prosecutor has reason to believe that the data is relevant to the investigation of the criminal offense; and
 - (c) there are grounds to believe that the data concerned is particularly vulnerable to loss or modification.
2. Where an immediate danger exists that the data concerned will be lost or modified, an order to secure the expeditious preservation of specified computer data or telecommunications traffic data may also be made by the police. The police must promptly inform the prosecutor of the order. The prosecutor must determine whether conditions for the issuance of the order exists and either validate or annul the order of the police.
3. An order to obtain the expeditious preservation of computer or telecommunications traffic data may be made against:
 - (a) a specified person who is in possession or control of the data concerned; or
 - (b) a service provider or providers.
4. An order to obtain the expeditious preservation of specified computer data or telecommunications traffic data must require the person against whom the order is directed to preserve and maintain the integrity of the computer data or the telecommunications traffic data to enable the competent authorities to later seek a warrant to obtain access to it and its disclosure.
5. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data must include a warning of the consequences of noncompliance with the order set out in Paragraph 6.

6. Where a person fails to comply with an order to obtain the expeditious preservation of specified computer data or telecommunications traffic data, the prosecutor or the police may request the court to issue an order of noncompliance, which can require the person who has breached the order to be detained until such time as he or she complies or until compliance becomes irrelevant. The term of detention imposed by the court must not exceed four weeks. An order for noncompliance with an order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may be appealed by way of interlocutory appeal under Article 295.
7. An order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may oblige the person against whom the order is directed to keep confidential the order to obtain the expeditious preservation of the specified computer data or telecommunications traffic data for the duration of the order's application.
8. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may require that the service provider disclose a sufficient amount of traffic data to enable the police and the prosecutor to identify a service provider and the path through which the communication was transmitted.
9. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data can be issued for a period of up to seventy-two hours. Upon expiration of this time limit, the order may be renewed only by a competent judge upon the written application of the prosecutor.
10. A judge may renew the order to obtain the expeditious preservation of specified computer data or telecommunications traffic data for a period of time as long as necessary up to a maximum of ninety days, or up to a maximum of one hundred and eighty days where the order has been made in response to a request for mutual legal assistance under Chapter 14, Part 1.

Commentary

Article 128 is directed at a service provider or another person who is in possession or control of computer data or telecommunications traffic data that must preserve that data. Article 128 allows the prosecutor and the police, in cases of urgency under Paragraph 2, to order the service provider or other person to preserve or secure data that is relevant to the criminal investigation. This particular procedural power is inspired by Articles 16 and 17 of the Council of Europe Convention on Cybercrime (hereafter Convention on Cybercrime). Because of its newness, it is absent from many domestic criminal procedure codes, but it may be a valuable addition. The power to preserve computer and telecommunications data is pivotal to the investigation of cybercrime offenses (such as those contained in Section 16 of the Special Part of the MCC) and a range of

other offenses such as child pornography (Article 118 of the MCC). According to the *Explanatory Report to the European Convention on Cybercrime* (hereafter *Explanatory Report*), “[t]he ever-expanding network of communications opens new doors for criminal activity in respect of both traditional offenses and new technological crimes. Not only must substantive criminal law keep abreast of these new abuses, but so must criminal procedure law and investigative techniques. . . . [Preservation of stored computer data] is an important new investigative tool in addressing computer and computer-related crime, especially crimes committed through the Internet. First, because of the volatility of computer data, the data is easily subject to manipulation or change. Thus, valuable evidence of a crime can be easily lost through careless handling and storage practices, intentional manipulation or deletion designed to destroy evidence or routine deletion of data that is no longer required to be retained” (paragraphs 132 and 155).

A *service provider*, according to Article 1(c) of the Council of Europe Convention on Cybercrime, is “any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and any other entity that processes or stores computer data on behalf of such communication service or users of such service.” The term *computer data*, according to Article 1(b) of the Convention on Cybercrime, means “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function.” Computer data is also called *information technology data*. The term *traffic data* refers to information, including the location data that indicates the origin, destination, route, time, date, size, duration, or type of a communication conducted via telephones, computer networks, or other forms of telecommunications and information technology or the type of underlying service (Article 1[d] of the Council of Europe Convention on Cybercrime). The term *telecommunications data* includes data about fixed telephones, mobile phones, VoIPs (Internet phones), e-mail messages, text messages, multimedia messages, Internet communications, and so forth.

According to the *Explanatory Report*, “speed and, sometimes, secrecy are often vital for the success of an investigation” (paragraph 133). The powers in Article 128 pave the way for the prosecutor to access information. These powers do not give police carte blanche to view computer data without a warrant. When the police are authorized to preserve computer data, they are not allowed to access all the data that is preserved; the data is merely preserved and kept safe, pending the issuance of a warrant allowing the police and prosecutor to view it. For access to preserved computer data, the prosecutor may apply under Article 130 (providing for seizure of computer data) for access to telecommunications traffic data, Articles 134–140 (providing for covert technical measures of surveillance), or Article 131 (providing for production orders). A production order would be easier to obtain because it requires a lower threshold of proof; however, a company required to produce telecommunications traffic data is not required to keep this request confidential as it would be with regard to a covert measure (as required by Article 137[7]). Moreover, a covert measure is not necessarily a one-time measure, whereas a production order is.

Under Articles 134–140, the prosecutor may apply for the real-time collection of telecommunications traffic data. It may be noted that Article 128 refers to computer data that is stored and accessible to a service provider or another person. According to the *Explanatory Report*, the powers of the sort contained in Article 128 of the MCCP “do not apply to the real-time collection and retention of future traffic data or to real-

time access to the content of communications. . . . The measures described in the article operate only where computer data already exists and is currently being stored” (paragraphs 149–150). The *Explanatory Report* also notes that *data preservation* must be distinguished from *data retention*: “while sharing similar meanings in common language, they have distinctive meanings in relation to computer usage. To preserve data means to keep data, which already exists in a stored form, protected from anything that would cause its current quality or condition to change or deteriorate. To retain data means to keep data, which is currently being generated, in one’s possession into the future. Data retention connotes the accumulation of data in the present and the keeping or possession of it into a future time period. Data retention is the process of storing data. Data preservation, on the other hand, is the activity that keeps stored data secure and safe” (paragraph 151).

During the time in which computer data or telecommunications data is being preserved, the service provider or other person in possession or control of the stored computer data does not have to render the data inaccessible to legitimate users (*Explanatory Report*, paragraph 159). The investigation of computer-related criminal offenses or criminal offenses that are committed through the Internet requires specific skills and expertise. Considerable training of a cadre of police officers and prosecutors in computer-related investigative techniques is required prior to implementing a power such as that contained in Article 128. It is also important that a state possess a law dealing with telecommunications or Internet service providers that supplements criminal procedure powers by setting out the duties of service providers with regard to police investigations and the preservation or disclosure of computer data, including traffic data.

Paragraph 6: Usually, the penalty for failure to comply with an order of the prosecutor under Article 128 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes, Paragraph 6 provides for such. Reference should be made to Article 295, on interlocutory appeals, which provides a mechanism to appeal the trial judge’s determination under Paragraph 6.

Article 129: Identification of a Subscriber, Owner, or User of a Telecommunications System or Point of Access to a Computer System

1. A prosecutor may make an order to a telecommunications service provider to disclose to him or her:
 - (a) the identity of a subscriber, owner, or user of a specific telecommunications device or point of access to a computer system;

- (b) the identification of the telecommunications device or point of access to a computer system; or
 - (c) information about whether a specific telecommunications device or point of access to a computer system is in use or active or has been in use or active at a specific time.
- 2. A prosecutor may make an order under Paragraph 1 where:
 - (a) reasonable suspicion exists that a criminal offense has been committed; and
 - (b) there are grounds to believe that data requested under Paragraph 1 represents evidence of a criminal offense or can facilitate the execution of further investigative measures.
- 3. Where an immediate danger exists that the data concerned will be lost or modified, an order under Paragraph 1 may also be made by the police. The police must promptly inform the prosecutor of the order. The prosecutor must determine whether conditions for the issuance of the order exist and either validate or annul the order of the police.
- 4. The order to the telecommunications service provider to disclose certain data may oblige the person against whom the order is directed to keep the order confidential for the duration of its application.
- 5. The order to identify a subscriber, owner, or user of a telecommunications device or point of access to a computer system must include a warning that noncompliance with the order may result in a fine, as set out in Paragraph 6.
- 6. Where a person fails to comply with the order to identify a subscriber, owner, or user of a telecommunications device or point of access to a computer system, the prosecutor may apply to the court to issue an order of noncompliance that can require the person who has breached the order to be subject to a fine not exceeding [insert monetary amount]. The order may be appealed by way of interlocutory appeal under Article 295.

Commentary

Like Article 128, Article 129 provides power to the prosecutor and the police without them having to resort to an application for a warrant to access the data mentioned in this article. The aim of Article 129 is to empower the prosecutor or the police to acquire information about (a) a particular person when the police or the prosecutor is in possession of information on a specific telecommunications device or a point of access to a computer system; (b) a specific telecommunications device or point of access to a computer system where the police have information on the name of a particular person; or (c) whether a specific telecommunications device or point of access to a computer system is active or was active at a certain specified time and date. For example, under (a), the prosecutor may have information about a criminal offense that has been

perpetrated through the Internet, and specifically through a particular computer. Article 129 gives the prosecutor the power to order the service provider to provide the name of the person who is registered to that computer. Under (b), the prosecutor may have the name of a particular person and need access to information on his or her telephone number, for example.

With regard to telecommunications devices, such as telephones, the ability of the telecommunications service provider to provide relevant information to the police or the prosecutor may depend on the legislation in place in the state that applies to the service providers and that sets down their duties with regard to registering users. In some states, a person may not obtain a prepaid mobile phone without his or her name being registered upon the presentation of a valid form of identification. In other states, a prepaid mobile phone may be obtained without registration of the buyer's name. In the latter case, without a change to the telecommunications law, the service provider may not be in a position to provide the information.

Reference should be made to the commentary to Article 128 for the definition of *service provider* and *telecommunications*.

Paragraph 6: Usually the penalty for a failure to comply with an order of the prosecutor under Article 129 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes, Paragraph 6 provides for such. Reference should be made to Article 295 on interlocutory appeals that provide a mechanism to appeal the trial judge's determination under Paragraph 6.

Article 130: Seizure of a Computer and Access to Computer Data

1. Where, during a search under Article 119, Article 120, Article 123, Article 124, Article 126, and Article 127, the police have reason to believe that a computer; a component of a computer; computer data stored on a computer or a component of a computer; or a computer data-storage medium in which computer data may be stored contains evidence relevant to the investigation of the criminal offense, the police may:
 - (a) seize or similarly secure the computer, a component of it, computer data stored on it, or a computer data-storage medium in which computer data may be stored;
 - (b) make and retain a copy of computer data;
 - (c) maintain the integrity of the relevant stored computer data; or
 - (d) render inaccessible or remove the computer data in the accessed computer.

2. The measures set out in Paragraph 1 must be conducted in a manner that minimizes the damage or the intrusion into the privacy of third parties also using the computer, a component of it, or a computer data-storage medium.
3. A warrant is required to examine and access the seized computer data, unless the judge has already authorized this in a search warrant issued under Articles 119 and 120, Articles 123 and 124, and Article 127.
4. Where an immediate danger exists that relevant data will be lost or modified, the police may examine and access seized computer data without a warrant. The police must promptly inform the prosecutor of any measures taken to access seized computer data. The prosecutor must then inform the competent judge of any measures taken by the police to access seized computer data. Where the competent judge concludes that the measure of the police was conducted in accordance with the MCCP, the judge must issue an order validating the measure without a warrant.
5. A search warrant or an order validating the examination of seized computer data under Paragraph 4 may include an order that an expert witness examine the seized computer, a component of it, or a computer data-storage medium in which computer data may be stored.

Commentary

Article 130 consists of two separate elements. The first relates to the power of the police in the course of a search to seize a computer, a component of it, computer data, or a computer data-storage medium; to make and retain a copy of any computer data; to maintain the integrity of stored computer data; and to render inaccessible or remove computer data in an accessed computer. The crux of this power is to preserve computer data pending a further warrant to access it, under Paragraph 3, or, pending a warrantless search, if justified, under Paragraph 4. The second element of Article 130 relates to accessing computer data once it has been preserved. Computer data may be accessed in two circumstances: where a warrant is obtained from a competent judge, and, under Paragraph 4, where there is an immediate danger that the data will be lost or modified. It is important to note that any access to computer data is not real-time interception of data of the sort found in Article 136; only stored computer data is accessed. It should also be noted that Article 130 refers to the seizure of a computer rather than a computer system. A *computer system* means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data (Article 1[a] of the Council of Europe Convention on Cybercrime).

Paragraph 1: The term *computer data*, according to Article 1(a) of the Council of Europe Convention on Cybercrime, means “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a pro-

gram suitable to cause a computer system to perform a function.” A *data-storage medium* refers to a CD-ROM or a diskette.

Paragraph 3: Computer data is generally not considered tangible property and is therefore not covered by ordinary provisions on search and seizure. In order for a search to legally encompass the accessing of computer data (as opposed to its preservation, which is dealt with under Article 128), the judge must include a power in the warrant to search for the data, whether during the search of a dwelling or premises, a vehicle, or a person. Where an existing search warrant does not contain the power to search a computer to obtain computer data, a new warrant must be obtained that provides for this power.

Paragraph 4: Reference should be made to Article 115, which provides that evidence obtained through accessing data without a warrant (and that falls outside the exceptions provided for in Paragraph 4) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Examples of situations in which relevant data could be lost or modified, and thus where a search without a warrant may be justified under Paragraph 4, are where encrypted files are open on a computer or where an e-mail is open (i.e., not downloaded onto the computer) at the time of the search. If the files are not accessed in these cases, the information may be inaccessible in the future.

Paragraph 5: As with Article 128 on the preservation of stored computer data and the partial disclosure of traffic data, searching and seizing stored computer data are complex and require skilled and well-trained investigators. In accordance with Article 19 of the Council of Europe Convention on Cybercrime, Paragraph 5 provides that a person who has knowledge about the functioning of the computer system may be compelled to provide the information necessary to undertake an examination of the seized data. According to the *Explanatory Report*, this provision “addresses the practical problem that it may be difficult to access and identify the data sought as evidence, given the quantity of data that can be processed and stored, the deployment of security measures, as well as the nature of computer operations. It recognizes that system administrators, who have particular knowledge of the computer system, may need to be consulted concerning the technical modalities about how best the search should be conducted” (paragraph 200).

Where a judge decides to appoint an expert witness, the person must be appointed under Article 141. Reference should be made to Article 141 and its accompanying commentary.

Subsection 5: Production Order

Article 131: Production Order

1. A production order is an order that compels a third party to produce documents, records, or other objects in his or her possession before the court.
2. A production order may be granted where:
 - (a) probable cause exists that a criminal offense has been committed; and
 - (b) there are reasons to believe that documents, records, or other objects of a third party represent evidence relevant to the investigation of that criminal offense.
3. A motion for a production order may be filed by the prosecutor.
4. A motion for a production order must be submitted in writing to the competent trial court.
5. The motion for a production order must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the production order is sought;
 - (c) the particular criminal offense to which the motion relates;
 - (d) the reasons for believing that the document, record, or object is relevant to the investigation of the criminal offense; and
 - (e) a request that the competent judge issue a production order.
6. Where the requirements of Paragraph 2 are met, the competent judge may grant a production order.
7. The production order must contain the following:
 - (a) the name of the issuing court and the signature of the judge who issued the production order;
 - (b) the name and details of the person to whom the order is addressed and the title or rank of the person or persons authorized to execute the order;
 - (c) a description of the document(s), record(s), or object(s) that are the subject of the order;
 - (d) a direction as to when and where the document(s), record(s), or object(s) should be delivered;
 - (e) a warning that noncompliance with the order could result in a fine or in the detention of the person to whom the order is addressed, in accordance with Article 41 of the MCCP; and
 - (f) the expiration date of the order.

Commentary

Article 131 provides the court with the power, subject to a motion of the prosecutor to order a third party to produce records, documents, or objects relevant to the criminal investigation. The article is purposely broad so as to empower the court to require the production of a wide range of documents, records, or objects. That said, any document, object, or record that is subject to a production order (also known as a *subpoena* in some states) must be linked to an ongoing criminal investigation, and the party who has filed the motion must prove that a criminal offense has been committed and that there is reason to believe that the subject of the production order constitutes relevant evidence in the criminal investigation.

Production orders are usually used to compel banks or legal entities to produce evidence. Documents and records subject to a production order under Article 131 may be, for example, financial records, bank records, or commercial requirements. Article 12(6) of the United Nations Convention against Transnational Organized Crime and Article 31(7) of the United Nations Convention against Corruption require that a state party empower the courts to order the production of such records. According to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 147, paragraph 312), *financial records* include records of financial service companies other than banks. *Commercial records* mean real estate transactions and records of shipping lines, freight forwarders, and insurers. As discussed in the commentary to Article 128, a production order may also be a mechanism by which to require a service provider to provide the prosecutor with telecommunications traffic data. Reference should be made to the commentary to Article 128 for further discussion.

Subsection 6: Preservation and Seizure of Proceeds of Crime and Property Used in or Destined for Use in a Criminal Offense

Article 132: Expedient Preservation of Property and Freezing of Suspicious Transactions

1. A prosecutor may make an order to secure the expeditious preservation of property and freezing of suspicious transactions where:
 - (a) reasonable suspicion exists that the property to be preserved or the transaction to be frozen represents the proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense; and
 - (b) there is a significant risk that the property concerned will be concealed, destroyed, alienated, or in any other way made impossible to retrieve before a warrant, under Article 133, can be obtained from a judge.

2. An order to secure the expeditious preservation of property and the freezing of suspicious transactions temporarily prohibits a third party, such as a financial institution, from transferring, destroying, converting, disposing, or moving property that is the subject of the order.
3. The order of a prosecutor can be issued for up to a period of seventy-two hours. Within this time limit, the prosecutor must seek an order under Article 133. Where an order is not granted under Article 133, the order of the prosecutor ceases to have effect.
4. For the purposes of Article 132, *property* includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Commentary

Article 132 provides an interim measure for a prosecutor to order a third party to preserve property or to freeze a certain suspicious transaction pending an application for seizure under Article 133. The interim preservation of property and freezing of transactions require a lower burden of proof than that of seizure. The requirement is that there is a “reasonable suspicion” that the property or transaction represents the proceeds of crime or property, equipment, or other instrumentalities that have been used in or are destined for use in a criminal offense. In addition, there must be a significant risk that the property concerned will be concealed, destroyed, or alienated before a warrant for seizure may be obtained under Article 133. Reference should be made to Article 1(40) for the definition of *reasonable suspicion*. Under Article 133, the higher standard of “probable cause” is used, in addition to the significant risk test under Article 133(3)(b) and a proportionality test under Article 133(3)(c). The order under Article 132 is finite in nature and ceases to apply after seventy-two hours, which gives the prosecutor enough time to apply for a seizure warrant but not so much time as to unduly restrict the property rights of a person without judicial authorization.

Paragraph 4: The definition of *property* in Article 132 is taken from Article 1(b) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The definition is similar to that contained in the United Nations Convention against Transnational Organized Crime (Article 1[d]) and the United Nations Convention against Corruption (Article 2[d]). The only distinction is the omission of the term “tangible or intangible.” The reason for this exclusion is that *tangible* (meaning property that is detectable with the senses, such as a painting or jewelry) and *intangible* (meaning property that cannot be detected with the senses, such as a claim to a bank account, a stock, or a bond) are subsumed within the terms “corporeal” or “incorporeal,” which have been previously defined in the Council of Europe’s definition of *property*.

Article 133: Temporary Seizure of Proceeds of Crime or Property Used in or Destined for Use in a Criminal Offense

1. A warrant is required for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense.
2. The temporary seizure of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense involves:
 - (a) the temporary prohibition of the transfer, destruction, conversion, disposition, or movement of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense; or
 - (b) the temporary assumption of custody or control of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense on the basis of a warrant for temporary seizure.
3. An application for temporary seizure may be filed by the prosecutor with the registry of the competent trial court where:
 - (a) probable cause exists that the item or items sought to be seized represent the proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense;
 - (b) there is a significant risk that proceeds of crime, property, equipment, or other instrumentalities will be concealed, destroyed, alienated, or in any other way made impossible or difficult to confiscate at the end of proceedings; and
 - (c) there are no less restrictive means to preserve the property in question.
4. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may encompass:
 - (a) property into which proceeds of crime have been transformed or converted;
 - (b) property acquired from legitimate sources, if proceeds of crime have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; and
 - (c) income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted, or from property with which proceeds of crime have been intermingled, up

to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

5. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may include an order to a third party, such as a financial institution, temporarily prohibiting it from transferring, destroying, converting, disposing, or moving property that is the subject of the warrant.
6. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may be granted for the period of time up until the judgment after trial is final.
7. Where a warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities is granted before the indictment has been confirmed under Article 201, the warrant is no longer valid where the investigation is discontinued under Article 98, or where the indictment is not confirmed.
8. Where, under Paragraph 7, a warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities is no longer valid, the property must be returned to the owner or possessor where it has been taken into custody or control. Where the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities prohibited the transfer, destruction, conversion, disposition, or movement of property, all restrictions on dealing with the property must be lifted.
9. The application for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) a description and location of the proceeds of crime, property, equipment, or other instrumentalities that are the subject of the application and an estimation of their value;
 - (c) the particular measure sought by the prosecutor, whether it is the temporary prohibition on the transfer, destruction, conversion, disposition, or movement of property or the temporary assumption of custody or control of proceeds of crime, property, equipment, or other instrumentalities;
 - (d) if the measure sought is the temporary prohibition on the transfer, destruction, conversion, disposition, or movement of property, whether any orders against a third party, under Paragraph 5, are sought;
 - (e) the particular criminal offense or offenses that the application for temporary seizure relates to and the alleged perpetrator of the criminal offense or offenses;

- (f) a declaration that an investigation has been initiated by the prosecutor under Article 94 or that an indictment has been presented under Article 195;
 - (g) the facts that substantiate the probable cause that the proceeds of crime, property, equipment, or other instrumentalities in question constitute the proceeds of crime or property, equipment, or other instrumentalities used or destined for use in a criminal offense;
 - (h) the facts that substantiate the significant risk that proceeds of crime, property, equipment, or other instrumentalities will be concealed, destroyed, alienated, or in any other way made impossible or difficult to confiscate at the end of proceedings; and
 - (i) a request that the competent judge issue a warrant for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities.
10. The competent judge may issue a warrant upon the consideration of the written application, where the criteria set out in Paragraph 3 are met.
11. The warrant must contain the following:
- (a) the name of the issuing court and the signature of the competent judge who issued the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities;
 - (b) the name and particulars of the person to whom the warrant is addressed and the title or rank of the person or persons authorized to execute the warrant;
 - (c) a description and location of the proceeds of crime, property, equipment, or other instrumentalities that are the subject of the warrant and an estimation of their value;
 - (d) an order to prohibit the transfer, destruction, conversion, disposition, or movement of proceeds of crime, property, equipment, or other instrumentalities or an order to temporarily assume custody or control of proceeds of crime, property, equipment, or other instrumentalities;
 - (e) where relevant, an order to a third party to refrain from transferring, destroying, converting, disposing, or moving the property that is the subject of the warrant;
 - (f) a direction that the seized proceeds of crime, property, equipment, or other instrumentalities should be delivered to [insert location] without delay;
 - (g) the duration of the warrant; and

- (h) a declaration that, if the investigation is discontinued or if the indictment is not confirmed, the warrant is no longer valid and the proceeds of crime, property, equipment, or other instrumentalities must be returned to the owner or possessor.
12. A written and reasoned decision must be prepared by the competent judge within a reasonable period after issuing the warrant for the temporary seizure.
 13. A copy of the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities and the accompanying decision must be served upon the prosecutor, the suspect or the accused, and his or her counsel, in accordance with Article 29.
 14. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may be appealed under Article 295.
 15. For the purposes of Article 133:
 - (a) *proceeds of crime* means any economic advantage derived from or obtained directly or indirectly from a criminal offense or criminal offenses. It may consist of any property, as defined in Subparagraph (b); and
 - (b) *property* includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Commentary

Seizure, as provided for in Article 133, is sometimes known as *freezing*. According to Article 2(f) of the United Nations Convention against Transnational Organized Crime, the seizing or freezing of the proceeds, assets, equipment, and other instrumentalities of crime is a legal measure under which a person is temporarily prohibited from transferring, converting, disposing of, or moving his or her property by order of the court. Seizure may be distinguished from *confiscation* or *forfeiture*, which involves the permanent deprivation of property by order of a court (see Article 2[g] of the United Nations Convention against Transnational Organized Crime). Confiscation is provided for in Articles 70–73 of the MCC. Reference should be made to Articles 70–73 of the MCC and their accompanying commentaries for further discussion. The United Nations Convention against Corruption (Article 31[1]) and the United Nations Convention against Transnational Organized Crime (Article 12[1]) both require that a confiscation regime be set in place for the confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense and for the confiscation of the proceeds of crime. Both conventions also require that a seizure or freezing regime be set in place (United Nations Convention against Corruption, Article 31[2] and United Nations Convention against Transnational Organized Crime,

Article 12[2]). Article 133 provides a mechanism for the seizure of property and other instrumentalities used in criminal acts.

Seizure, like confiscation, has been increasingly recognized—both in domestic law and in international conventions—as a valuable tool in the fight against serious crimes such as organized crime, money laundering, drug trafficking, and the financing of terrorism. A number of international conventions requires that states introduce legislation on seizure, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Article 5), the United Nations Convention against Transnational Organized Crime (Article 12), the United Nations Convention against Corruption (Article 31 and Chapter 5), and the International Convention for the Suppression of the Financing of Terrorism (Article 8). Seizure and confiscation are used to ensure that the perpetrators of serious criminal activity do not profit from their crime and that they do not enjoy their illegal gains. Taking away the “capital” of a criminal gang will also hinder the commission of future criminal activities by preventing the reinvestment of funds in criminal activity. According to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, “[c]riminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use and for maintaining the operations of their criminal enterprises. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that Governments have been ineffective in removing the means for continued activities of criminal groups. Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property” (paragraphs 287–288).

It must be noted that the seizing and confiscating of assets and proceeds of crime amounts to an extraordinarily complicated challenge, with which even well-resourced states grapple. The Council of Europe’s *Combating Organized Crime: Best Practice Surveys of the Council of Europe* highlights the fact that “proceeds of crime only rarely fall into the lap of the courts or government like ripe fruit from the tree or vine. What is not investigated by financial intelligence or other personnel may never be learned about at all, for it is very difficult to reconstruct financial flows from crimes long after they have occurred, and harder still to get the money back. . . . Merely to pass laws . . . will not ipso facto lead to a substantial increase in recoveries from offenders or third parties. This extra recovery can happen only if unspent assets can be found, and can be attributed to the possession or control of someone against whom an order can be made” (page 64). In addition to resources, intensive training programs are required for those involved in the investigation of the proceeds of crime. It may be necessary to establish special units or teams to undertake the investigations. The teams may consist of actors from different sectors of the justice system and beyond, including prosecutors, police, and experts in forensic accounting.

As discussed in the commentary to Section 12 of the General Part of the MCC, still other changes to the legal framework in a post-conflict state will be required in order to ensure that seizure and confiscation measures can be implemented. First, the crimi-

nal procedure law must be amended to allow police and prosecutors to gain information on or trace the banking or other transactions of convicted persons and any money held in accounts with a bank as required by Article 12(6) of the United Nations Convention against Transnational Organized Crime and Article 31(7) of the United Nations Convention against Corruption. *Tracing* is a necessary part of confiscation or seizure. It refers to the process by which proceeds of crime are identified for later seizure or confiscation. Tracing requires that the prosecutor have the power to access bank and business records and to require that banks or businesses produce these records. This measure has been incorporated into Article 131 of the MCCP. Second, other changes to domestic banking laws may be required. The most elaborate and extensive provisions on the sorts of amendments required are contained in Article 52 of the United Nations Convention against Corruption and include a requirement that financial institutions verify the identity of customers, take reasonable steps to determine the identity of beneficial owners of funds deposited in high-value accounts, conduct enhanced scrutiny of certain accounts, and maintain adequate records of transactions. Third, it is necessary to regulate procedures for the handling of seized proceeds and property. Regulations should specify who is responsible for taking the seized property and holding it, where it should be held, and what will be done with it. The United Nations Convention against Corruption (Article 31[3]) and the United Nations Convention against Transnational Organized Crime (Article 14) specify that states parties should make provisions to regulate the administration and disposal of seized and confiscated property.

Paragraph 1: The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 146) states that the term “destined for use in” is meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a criminal offense.

Paragraph 2: The definition of *seizure* contained in Paragraph 2 is based on the definition contained in Article 2(f) of the United Nations Convention against Transnational Organized Crime and Article 2(f) of the United Nations Convention against Corruption.

Paragraph 3: In some states, when a judicial assessment is being made of whether proceeds or property should be seized, the burden of proof is shifted to the suspect to demonstrate the lawful origins of the proceeds or property. This is in contrast to the prosecutor being required to prove that the proceeds or property have an unlawful origin. This practice is not generally accepted around the world. Many experts are concerned that the practice violates the presumption of innocence that requires the prosecutor to bear the burden of proof in a criminal case. That being said, treaties such as the United Nations Convention against Corruption (Article 31[8]) and the United Nations Convention against Transnational Organized Crime (Article 12[7]) provide for this possibility. The drafters of the MCCP, in view of the controversy surrounding the shifting of the burden of proof, and in view of concerns about protecting the right to presumption of innocence of a suspect, decided not to include a reverse burden of proof in the MCCP.

Paragraph 4: This paragraph is based on Article 31(4)–(6) of the United Nations Convention against Corruption and Article 12(3)–(5) of the United Nations Convention against Transnational Organized Crime.

Paragraph 14: An appeal against a decision for temporary seizure may be filed under Article 295 by a suspect or an accused or by a prosecutor (where the decision of the court has been not to grant a warrant for temporary seizure requested by the prosecutor). An interlocutory appeal under Article 295 may also be filed by a third party; for example, a third party with a bona fide property or other interest in the proceeds or property seized. Most legal systems that allow the court to seize property provide for some mechanism for a third party to appeal the decision on the basis of that party's right to the property or to the money (that is seized as representing the proceeds of crime). Where seizure and confiscation are conducted under civil law, then the third-party appeal may also be under civil law. Under the MCC and the MCCP, because seizure and confiscation are addressed under criminal law, the third-party appeal is also afforded under the criminal law.

Paragraph 15(a): The definition contained in Paragraph 23(a) is taken from Article 1(a) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The United Nations Convention against Transnational Organized Crime (Article 1[e]) and the United Nations Convention against Corruption (Article 1[e]) also define “proceeds of crime,” although in a more narrow way. The definition in both United Nations conventions refers only to “property” derived from crime rather than “any economic advantage,” which is contained in the Council of Europe Convention. The Council of Europe definition and the MCCP definition both include property but go much further. The *Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* states that “the definition of ‘proceeds’ was intended to be as broad as possible” (paragraph 21).

Paragraph 15(b): The definition of *property* in Paragraph 23(b) is taken from Article 1(b) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The definition is similar to that contained in Article 1(d) of the United Nations Convention against Transnational Organized Crime (Article 1[d]) and the United Nations Convention against Corruption. The only distinction is the omission of the term “tangible or intangible.” The reason for this exclusion is that “tangible” (meaning property that is detectable with the senses, such as a painting or jewelry) and “intangible” (meaning property that cannot be detected with the senses, such as a claim to a bank account, a stock, or a bond) are already subsumed within the terms “corporeal” and “incorporeal” that are found in the Council of Europe's definition of “property.”

Section 5: Covert or Other Technical Measures of Surveillance or Investigation

General Commentary

Criminal gangs are becoming increasingly sophisticated in the methods they employ. Consequently, the means used to investigate crime have also become more sophisticated. Advances in surveillance technology have been of great benefit to the investigation of organized crime, which often involves a closed group of individuals, making it immensely difficult to obtain testimony against ringleaders. International and regional conventions, including the United Nations Convention against Transnational Organized Crime, have urged states to incorporate special investigative techniques into domestic law to use in the course of the investigation of serious and complex crimes such as organized crime, weapons trafficking, trafficking in persons, and smuggling in persons. The Council of Europe Convention on Cybercrime requires states parties to implement technical measures of investigation such as the real-time interception of content data associated with specified computer communications and the real-time collection of traffic data associated with specified telecommunications. In post-conflict states such as Kosovo, given the problems that organized crime created and the lack of legislation authorizing covert surveillance, the United Nations Mission in Kosovo implemented UNMIK Regulation 2002/6 on Covert and Technical Measures of Surveillance.

Section 5 incorporates covert and other technical measures of surveillance and investigation into the MCCP in order to give the police and prosecutors the tools necessary to investigate serious crimes. Because of the highly intrusive nature of these measures, the need to investigate crime must be balanced with the right to privacy of a suspect, an accused, or other persons. The right to privacy is protected under Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article IX of the American Declaration of the Rights and Duties of Man, and Article 11 of the American Convention on Human Rights. The right to privacy encompasses the right to privacy of family, home, and correspondence.

Thus, a delicate balancing act is required, which is why Section 5 was one of the most complex and contentious provisions to draft. Many human rights advocates were opposed to its inclusion in the MCCP, while many other experts were concerned that its omission would hinder the prosecution of the sorts of serious crimes that are endemic in post-conflict societies. The drafters of the MCCP worked with both policing officials and human rights experts in the drafting and vetting of Section 5. In-depth and substantive research was undertaken on similar legislation from around the world. In addition, significant research was undertaken on the human rights dimension of covert surveillance. The European Court of Human Rights is the only human rights body that has dealt with the issue of covert surveillance in detail; its jurisprudence provided significant guidance on the procedural counterbalances necessary to ensure the conformity of covert or other technical measures of surveillance or investi-

gation with international human rights law. The case law of the European Court of Human Rights was studied and deconstructed and then integrated into Section 5 to ensure that all the standards evinced by the court in the sphere of covert surveillance were adequately included (see *Klass v. Germany*, application no. 5029/71 [1978] ECHR 4 [September 6, 1978]; *Malone v. United Kingdom*, application no. 8691/79 [1984] ECHR 10 [August 2, 1984]; *Halford v. United Kingdom*, application no. 20605/92 [1997] ECHR 32 [June 25, 1997]; *Huvig v. France*, application no. 11105/84 [1990] ECHR 9 [April 24, 1990]; *Kruslin v. France*, application no. 11801/85 [1990] ECHR 10 [April 24, 1990]; *Valenzuela Contreras v. Spain*, application no. 27671/95 [1998] ECHR 70 [July 30, 1998]; *PG and JH v. United Kingdom*, application no. 44787/98 [2001] ECHR 550 [September 25, 2001]; *Taylor-Sabori v. United Kingdom*, application no. 47114/99 [2002] ECHR 691 [October 22, 2001]; *Khan v. United Kingdom*, application no. 35394/97 [2000] ECHR 195 [May 12, 2000]; *Govell v. United Kingdom*, application no. 27237/95 [1997] EHRLR 438 [January 14, 1998]; *Ludi v. Switzerland*, application no. 12433/86 [1992] ECHR 50 [June 15, 1992]; *Teixeira de Castro v. Portugal*, application no. 25829/94 [1998] ECHR 52 [June 9, 1998]; *Radermacher and Pferrer v. Germany*, application no. 12811/87 ECHR 34 [May 13, 1991]; *Shahzad v. United Kingdom* [1998] EHRLR 210 [October 22, 1997]; and *X v. United Kingdom*, application no. 7215/75).

The European Court has held that interference with privacy by reason of covert measures may be necessary but must be proportionate. Perhaps more important, interference with privacy must be accompanied by sufficient procedural safeguards as to its conduct and authorization to ensure that the interference is not arbitrary, unpredictable, or uncontrolled. According to the European Court, covert surveillance measures must be provided for by a law that must be accessible to the public and is precise. The law must indicate the permissible covert surveillance techniques that may be used, the category of persons against whom the techniques may be used, the duration of time for which covert surveillance techniques may be undertaken, and the circumstances under which information gathered may be kept on file. In addition, proper methods of independent accountability must exist in relation to the authorization and use of surveillance and its review and supervision. Finally, covert surveillance measures should be used only in relation to serious crimes. (Because the MCC does not contain a full catalog of crimes but generally focuses on the most serious crimes that occur in a post-conflict state, Section 5 does not specify a list of criminal offenses to which it applies. However, Article 136[2] limits the application of surveillance in private premises and the interception of telecommunications content data to offenses carrying a potential penalty of more than five years, given the extremely intrusive nature of these measures. In ordinary domestic provisions on covert surveillance, such a list should be included.)

The use of covert surveillance is in many respects a great advance in criminal investigation. Covert surveillance is, however, an expensive endeavor, and a state should consider carefully whether it has sufficient resources to buy and maintain the necessary equipment. Not only is recording equipment expensive, so too is the media to store recorded conversations, the equipment to duplicate conversations, and the cost of transcription. The use of such measures requires highly trained personnel, including undercover agents, who require special training and whose activities may require additional money. In Kosovo, despite the introduction into law of sophisti-

cated covert surveillance measures, many of these measures have never been implemented because police have neither the training nor the expensive equipment necessary to undertake the measures.

Article 134: General Provisions on Covert or Other Technical Measures of Surveillance or Investigation

1. Covert or other technical measures of surveillance or investigation are the following:
 - (a) *interception of telecommunications content data*, which involves covert interception, access to, monitoring, collection, or recording of the content of communications between persons conducted through telephone, computer networks, or other forms of telecommunications and information technology;
 - (b) *real-time collection of telecommunications traffic data*, which involves obtaining, monitoring, or recording traffic data, including the location data that indicates the origin, destination, route, time, date, size, duration, or type of a communication conducted through telephone, computer networks, or other forms of telecommunications and information technology or type of underlying service;
 - (c) *surveillance in private premises*, which involves covert monitoring, recording, or transcribing of conversations, persons, their movements, or their other activities in private premises or dwellings;
 - (d) *monitoring and recording of private conversations*, which involves covert monitoring, recording, or transcribing of conversations conducted in public or publicly accessible or open spaces, or conversations in which at least one party of the conversation consents to such measure;
 - (e) *targeted observation*, which involves covert monitoring, observation, or recording of persons, their movements, or their other activities in public, publicly accessible, or open spaces; it may include the use of tracking and positioning devices for monitoring the movement of targeted persons or objects;
 - (f) *monitoring of financial transactions and disclosure of financial data*, which involves monitoring of financial transactions conducted through a bank or another financial or business institution, or obtaining information on

deposits, accounts, or transactions kept by such institutions without the consent or the knowledge of the person under investigation;

- (g) *search of letters, packages, containers, and parcels*, which involves inspection, by physical or technical means, of letters, packages, containers, and parcels without the consent or the knowledge of the person under investigation;
- (h) *controlled delivery*, which involves the technique of allowing illicit or suspect consignments to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of a criminal offense and the identification of persons involved in the commission of the offense;
- (i) *deployment of undercover agents*;
- (j) *regulatory purchase of an item*; and
- (k) *a simulation of a corruption offense*.

2. Except as otherwise provided for in Article 135, a warrant is required for covert or other technical measures or surveillance or investigation.

Commentary

Article 134 sets out a number of different sorts of covert or other technical measures of surveillance. It is worth noting that these surveillance or investigative measures are similar to the methods used by military and civilian intelligence agencies, but their purpose is different. The purpose of Section 5 is not simply to gather data about a person in general but to gather data specific to a criminal investigation (and under the supervision of a judge). The surveillance measures listed in Article 134 were compiled through comparative research on domestic legislation and from conventions such as the Council of Europe Convention on Cybercrime.

The term *content data*, used in Article 134, refers to the actual content of a communication, for example, an e-mail or the contents of a phone call as described under Paragraph 1(a). The term *real-time* used in Paragraph 1(b) means the interception of the data is taking place at the same time the data is being transmitted. The opposite to real-time collection of data is the collection of stored data, which is provided for under Article 130. The term *traffic data* used in Paragraph 1(b), according to Article 1(d) of the Council of Europe Convention on Cybercrime, means “any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication’s origin, destination, route, time, date, size, duration, or type of underlying service.”

Article 135: Covert or Other Technical Measures of Surveillance or Investigation without a Warrant in Exigent Circumstances

1. The police do not require a warrant to:
 - (a) open or seize any letter, package, container, or parcel where there is probable cause that an immediate danger to the safety and security of persons exists; or
 - (b) detain a letter, package, container, or parcel where there is probable cause that it contains objects, the possession of which in itself constitutes a criminal offense, or objects that are related to a criminal offense.
2. The police can start implementing the measures set out in Article 134(1)(b), (d), (e), (f), (g), (i), (j), and (k) without a warrant and upon the authorization of a prosecutor where:
 - (a) the warrant cannot be obtained in time and a substantial risk of delay exists that could result in the loss of evidence or an immediate danger to the safety and security of persons or that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge; and
 - (b) the conditions set out in Article 136(1)(a)–(d) have been met.
3. Within twenty-four hours of the prosecutor authorizing the measure without a warrant under Paragraph 2, he or she must send a report to the competent trial court and request a warrant under Article 136, or the prosecutor's authorization becomes null and void.
4. Upon receiving the report under Paragraph 3, the competent judge must determine whether the conditions under Paragraph 2 have been met. Where the competent judge concludes that the covert or other technical measures of surveillance or investigation were conducted in accordance with Paragraph 2, the judge must issue an order validating the prosecutor's authorization and a warrant under Article 136.

Commentary

As a general rule, a warrant is required for all the measures contained in Section 5, although there are some exceptions for exigent circumstances. Under Paragraph 1, the police may open, seize, or detain a letter, package, parcel, or container where the conditions of Paragraph 1(a) or 1(b) are met. The police require the prosecutor's authorization to undertake the measures set out in Paragraph 2. The prosecutor then needs to seek the ex post facto validation of the court under Paragraph 4. Where no order was received from the prosecutor by the police as required by Paragraph 2 or where the validation of the judge was not obtained under Paragraph 4, the evidence obtained by the police will be inadmissible at trial. Reference should be made to Article 115 on exclusion of evidence obtained without a warrant or without validation of the prosecutor or the judge, as required under the MCCP.

Article 136: Covert or Other Technical Measures of Surveillance or Investigation under a Warrant

1. A warrant for the covert or other technical measures of surveillance or investigation may be applied for by a prosecutor where:
 - (a) in the case of measures under Article 134(1)(a)–(h), probable cause exists that the suspect has committed or attempted to commit a criminal offense; or
 - (b) in the case of measures under Article 134(1)(i)–(k), a probable cause exists that the person is involved in criminal activities relating to a criminal offense; and
 - (c) the application of the measure is necessary and proportionate given all the circumstances of the case, including the importance of the information or evidence to be obtained and the gravity of the criminal offense; and
 - (d) the information that could be obtained by the measure is unlikely to be obtained by any other less intrusive investigative measure without unreasonable difficulty or potential danger to the safety and security of persons.
2. The measure of surveillance in private premises under Article 134(1)(c) may be ordered only in relation to the investigation of criminal offenses for which a penalty of more than five years can be pronounced, and the measure of interception of telecommunications content data under Article 134(1)(a) may

be ordered only in relation to the investigation of criminal offenses for which a penalty of more than five years can be pronounced.

3. The measures contained in Article 134(1)(a), (b), (f), (g), and (h) may be ordered against:
 - (a) a suspect;
 - (b) a person who is suspected of receiving or transmitting communications, letters, packages, containers, or parcels originating from or intended for the suspect or a person who is participating in or conducting financial transactions for the suspect. This is subject to the provisions of Article 244 on privileged communications between a lawyer and his or her client; or
 - (c) a person whose telephone, telecommunications device, or point of access to a computer system the suspect is suspected of using. This is subject to the provisions of Article 244 on privileged communications between a lawyer and his or her client.
4. The measure contained in Article 134(1)(e) may be ordered against:
 - (a) a suspect; or
 - (b) a person other than the suspect, where probable cause exists that monitoring the other person will lead to the discovery of the location of a suspect who has fled and is evading arrest and detention.
5. The measures contained in Article 134(1)(c), (d), (i), (j), and (k) may be ordered only against a suspect.
6. The application for covert or other technical measures of surveillance or investigation must be in writing and must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name or identification of the person against whom the warrant is sought;
 - (c) the criminal offense, or offenses, in connection with which the warrant is being sought;
 - (d) the type of covert or other technical measure of surveillance or investigation that is sought by the applicant;
 - (e) in relation to measures under Article 134(1)(a)–(h), the facts that substantiate the probable cause that the suspect has committed or has attempted to commit a criminal offense;
 - (f) in relation to the measures under Article 134(1)(i)–(k), the facts that substantiate the probable cause that the person is involved in criminal activities relating to a criminal offense;

- (g) in relation to the measures under Article 134(1)(c), whether the applicant requests authorization for a police officer to enter private premises to activate or disable the technical means for the execution of the measure; and
 - (h) a request that the competent judge issue a warrant for covert or other technical measures of surveillance or observation.
7. Where the requirements of Paragraph 1 are met, the competent judge may issue a warrant for covert or other technical measures of surveillance or observation.
8. The warrant must specify:
- (a) the name or identification of the person against whom the warrant is ordered;
 - (b) the particular measure of covert or other technical measures of surveillance or observation that has been approved by the competent judge;
 - (c) where applicable, the address on postal items, the elements for the identification of each telephone or point of access to a computer network, or the suspect's bank account number;
 - (d) where a warrant for the measure under Article 134(1)(c) is granted by the competent judge, whether a designated police officer is authorized to enter private premises to activate or disable the technical means for the execution of the measure;
 - (e) where a warrant requires the assistance of a telecommunications provider or a financial institution for its implementation, a warning that non-compliance with the warrant may result in the commission of the criminal offense of "failure to respect an order of the court" under Article 197 of the MCC or a fine or term of imprisonment under Article 41 of the MCCP for noncompliance with a court order;
 - (f) the person or persons authorized to implement the measure and the persons responsible for supervising the execution of the warrant;
 - (g) the dates on which written reports must be submitted to the competent judge and the prosecutor; and
 - (h) the length of time for which the warrant is valid.
9. A warrant for covert or other technical measures of surveillance or investigation must not exceed sixty days from the date of the issuance of the warrant, except as provided for in Article 139.

Commentary

The criteria for granting covert surveillance measures vary depending on the measure being sought. The measure being sought also affects whom the measure may be ordered against (see Paragraphs 3–5). There is no oral mechanism to obtain a warrant for covert or other technical measures of surveillance or investigation; the competent judge may consider only a written application (Paragraph 6). If the judge grants a warrant, Paragraph 9 provides a time limit for the warrant as required in the jurisprudence of the European Court of Human Rights, subject only to limited extensions under Article 139 that must be sought upon application of the prosecutor.

Where covert or other technical measures of surveillance or investigation are carried out without a warrant under Article 136, any evidence obtained in the execution of such a measure is inadmissible at trial. Reference should be made to Article 115 and its accompanying commentary.

Paragraph 2: International human rights case law on covert surveillance provides guidance on the safeguards that should be included in legislation on covert surveillance in order to ensure that it complies with the right to privacy of the person against whom any such measure is directed. One of the safeguards is that covert surveillance measures should be used only in the case of serious crimes. Because the MCCP does not contain a full catalogue of criminal offenses and, for the most part, contains serious criminal offenses, the provisions of Section 5 apply generally to all offenses. Paragraph 2 provides a slight exception in the case of surveillance of the content data of telecommunications and surveillance in private premises. Both of these measures are highly intrusive and should be used only in relation to criminal offenses carrying a penalty of more than five years' imprisonment. Under the MCC, the penalty ranges provided for criminal offenses are as follows: 1–5 years, 2–10 years, 3–15 years, and 5–20 years. Thus, covert and other technical measures of surveillance and investigation may not be employed with regard to any offense that carries a potential penalty of 1–5, 2–10, 3–15 or 5–20 years' imprisonment.

Paragraph 3(b): International human rights law provides that communications between a suspect and an accused and his or her lawyer that fall under the category of privileged communications may not be made the subject of a warrant for covert or other technical measures of surveillance or investigation. This is why Paragraph 3(b) is subject to the exception to Article 244.

Paragraph 8(e): Usually the penalty for a failure to comply with an order under Article 136 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes package, reference is instead made to Article 41 of the MCCP on “noncompliance with a court order.” Reference should also be made to the commentary to Article 41, which explains the scope of this provision and the differences between it and the criminal offense of “failure to respect an order of the court” under Article 197 of the MCC.

Article 137: Execution of Covert or Other Technical Measures of Surveillance or Investigation

1. The police must commence the execution of the warrant no later than fifteen days after it has been issued.
2. The execution of measures of covert or other technical measures of surveillance or investigation must be carried out in such a way as to minimize the intrusion into the privacy of persons not subject to the measure.
3. Where a warrant under Article 134(1)(c) is being executed and where the warrant has authorized a designated police officer to enter private premises, his or her actions in the private premises must be limited to those specified in the warrant.
4. Periodic written reports and other relevant information on the implementation of a warrant must be sent to the prosecutor by the police:
 - (a) at monthly intervals in the case of a measure under Article 134(1)(i); and
 - (b) at weekly intervals in the case of all other covert or other technical measures of surveillance or investigation.
5. The police implementing covert or other technical measures of surveillance or investigation must make a record of the time and date of the beginning and end and nature of each action taken in implementing the warrant. These records must be annexed to the periodic report under Paragraph 4 and to the final report under Paragraph 12.
6. Where the prosecutor does not receive written reports at the required intervals under Paragraph 4, he or she may:
 - (a) suspend the warrant until such time as a written report is sent to him or her by the police; or
 - (b) terminate the warrant.
7. Telecommunications service providers and financial institutions must assist the police in the implementation of warrant for covert or other technical measures of surveillance or investigation and are prohibited from disclosing this fact and any details about the warrant to the suspect, another person subject to the warrant, or a third party. Where a telecommunications service provider discloses information in contravention of the warrant or where the telecommunications provider otherwise fails to comply with the warrant, it may be

liable for the criminal offense of “failure to respect an order of the court” under Article 197 of the MCC or a fine or term of imprisonment under Article 41 of the MCCP for noncompliance with a court order.

8. Upon a written application of the prosecutor, the competent judge may modify the warrant at any time if he or she determines that modification is necessary to ensure that all preconditions of the warrant are satisfied.
9. Where, in the course of the execution of a warrant for covert or other technical measures of surveillance of investigation, any of the conditions under Article 136(1) cease to exist, the execution of the measure must be immediately terminated. In such a case, the police must immediately notify the prosecutor and the prosecutor must notify the competent judge in writing.
10. Upon the completion of the execution of a warrant for covert or other technical measures of surveillance or investigation, the police must deliver all recordings, messages, photographs, and other items obtained through the use of covert or other technical means of surveillance, together with a report comprising a summary of the evidence gathered, to the prosecutor.
11. Letters, packages, containers, and parcels that do not contain information that will assist in the investigation of a criminal offense or that do not contain objects that must be seized under the applicable law must be immediately forwarded to the addressee or returned to the sender.
12. A written report must be sent to the competent judge by the prosecutor when the warrant has been fully executed or has expired.

Commentary

Once the judge has granted a warrant, his or her role in relation to the covert or other technical measures of surveillance or investigation is not over. The drafters of the MCCP decided to legislate for a strong oversight role for the judge that grants the warrant for covert or other technical measures of surveillance, as required under international human rights law.

Paragraph 7 requires that telecommunications service providers assist the police in the implementation of a warrant for covert or other technical measures of surveillance or investigation without disclosing details about the warrant to any person. This obligation is usually contained in a telecommunications law but, because it may be absent, it has been included in the MCCP.

Paragraph 7: Reference should be made to the commentary to Article 136(8)(e) for a discussion on the consequences of noncompliance with a court order for covert or other technical measures of surveillance or investigation.

Article 138: Prohibition of Provocation (Entrapment)

1. In the implementation of covert or other technical measures of surveillance or investigation, and in particular in the execution of a warrant under Article 134(1)(i)–(k), the undercover police officer, or a person acting under the direction and supervision of the police in implementing the measure, must not provoke criminal activity by inciting a person to commit a criminal offense that the person would not have committed but for the intervention of the police officer or the persons acting under his or her direction.
2. Where criminal activity has been provoked, the suspect must not be prosecuted for or convicted of the criminal offense that resulted from the provocation.

Commentary

Entrapment involves a situation where a person is induced to a commit a criminal offense by deception or undue persuasion where the person would not have otherwise committed the criminal offense. The central element of entrapment is that the person would not have committed the criminal offense “but for” the intervention of the police. In the case of the use of undercover agents, regulatory purchases of items such as drugs, or simulated corruption offenses, Article 138 requires that the police do not incite a person to commit a criminal offense. A person who is unlawfully “entrapped” may not be prosecuted for the criminal offense alleged.

Article 139: Extension of a Warrant for Covert or Other Technical Measures of Surveillance or Investigation

Upon a written application of the prosecutor, the competent judge may issue a further extension of sixty days at a time and up to a total period of:

- (a) four months for the measure under Article 134(1)(c);
- (b) two years for the measure under Article 134(1)(e) ;
- (c) three years for the measure under Article 134(1)(i); or

- (d) one year for all other measures of covert or other technical measures of surveillance or investigation under Article 134(1).

Article 140: Destruction of Unused Materials from Covert or Other Technical Measures of Surveillance or Investigation

1. Where the prosecutor decides not to file an indictment against the suspect who has been subject to the covert or other technical measures of surveillance or investigation, he or she must inform the competent judge in writing of this decision.
2. The competent judge must, upon receipt of the decision of the prosecutor not to file an indictment or upon the expiration of two years after the end of execution of the warrant for covert or other technical measures of surveillance or investigation, issue a decision:
 - (a) ordering that the materials gathered be destroyed under the supervision of the competent judge; and
 - (b) setting an official date for their destruction.
3. Prior to the official date for the destruction of the materials gathered in the execution of measures of covert or other technical measures of surveillance or investigation, the competent judge must inform the person against whom the warrant was issued of the use of the measures against him or her.
4. The competent judge may at the request of the prosecutor decide not to inform the person of the measures of covert or other technical measures of surveillance or investigation against him or her, or to deny him or her the inspection of all or part of the material, if:
 - (a) there are strong reasons to believe that the inspection of the obtained material could constitute a serious risk to the lives or security of a particular person; or
 - (b) persons or where the inspection would endanger an ongoing investigation.
5. Where a person is informed that covert or other technical measures of surveillance or investigation have been ordered against him or her, he or she has the right to inspect the material collected.

6. The competent judge must give written notice to the prosecutor, the police, and the person who was subject to the measure of covert or other technical measures of surveillance or investigation (if the person has been informed that covert or other technical measures of surveillance or investigation have been ordered against him or her under Paragraph 3) thirty days before the destruction of materials gathered in the execution of the measure.
7. The competent judge, or a person authorized by the judge, must be present at the destruction of the materials and must produce an official note for the case file on the destruction.

Commentary

Where no indictment is filed by the prosecutor against the person who was subject to the warrant, the competent judge must be informed (Paragraph 1). Because of the nature of the materials gathered and the fact that they were not used in criminal proceedings, it is important that they not be retained by the authorities but instead be destroyed. Paragraph 2 places the onus on the judge to ensure the destruction of all materials related to the covert or other technical measures of surveillance or investigation, either upon notification by the prosecutor under Paragraph 1 or upon the expiration of two years after the end of the execution of the warrant (Paragraph 2). Best practice in surveillance legislation requires that the target of the surveillance has the right to be informed of the invasion of his or her right to privacy. The only permissible exception under the M CCP is where doing so would constitute a serious risk to the lives or security of persons or where it would endanger an ongoing investigation (Paragraph 4). Where the person who was subject to surveillance or investigation is informed under Paragraph 3, Paragraph 5 provides that he or she is entitled to examine the materials gathered. The judge must later oversee the destruction of the materials (Paragraphs 6 and 7) and must provide notice to the prosecutor and the person who was subject to surveillance or investigation (where he or she was informed of the measures in the first place).

Section 6: Expert Witnesses

Article 141: Expert Witnesses

1. Expert witnesses are engaged when the determination or assessment of an important fact calls for the finding and opinion of a specialist possessing the necessary professional knowledge.

2. Chapter 11, Part 5, Section 2 on witnesses and witness testimony applies, with the necessary modifications, to expert witnesses, except as otherwise provided for in Article 141.
3. The prosecutor and the defense may make a motion to the court for an expert analysis.
4. The court may order expert analysis on its own motion.
5. Before appointing an expert or experts under Paragraph 6, the court must invite the prosecutor and the defense to state their views on the expert or experts chosen. If the parties agree on an expert, the expert must be used provided that he or she is found suitable and that there are no impediments to the appointment, such as under Paragraph 8. Where the parties do not agree on the expert or experts chosen, the court has the final determination on the matter.
6. The court may designate one or more experts to conduct the expert analysis.
7. The court may entrust the expert analysis to a professional institution or a public entity that may then designate one or more expert witnesses to provide the expert analysis.
8. A person may not serve as an expert witness where he or she:
 - (a) is a victim of the criminal offense;
 - (b) is a relation or the extramarital partner of the defense counsel, the victim or the counsel for the victim, or the accused;
 - (c) has taken part in the proceedings as a prosecutor, defense counsel, or counsel for the victim;
 - (d) has been examined as a witness; or
 - (e) where other circumstances exist that cast substantial doubt on his or her impartiality.
9. The prosecutor or the defense may challenge the impartiality of an expert witness at any stage by filing a motion with the trial court to disqualify the expert witness. Where the trial court does not disqualify the expert witness, the party whose motion was refused may challenge the impartiality of an expert witness by submitting a written request for disqualification, along with a written statement of facts substantiating the request, to the president of the courts through the registry of the appeals court.
10. The president of the courts must determine whether to grant the request on the basis of the written statement of facts.

11. A decision of the president of the courts taken under Paragraph 10 may be challenged by the prosecutor or the defense by way of interlocutory appeal under Article 295.
12. Except for persons who in their official capacity are obliged to assist as experts, no person is required to act as an expert unless he or she voluntarily undertakes to do so. However, a person who has voluntarily undertaken to act as an expert witness may not later avoid its performance without a valid excuse.
13. An expert witness is entitled to an honorarium for preparing the expert analysis, for the costs accrued in the execution of his or her duties, and for expenditure of his or her efforts and time in an amount found reasonable by the court. When the analysis has been submitted by professional institution or public entity under Paragraph 7, compensation must be paid to an individual expert only to the extent special provisions so prescribe.
14. The order of the court for expert analysis must specify the facts to be established or assessed by an expert analysis as well as the persons to whom the expert analysis must be entrusted.
15. The court may grant an expert:
 - (a) access to relevant evidence;
 - (b) permission to examine particular persons in accordance with Articles 142 and 144; or
 - (c) permission to conduct an on-site inspection.
16. Unless the court prescribes otherwise, an expert witness must submit a written analysis. The court must direct the expert to submit the analysis within a fixed period.
17. After the written analysis is filed with the court, it must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.
18. An expert who has submitted a written analysis may also be examined orally during the confirmation hearing or the trial on the request of the prosecution or the defense or the court's own motion. When the expert analysis is entrusted to an institution or public entity, the institution or public entity must designate a person to be examined orally if requested by the prosecution, the defense, or the court.
19. Prior to oral examination, an expert witness must take the following oath: "I [name] promise and affirm on my honor and conscience that I will perform the expert task assigned to me to the best of my ability."

20. The court may on its own motion or on the application of the prosecutor or the defense order that a new analysis be rendered by the same or by other experts if he or she considers the analysis insufficient.

Commentary

The role of experts in criminal proceedings varies from state to state. In some systems, each side calls its own expert witnesses. Each expert witness is therefore aligned with a particular party, either the prosecution or the defense, and provides evidence before the court on their behalf. In other legal systems, an expert witness is appointed by the court and acts in the capacity of a “friend of the court.” The expert is aligned with neither the prosecution nor the defense and is responsible for giving an impartial and objective expert analysis to the court. The latter option was chosen by the drafters of the M CCP. The reason for this is because in a post-conflict state it may be quite difficult to obtain the services of an expert witness in certain instances. It may also be the case that a suspect or accused person does not have the means to pay for an expert witness in the same way that the prosecution service may. To ensure equality for both parties (discussed in the commentary to Article 62), the drafters of the M CCP thought it preferable that a single expert witness be appointed by the court. This is not to say that either party is precluded from engaging its own expert. The parties are free to prepare and submit their own “expert opinions” in writing to the court and to the other parties; such opinions, however, cannot serve as “best evidence.” They can be used, nevertheless, to challenge the credibility or qualification of the court-appointed experts.

Reference should be made to Articles 32–35, which regulate the summons of expert witnesses and the consequences of noncompliance with a court summons.

As with all investigative measures, in accordance with Article 112(5), an expert witness may be appointed by the court at any stage of the proceedings.

Paragraph 13: The payment of expert witnesses requires special regulation by the court system to limit the possibility of the arbitrary determination of honoraria. This may be done by the president of the courts by way of a “judicial circular” or another method as appropriate under the applicable law.

Paragraph 15: The reference to “on-site inspection” in this paragraph refers, for example, to a crime scene.

Section 7: Forensic Investigative Measures

Article 142: Physical Examination of a Suspect or an Accused

1. A physical examination involves the examination of the exterior or interior of the human body and the taking of samples from the human body and includes the:
 - (a) examination of the exterior or interior of the human body of the person;
 - (b) taking of hair and follicle samples from the person;
 - (c) taking of saliva and urine samples;
 - (d) taking of nasal swabs;
 - (e) taking of swabs of the skin surface, including the groin area and under-fingernail samples;
 - (f) taking of fingernail samples;
 - (g) taking of cell tissues for the purpose of establishing identity; or
 - (h) taking of blood samples.
2. Except as otherwise provided for in Paragraph 3, a warrant is required for the physical examination of a person.
3. A warrant is not required:
 - (a) where a person consents to the physical examination; or
 - (b) for the measures listed in Paragraph 1(a)–(f) where there is an imminent risk of loss, tainting, or destruction of evidence if the physical examination is not conducted immediately and prior to the authorization of a judge.
4. Where a physical examination without a warrant is conducted by the police, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
5. The competent judge must determine whether the conditions under Paragraph 3 were met. Where the competent judge concludes that the physical examination without a warrant was conducted in accordance with Paragraph 3, the judge must issue an order validating the physical examination without a warrant.

6. A warrant for a physical examination of a suspect or an accused may be granted:
 - (a) if the examination is necessary to determine facts important to the investigation of the criminal offense; or
 - (b) where it has been established that specific evidence of a criminal offense may be found on or in the body; and
 - (c) where the physical examination will not be detrimental to the health of the person of whom it is sought.
7. The prosecutor or the police, prior to sending the crime report to the prosecutor under Article 92, may make an application for a physical examination.
8. An application for a physical examination may be submitted orally or in writing to the competent trial court.
9. An oral application for a physical examination may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
10. An oral application for a physical examination may be communicated to the competent judge by telephone, radio, or other means of electronic communication.
11. Where an oral application for a warrant for a physical examination is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant and for placing the notes in the court file within twenty-four hours. The written notes and the warrant for a physical examination must be signed by the competent judge.
12. Where an oral application for a physical examination is made, the applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
13. Where a written application for a physical examination is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the warrant for a physical examination is sought;
 - (c) the particular criminal offense that he or she is suspected of;
 - (d) the facts that indicate that the search is necessary to find evidence of the criminal offense that may be found in or on the body;

- (e) the particular type of physical examination set out in Paragraph 1 that is sought; and
 - (f) a request that the competent judge issue a warrant for a physical examination.
14. Where the requirements of Paragraph 6 are met, the competent judge may make an order for a physical examination.
 15. A physical examination must not cause a risk to the health of the person on whom it is being carried out.
 16. A physical examination under Paragraph 1(a), where the examination is of the interior of the human body, and under Paragraph 1(d), (e), (g), and (h) must be conducted by a doctor, nurse, or medical professional under circumstances allowing for maximum privacy and with full respect for the dignity of the person.
 17. A record of the physical examination must be made and must include:
 - (a) the name of the person was subject to the physical examination;
 - (b) the name of the person who conducted the physical examination;
 - (c) the name of any other persons who were present during the physical examination;
 - (d) the nature of the physical examination;
 - (e) the findings of the physical examination; and
 - (f) a list of samples taken during the physical examination.
 18. The suspect or the accused who was physically examined must be given a record of the physical examination.
 19. All samples taken during a physical examination must be preserved and stored so as to preserve their integrity.
 20. In accordance with Article 101, the prosecutor is responsible for ensuring that the samples are either preserved or stored to preserve their integrity or that they are forwarded for DNA analysis under Article 143.
 21. Cells taken from a person under Paragraph 1(g) and blood samples taken from a person under Paragraph 1(h) may be used only for the purposes of the criminal investigation for which they are taken or in other pending criminal proceedings. They must be destroyed without delay as soon as they are no longer required for these uses.

Commentary

As discussed in the commentary to Article 122, a physical examination is a more intrusive form of examination than a search of a person, covering the interior and exterior of a person's body, including the taking of blood and other samples. As with a search of a person under Articles 122–125, a physical examination penetrates the right to privacy of an individual, although even more intrusively. Article 142 balances the right to privacy of an individual with the need to conduct an effective criminal investigation by incorporating a range of procedural safeguards.

A physical examination may involve taking samples of hair and follicles, fingernails, saliva, urine, skin cells from the nose or from the skin surface, cell tissues, and blood. Because these measures are so intrusive and because they result in the police taking a person's biometric data, the incidences in which samples may be taken from a person by way of physical examination are limited. The police may not take cell tissues or blood without a warrant. Other samples may be taken by the police without a warrant only where there is "an imminent risk of loss, tainting, or destruction of evidence if the physical examination is not conducted immediately and prior to the authorization of a judge" (Paragraph 3). Any physical examination that is conducted pursuant to Paragraph 3 without later judicial authorization being obtained is not valid until it has been approved by a judge under Paragraph 5. Where the physical examination is not approved of by a judge after it has been undertaken, any evidence obtained must be excluded from the trial as provided for in Article 115. In addition (and in cases where the police have not undertaken a physical examination without a warrant under Paragraph 3), when any of the measures listed in Paragraph 1 are undertaken without a warrant, all evidence obtained through the measure are not admissible at trial in accordance with Article 115.

Certain measures provided for under Paragraph 1, because of their delicate nature and the necessity for medical expertise in undertaking them, must not be undertaken by police officers. Paragraph 16 requires that interior examinations of the body, nasal swabs, skin swabs, the taking of cell tissues, and the taking of blood samples be done only by a person with medical expertise. The police may take fingernail samples under Paragraph 1(f), hair and follicle samples under Paragraph 1(b), and saliva and urine samples under Paragraph 1(c).

Any samples taken must be stored properly (Paragraph 19), which will require proper facilities and equipment and qualified personnel. Once the samples have been taken, the next step is to apply to the court for them to be analyzed. This requires another warrant and is dealt with under Article 143. Because a physical examination results in the extraction of biometric data from a person, this data needs to be handled correctly. Usually a special law is required to address how personal data, such as biometric data, is dealt with. A comprehensive regulation of how biometric data should be treated is beyond the scope of the MCCP.

Paragraph 15: When a physical examination is being carried out under a warrant from the court, it is important that the execution of the warrant not cause a risk to the person's health. It is also important that the intervention not violate other rights of the suspect, such as the right to bodily integrity and the right to freedom from torture and cruel, inhuman, or degrading treatment (protected under Article 58). In interpreting what the latter right means, in relation to the taking of physical evidence from a person by police, international and regional human rights bodies have held that an act may be classified as "inhuman" where it causes either actual bodily injury or intense mental or physical suffering (see *Labita v. Italy* [European Court of Human Rights], application no. 2677/95, paragraph 120). Treatment may be termed "degrading" where it arouses feelings of fear, anguish, and inferiority capable of humiliating and debasing a person (*Hurtado v. Switzerland* [European Court of Human Rights], application no. 1754/90). In order for treatment to be classified as inhuman or degrading, it must go beyond the inevitable element of suffering or humiliation that would be connected with a legitimate form of treatment, such as a physical examination under warrant (*Labita v. Italy*, paragraph 120). Likewise, with the right to bodily integrity, where a court has granted a warrant for a physical examination such as the taking of blood, international and regional human rights courts have recognized that, to obtain blood or other material that is the subject of a warrant, it is necessary for the suspect to endure a minor interference with his or her physical integrity. However, if a physical examination goes beyond what might be seen as a minor interference with the physical integrity of a person, it may constitute a breach of the person's right to bodily integrity.

Where a person does not cooperate with the police or the medical personnel carrying out the warrant for a physical examination, the examination may still be undertaken in defiance of the person's will (see *Jalloh v. Germany*, application no. 54810/00). On its own, this does not constitute a breach of the person's right to freedom from cruel, inhuman, or degrading treatment or his or her right to bodily integrity. Nor does it constitute a risk to the person's health. The question is whether the treatment causes either actual bodily injury or intense mental suffering and whether the degree of suffering goes beyond the inevitable suffering or humiliation that would normally accompany such an intervention. The European Court of Human Rights, in *Jalloh v. Germany* (paragraph 76), stated that "any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health."

If a physical examination was carried out in a manner that violates the right of a person to freedom from torture or cruel, inhuman, or degrading treatment, it must be excluded from evidence in court under Articles 230 and 232.

Article 143: DNA Analysis of Samples Taken during a Physical Examination or of Other Materials

1. A warrant is required for DNA analysis of samples taken during a physical examination or on any other materials that have been found or seized.
2. An application for DNA analysis of samples or other materials may be filed by the prosecutor where such measures are necessary to:
 - (a) establish identity; or
 - (b) establish whether certain trace substances originate from the suspect, the accused, or the victim of a criminal offense.
3. Where the requirements of Paragraph 2 are met, the competent judge may make a warrant for DNA analysis of samples.
4. DNA analysis must be conducted by a specialized institution appointed by the competent judge in accordance with Article 141.
5. Cell tissue that has been collected under Article 142 may be used only to identify DNA code. No other information may be ascertained during the examination of cell tissue.
6. The specialized institution that conducts the DNA analysis must submit a written analysis to the competent judge who ordered the measure, unless the warrant specifies otherwise.
7. Cell tissue must be destroyed without delay once the judgment becomes final.
8. The prosecutor, the suspect or the accused, and his or her counsel must be served with a copy of the report of the specialized institution in accordance with Article 27.

Commentary

A person's unique DNA code may be extracted from various sources, such as blood, saliva, and hair. The purpose of seeking DNA analysis in general, and specifically under Article 143, is to compare the DNA code of a suspect (which may be extracted from the samples taken under Article 142) with another biological specimen to see if they match. For example, the DNA code of a suspect, found through testing a sample of his or her blood, may be compared with the DNA code extracted from blood found

at a crime scene to determine if they are identical or not. A warrant must be obtained under Article 142 before such DNA cross-matching can be performed. Once the judge determines that sufficient grounds exist to grant a warrant under Paragraph 2, the judge must appoint a specialized institution to undertake the analysis and report back its findings. The specialized institution falls under the category of an expert witness as provided for in Article 141. Thus, the specialized institution is not acting for one of the parties but is a “friend of the court” and is tasked with providing an objective analysis and reporting it back to the court. Reference should be made to Article 141 on expert witnesses.

In many post-conflict states, even before the conflict, there will not have been the legal basis, or indeed the resources and facilities, to undertake forensic investigations and DNA analysis. In the post-conflict era, there may not be forensic laboratories equipped to undertake such analysis. In post-conflict Kosovo, DNA analysis, because of a lack of domestic capacity and facilities, was undertaken in Germany. In implementing a provision on DNA analysis, a post-conflict state should ensure that it has the domestic resources and facilities to undertake such analysis. Otherwise, it will need to consider making provisions and securing an adequate budget for DNA testing to be undertaken in another country.

Article 144: Examination of the Mental State of a Suspect or an Accused

1. An order is required for the examination of the mental state of the suspect or an accused.
2. A motion for the examination of the mental state of the suspect or the accused may be filed by the prosecutor or the defense alleging that the suspect or the accused person was mentally incompetent at the time of committing the criminal offense as defined in Article 23 of the MCC.
3. Upon receiving the motion for the examination of the mental state of the suspect or an accused, the competent judge must order the examination of the mental state of the suspect or an accused.
4. The examination of the mental state of the suspect or the accused must be carried out by a psychiatrist with experience in forensic psychiatry. Where no psychiatrist is available, the examination must be carried out by a psychologist with experience in forensic psychology. The psychiatrist or psychologist must be appointed by the judge in accordance with Article 141.
5. The psychiatrist or the psychologist who conducts the examination of the mental state of the suspect or the accused must submit a written analysis to

the competent judge who ordered the measure, unless the warrant specifies otherwise.

6. The prosecutor and the defense must be served with a copy of the report of the psychiatrist or the psychologist in accordance with Article 27.

Commentary

Both the prosecutor and the defense may make an application to determine the mental competency of the suspect or the accused at the time of the alleged criminal offense. Article 144 differs from Article 89, Mental Incapacity of the Suspect or the Accused, in two fundamental ways. First, the order under Article 144 relates to determining the mental competency of the suspect or the accused at the time the offense was committed, which will help determine whether the suspect or the accused may be excused from criminal responsibility under Article 23 of the MCC that provides for a defense of mental incompetence. On the other hand, Article 97 addresses the issue of whether the accused is presently mentally capable of standing trial and does not address the accused's capacity at the time of the criminal offense. Second, the implications of an examination of the mental state of the suspect or the accused under Articles 97 and 144 are different. Under Article 144, the results of the examination of the mental competency of the suspect or the accused are used as evidence at trial. The question of whether the suspect or the accused was mentally incompetent at the time of allegedly committing the criminal offense will not have an effect on the progress of the investigation or trial. In contrast, under Article 97, if the judge orders a competency report and finds at the hearing that the suspect or accused person is mentally incompetent, the trial may be suspended or indefinitely postponed.

The investigative measure under Article 144 is crucial in cases where the accused alleges that he or she was mentally incompetent at the time of the criminal offense. It is important that a trained psychiatrist or psychologist with experience in forensic psychiatry or psychology (i.e., psychiatry or psychology applied to the law) undertake the examination of the person's mental state. In many post-conflict states, however, there is a severe lack of trained psychiatrists or psychologists to undertake competency evaluations. In some post-conflict states, a solution has been to bring forensic psychologists or psychiatrists from other states to conduct competency evaluation reports, although this is an expensive option.

Article 145: Autopsy and Exhumation

1. A warrant is required for an autopsy or exhumation of a body.
2. An application may be filed by the prosecutor for an autopsy, where there is probable cause that a death was caused by a criminal offense or connected

with the commission of a criminal offense. If the body has been buried, the prosecutor may file a motion for the exhumation of the body with the aim of viewing the body and performing an autopsy.

3. The prosecutor must automatically submit an application for an autopsy where the deceased died in the custody of the police whether at a detention center or away from a detention center. The police or the detention authority must inform the prosecutor of all deaths in custody.
4. The competent judge must appoint a forensic pathologist to conduct the autopsy in accordance with Article 141 on the appointment of expert witnesses. Where no forensic pathologist is available, the competent judge must appoint a doctor, preferably with experience in forensic medicine, to conduct the autopsy.
5. The competent judge may order that toxicological tests be conducted by an institution that specializes in toxicological tests.
6. If the whereabouts of the family of the deceased person is known, the family must be notified of the date of the autopsy and may appoint a doctor or other medical professional to be present at the autopsy.
7. The forensic pathologist or doctor must perform the autopsy and must make professional observations regarding:
 - (a) the identification of the deceased person;
 - (b) the probable cause of the death of the deceased person;
 - (c) any sorts of injuries found on the corpse, whether the injuries were self-sustained or were caused by someone else and what probable means caused the injuries;
 - (d) any biological material, including blood, saliva, semen, or urine, found on the body of the deceased person;
 - (e) any substances identified through toxicological testing;
 - (f) the probable time of death; and
 - (g) the circumstances under which the death occurred, including an opinion as to whether the death occurred from natural causes, accident, suicide, unlawful killing, or unknown causes.
8. The forensic pathologist or doctor conducting the autopsy must pay attention to any biological material, including blood, saliva, semen, or urine, and must preserve it for possible DNA analysis if ordered under Article 143.
9. The forensic pathologist or doctor who conducts the autopsy must submit a written analysis to the competent judge who ordered the measure, unless the order specifies otherwise.

10. The forensic pathologist must not make any conclusion relating to the criminal responsibility of any suspect or any other individual in his or her written analysis.
11. The written analysis may include photographs taken by the forensic pathologist or under his or her supervision and may include exhibits, diagrams, or any other record that he or she deems appropriate.
12. Where a person is suspected or accused of a criminal offense in connection with the death of the person whose body was exhumed or subject to an autopsy, a copy of the report must be served upon the suspect or the accused.

Commentary

An *autopsy*, or postmortem examination, involves the medical examination of a human body to decipher the cause of the person's death or any injury or disease that the person may have had. An autopsy may be conducted for many reasons; Article 145 is concerned with *forensic autopsies*, that is, autopsies that are potentially connected with a criminal offense. An autopsy is always conducted by a forensic pathologist. The term *forensic pathologist* is defined in Article 1(21). A forensic pathologist is a doctor with expertise in forensic pathology, which is a branch of medicine that is associated with the study of changes to the human body caused by disease or injury, including changes caused by criminal behavior. A forensic pathologist will examine a body both externally and internally for structural alterations, will sometimes X-ray a body, and will conduct tests on samples removed from the body in a forensic laboratory to determine the possible cause of death. The forensic pathologist will produce a report that identifies the potential cause or manner of death, how death may have come about, and whether any preexisting contributing factors contributed to the cause of death.

An *exhumation* involves digging up a body that has already been buried. The purpose of an exhumation is to conduct an autopsy on the body to determine the cause of death. An exhumation may be conducted for a number of different reasons; the MCCP is concerned only with an exhumation connected with the alleged commission of a criminal offense.

The prosecutor may apply for an autopsy and/or an exhumation on the basis of probable cause that death was caused by or connected with a criminal offense (Paragraph 2). Under the MCCP, a prosecutor is obliged to apply for a warrant for an autopsy where a person has died at a detention center or in police custody. The MCCP also obligates the police and the detention authority to inform the prosecution service of the death of someone in their custody. The rationale behind this requirement is to make sure that torture or other mistreatment by the police did not contribute to the death. If there is any evidence of a criminal offense committed by the police, the prosecution service will be obliged to investigate the matter.

Ideally, a forensic pathologist should conduct the autopsy. This is standard practice. However, in many post-conflict states, there are no forensic pathologists nor are there forensic laboratories, which is why the MCCP specifies that as a second resort, a

doctor may conduct an autopsy. Even if a doctor has undertaken the autopsy, a person with the necessary expertise to undertake toxicological tests or other tests on any samples will be required, as will laboratory facilities. Realizing the importance of forensic laboratories to investigative techniques such as autopsies or physical examinations, international donors have invested in building, staffing, and refurbishing new laboratories in post-conflict states such as Liberia.

Paragraph 6 provides that if the whereabouts of the family of the deceased person is known, they may appoint a doctor or other medical professional to be present during the autopsy. This provision has been taken from the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; Principle 16 states that “[t]he family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy.” Upon completing the autopsy and any other tests on specimens arising from it, the forensic pathologist or doctor must make his or her professional observations in accordance with Paragraph 7 and set them out in a detailed report (Paragraph 9). Copies of the autopsy report must be served upon the suspect or the accused (Paragraph 12). At trial, the forensic pathologist or doctor may be required to testify as an expert witness, as provided for in Article 141 on expert witnesses. With regard to autopsies conducted in relation to a potential extra-legal, arbitrary, or summary execution, the criminal justice actors and the forensic pathologist or doctor should be aware of the United Nations Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (the “Minnesota Protocol”). A more general protocol on autopsies, the Model Autopsy Protocol, has also been drafted, as has a Model Protocol for Disinterment and Analysis of Skeletal Remains. All these model protocols are contained in the *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. The manual also contains an annex on “Postmortem Detection of Torture and Drawings of Parts of the Human Body for Identification of Torture.”

Paragraph 3: According to Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, whenever a death in custody occurs, it must be investigated. One crucial element of any such investigation is an autopsy of the body. Given the importance of determining the cause of death, Paragraph 3 requires that the prosecutor automatically apply for an autopsy when a person dies in custody, whether in police custody or in a detention center or whether a person was away from the detention center or the police station but was still in custody.

Section 8: Unique Investigative Opportunity

Article 146: Unique Investigative Opportunity

1. An order is required to undertake a unique investigative opportunity.
2. A unique investigative opportunity involves the taking of evidence from a witness or expert witness for the purpose of preserving the evidence, where the witness or expert witness will not be available to testify during the trial.
3. A motion for a unique investigative opportunity may be filed by the prosecutor or the defense with the registry of the competent trial court where:
 - (a) there is a unique opportunity to obtain important evidence from a witness or an expert witness; and
 - (b) there is a significant risk that the evidence may not subsequently be available at trial.
4. Where the requirements of Paragraph 3 are met, the competent judge must schedule a time and date for the taking of evidence.
5. The prosecutor, the suspect or the accused, and the witness or expert witness must be summonsed to appear at the hearing on the date and at the time specified in the summons. The summons must be served in accordance with Article 27.
6. The competent judge must take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the witness and the suspect or the accused.
7. The taking of evidence before the competent judge must be conducted in accordance with Chapter 11, Part 5, Section 4 of the MCCP.

Commentary

Both the prosecutor and the defense may apply for an order for a unique investigative opportunity. Under the MCCP, live testimony during the trial is preferable to pre-recorded evidence or prior statements. This is because the trial process established under the MCCP is premised on the orality principle, where the evidence is introduced only at trial and the judge or panel of judges will not have had access to it in advance. Article 146 is one exception to this general principle. Under Article 146, evidence cannot be

taken where the other party (either the defense or the prosecution) has not been given an opportunity to fully examine the witness. From the perspective of the suspect or the accused, this requirement is vital in order to protect his or her right to examine a witness before him or her (see Article 64 and its accompanying commentary). In a unique investigative event, a judge should be present during the taking of evidence. This taking of evidence is akin to the mechanism by which the witness would have been questioned during the trial, except it occurs at a different time. The same rules apply to a unique investigative opportunity as apply to the questioning of a witness during the trial. When the trial is conducted later, the transcript of the evidence provided during the unique investigative opportunity will be entered into evidence by the party who requested it, and this evidence will be considered by the judge or panel of judges when determining the criminal responsibility of the accused.

An example of a situation in which a unique investigative opportunity may be appropriate is where a witness is gravely ill and may not be alive at the time of the trial to testify.

Part 4: Witness Protection, Witness Anonymity, and Cooperative Witnesses

Section 1: Protective Measures for Witnesses under Threat and Vulnerable Witnesses

General Commentary

The importance of adequately protecting witnesses in criminal proceedings has been increasingly realized in recent years both domestically and internationally. At the international level, the need for witness protection is recognized in Article 24 of the United Nations Convention against Transnational Organized Crime and Article 32 of the United Nations Convention against Corruption. In post-conflict states such as Kosovo and Bosnia and Herzegovina, legislation was introduced to allow for witness protection in light of the significant threats to witnesses testifying in criminal cases.

Witnesses may include victims, innocent bystanders, or individuals who have been involved in criminal activity but who are cooperating with the police. Witnesses may need to be protected because (a) their security or that of their family is at risk because they are a witness in a particular case (i.e., a *witness under threat* or an *intimidated witness*); or (b) the witness—usually a victim-witness—would be traumatized by testifying in open court and confronting the accused person (i.e., a *vulnerable witness*).

Turning to witnesses under threat first, protecting such witnesses is very important. A witness under threat should be protected in order to protect his or her life and safety and that of his or her family. From another perspective, if the witness is not protected, the intimidation of the witness may prevent the crime from being reported or, where it is reported, may stop the witness from giving full and frank testimony. This is a particular risk in serious crimes cases like organized crime. A witness under threat may be protected in different ways according to the gravity of the threat against him or her and according to the particular stage of the proceedings. At any early juncture in the proceedings, the police may decide to place a witness under threat under basic police protection, sometimes known as *close protection*. For a full discussion on the meaning and scope of close protection, reference should be made to Colette Rausch, *Combating Serious Crimes in Postconflict Societies* (pages 106–11). Close protection is purely a matter of police law and procedure and does not fall within the ambit of criminal procedure law, and therefore is not covered in the MCCP.

The second means of protecting a witness under threat falls under criminal procedure law and is contained in Part 4, Sections 1 and 2: witness protection procedural measures. These measures are the subject of Subsection 1 and Subsection 2 and are discussed in further detail below; they consist of “witness protection measures” and

“witness anonymity.” Witness protection measures apply both prior to and during a trial.

The third method of protecting a witness under threat is through witness protection programs. Witness protection programs are aimed at protecting witnesses in the case of serious intimidation and where other protective measures are not sufficient to protect the witness (and where the witness is sufficiently important to the proceedings to merit being placed in a witness protection program). Witness protection programs, in some instances, may be geared toward ensuring the long-term safety of a witness and his or her family. A witness and his or her family may be granted a visa to live in another state and may be given new identities, jobs, and other assistance to build a life elsewhere. Witness relocation programs are generally regulated either by a special law or as part of police laws and procedures rather than through a criminal procedure code. For a fuller discussion on witness protection programs, reference should be made to Rausch, *Combating Serious Crimes in Postconflict Societies* (pages 60–61).

Vulnerable witnesses may not need the same level of protection as witnesses under threat; for example, a vulnerable witness may not need close protection or to be part of a witness protection program. The form of protection provided to a vulnerable witness will vary from that provided to a witness under threat. Protection measures will be aimed more at lessening the trauma experienced by the vulnerable witness at all stages of the proceedings from the initial interview through to the witness testifying before the court. With regard to testifying before the court, as provided for in Article 147, a protective measure may be granted, for example, to ensure the absence of the accused person during the witness’s testimony. A witness protection order may also allow the vulnerable witness to testify behind a shield or in a location other than the courtroom under Article 147.

Article 24 of the United Nations Convention against Transnational Organized Crime and Article 32 of the United Nations Convention against Corruption recognize that in providing for witness protection, it is imperative to take account of the rights of a suspect or an accused person, because witness protection measures may impinge upon such fundamental rights as the right to examine or to have examined witnesses against him or her (Article 64) and the right to have adequate time and facilities to prepare a defense (Article 61). In drafting the provisions in the MCCP, careful attention was paid to ensuring that the rights of the accused are adequately balanced with the rights of the witness to protection and the need to use witness protection measures in the investigation of crime. Research was carried out on relevant international standards and human rights jurisprudence relating to witness protection, which was then integrated into the witness protection provisions to ensure that the need to protect the witness under threat or the vulnerable witness and the needs of the criminal investigation are carefully balanced with the rights of the suspect or the accused.

Witness protection measures, while usually granted during an investigation, may be granted at any stage of the proceedings.

As a complement to Sections 1 and 2 of Part 4 of Chapter 8, a number of criminal offenses have been included in the Model Criminal Code so as to penalize those who interfere in any way with a witness in a trial or who violate a court order for protective measures. The relevant offenses contained in the MCC are “obstruction of justice of a witness” (Article 193) and “revealing the sealed order for protective measures or ano-

nymity” (Article 200). The former offense criminalizes the use of force or intimidation against a witness, whereas the latter makes it a criminal offense to reveal the name of a witness who is subject to protective measures or witness anonymity where the court has ordered otherwise.

A post-conflict state considering introducing witness protection measures should carefully consider the financial implications of doing so. Some measures such as redaction of the names of witnesses from the public record (Article 147[a]) have minimal cost implications. Others, such as the use of voice-altering devices (Article 147[e][ii]), are quite costly. A post-conflict state must ensure that it has the monetary means to implement and sustain such measures in advance of introducing them into law.

Article 147: Protective Measures

A competent judge may order one or more of the following protective measures:

- (a) expunging from the public record any names, addresses, workplaces, profession, or any other data or information that could be used to identify a witness;
- (b) the prohibition on counsel for the suspect or the accused not to reveal the identity of the witness or disclose any materials or information that may reveal the identity of a witness;
- (c) the nondisclosure of any records that identify the witness, until such time as the competent judge decides otherwise or until a reasonable time before the trial, whichever occurs first;
- (d) the assignment of a pseudonym to a witness, where the full name of the witness is revealed to the defense within a reasonable period prior to trial;
- (e) efforts to conceal the features or physical description of the witness giving testimony, including testifying:
 - (i) behind an opaque shield;
 - (ii) through image- or voice-altering devices;
 - (iii) through contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television; or
 - (iv) through a videotaped examination of the witness prior to the hearing but only where counsel for the accused is present and can examine the witness; or
- (f) the temporary removal of the accused from the courtroom if a witness refuses to give testimony in the presence of the accused or if the circum-

stances indicate that the witness will not speak the truth in the presence of the accused. In this case, counsel for the accused may remain in the courtroom and may question the witness.

Commentary

Article 147 lists a range of protective measures that may be ordered in favor of a witness under threat or a “vulnerable witness.” This list is exhaustive rather than illustrative and was compiled after comparative research on witness protection legislation and jurisprudence at both international and domestic levels.

The party that is petitioning for an order for protective measures may request any one of these measures or a combination of them. The expungement of the name of a witness from the public record under Subparagraph (a) aims to keep the identity of the witness secret from the general public (including the press). Subparagraph (a) places a duty on the court and the registry to ensure that no details about the witness are made public. Subparagraph (b) places a direct duty not to disclose on the counsel for the accused. This duty prevents counsel from making disclosure to the public, the suspect, and the accused person. Where this obligation is broken, counsel may be liable for a criminal offense under Article 200 of the MCC or Article 41 of the MCCP. Under Subparagraphs (c) and (d), neither the accused person nor his or her counsel will be aware of the identity of a witness until a “reasonable time prior to the trial.” This is a more severe measure than presented in Subparagraph (a) or (b) and provides a temporary form of anonymity. Under this measure, the judge must reveal the identity of the witness early enough to ensure the right of the accused to adequately prepare his or her defense (as provided for under Article 61) and to examine or have examined the witnesses (as provided for under Article 64). What constitutes a “reasonable time” will be a matter for the competent judge to decide and will often depend upon the complexity of the case. In the context of international tribunals, such as the International Criminal Tribunal for Rwanda, the practice has been to provide information on the identity of a witness within a period of twenty-one to sixty days prior to the commencement of trial. While the identity of the witness must be revealed to the defense prior to trial under Subparagraph (c), the judge may decide to withhold it from the public altogether. Where a person is granted a pseudonym under Subparagraph (d), the public will not be aware of the true identity of the witness even during the trial. The witness will be referred to as “Witness X,” for example, and all documentation will refer to the witness in this manner.

The protective measures provided for in Subparagraphs (e) and (f) all center around the appearance of the witness during the trial in open court. Where the voice or physical features of a witness are altered under Subparagraph (e), the defense will be aware of the identity of the witness but the public will not. Subparagraph (e) provides a range of options for the witness to testify in a concealed manner in the courtroom, testify live from another location, or testify in advance of the trial and have the video played at trial. With regard to the latter option, Subparagraph (e) provides that counsel for the accused must be present when the video is made. This proviso is made to ensure that the defense has the opportunity to properly examine the witness as required under Article 64. The measure provided for under Subparagraph (f) is an exception to the

right of the accused to be present during the trial and is justified on the basis of the needs of the witness as balanced against the rights of the accused. In order to lessen the impingement upon the rights of the accused, Subparagraph (f) requires that counsel for the accused must be present during the questioning of the witness to safeguard his or her rights.

Article 148: Grounds for Seeking an Order for Protective Measures

1. A protective measure may be granted by the competent judge to protect:
 - (a) a “witness under threat,” meaning a witness whose personal security or the security of his or her family member is endangered through the participation of the witness in criminal proceedings, as a result of threats, intimidation, or similar actions relating to his or her testimony; or
 - (b) a “vulnerable witness” meaning:
 - (i) a witness who has been severely physically or mentally traumatized by the commission of the criminal offense;
 - (ii) a witness who suffers from a serious mental condition rendering him or her unusually sensitive; or
 - (iii) a child witness.
2. For the purposes of Paragraph 1(a), “family member” means a spouse, a brother, a sister, a parent, a child, a grandparent, a grandchild, an adopted parent or adopted child, and a foster parent or child.

Commentary

Paragraph 2: The definition of family member is narrower than that of “relative” in Article 1(41) and includes only immediate family members who may be endangered by testifying at trial. The reason for a more narrow definition is that a protective measure is an exceptional measure that impacts on the rights of the suspect or accused. Therefore, the drafters wanted to allow for adequate protection of a person and his or her close family but not expand the scope of this measure too much. Paragraph 2 refers to “adopted parent” and “adopted child.” In some legal systems, it is not possible to “adopt” a child, in the sense that the child will take the name of the adoptive parents. Different terminology is used to describe a relationship that is akin to adoption but where the child maintains his or her family name. In a state that does not recognize adoption, the definition of family member used in domestic legislation should include any relationships that operate similarly to it.

Article 149: Procedure for Seeking an Order for Protective Measures

1. All protective measures must be applied for by way of written motion.
2. At any stage in the proceedings, the prosecutor, the defense, or a witness may file a written motion for protective measures with the registry of the competent trial court.
3. The motion must contain:
 - (a) the name of the competent trial court to which the motion is being submitted;
 - (b) the name of the party filing the motion;
 - (c) the identity of the proposed witness under threat or the proposed vulnerable witness;
 - (d) information concerning the criminal proceedings in which the proposed witness under threat or vulnerable witness is to testify, including the name of the suspect or the accused and the criminal offense of which he or she is suspected or accused;
 - (e) information relating to the evidence the proposed witness under threat or vulnerable witness will provide at the trial of the criminal offense;
 - (f) a description of the factual circumstances that substantiate the need to declare the witness to be a witness under threat or vulnerable witness and to afford protective measures in his or her favor; and
 - (g) the particular protective measures, or combination of measures, sought to protect the proposed witness under threat or vulnerable witness and a request to the competent judge to grant the measures sought.
4. The motion must be submitted to the registry of the competent trial court in a sealed envelope clearly indicating on the outside that it is a motion for protective measures.
5. The registry must forward the sealed motion immediately to the competent judge.
6. Only the competent judge and the prosecutor may have access to the sealed contents of the envelope submitted by the applicant.

Commentary

Article 149 sets out the procedure under which a motion for protective measures should be submitted to the court. All motions must be submitted in writing to the court.

Paragraph 4: Paragraph 4 ensures that no details relating to the potential witness under threat or vulnerable witness are revealed unnecessarily. This is particularly important where the motion requests that the identity of the witness be kept confidential as provided for under Article 147(a)–(d). The motion should be filed in a sealed envelope that should not be opened by the court staff member who receives it. Instead, it should be transmitted immediately to a competent judge who can open it and deal with it. The registry should not be privy to any information concerning the contents of the motion.

Article 150: Granting of an Order for Protective Measures without a Hearing

1. Upon receipt of the motion for a protective measure under Article 147(f), the competent judge may make an order for this protective measure without conducting a hearing.
2. The order for protective measures under Article 147(f) must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.

Commentary

When determining whether to grant an order for a protective measure under Article 147(f), the competent judge has two options: either the judge can rely solely on the written information provided in the motion submitted by the prosecutor, the defense, or the witness, or he or she can schedule a hearing under Article 151 to gather more information in advance of making his or her decision. Where the judge deems that he or she has sufficient information to grant the order for protective measures under Article 147(f), he or she can simply issue the order and later issue a written and reasoned decision. Where a judge is unsure about whether to grant an order for protective measures or where he or she wishes to gather more information, he or she must schedule a hearing.

Article 151: Granting of an Order for Protective Measures after a Hearing

1. Except as provided for in Article 150, upon receipt of the written motion, the competent judge must schedule a date and time for a closed protective measures hearing to request further information from the prosecutor, the defense, and the potential witness under threat or vulnerable witness.
2. Where the motion for protective measures has been submitted by the defense, the defense, the prosecutor, and the potential witness under threat or vulnerable witness must be informed of the date and time of the hearing under a sealed notice of a protective measures hearing in accordance with Article 27. The prosecutor must be present at the protective measures hearing.
3. Where the motion for protective measures has been submitted by the prosecutor or a potential witness under threat or vulnerable witness, the prosecutor and the witness must be informed of the date and time of the hearing under a sealed notice of a protective measures hearing in accordance with Article 27. The defense may not be present at a hearing of a motion for protective measures filed by the prosecutor or a potential witness under threat or vulnerable witness.
4. The protective measures hearing must be held in closed session and may include only the prosecutor, the defense, where applicable, the witness in question, and essential court and prosecution personnel.
5. Where a witness is examined at the protective measures hearing, he or she must make a solemn declaration under Article 247, 248, or 249. The competent judge must issue the warning set out in Article 235. The competent judge must inform the witness of his or her right to be free from self-incrimination under Article 251.
6. The competent judge may grant a protective measures order where:
 - (a) the judge has verified that the witness concerned falls under the category of a witness under threat or a vulnerable witness as defined in Article 148, respectively;
 - (b) with regard to a witness under threat, the judge has verified that a credible threat to the security of the witness or his or her family members exists. The threat must be substantiated by facts;
 - (c) with regard to a vulnerable witness, the witness is vulnerable as defined in Article 148;

- (d) the judge is convinced that the potential witness under threat or vulnerable witness is a credible witness;
 - (e) the testimony of the potential witness under threat or vulnerable witness is important for the criminal proceedings; and
 - (f) the need to grant the protective measure in favor of the witness under threat or the vulnerable witness and the needs of the criminal investigation are adequately balanced against the rights of the suspect or the accused.
7. Where the competent judge finds that the conditions set out in Paragraph 6 are met, the judge may make an order for protective measures, specifying:
- (a) the name of the person to whom the protective measures will apply, unless the witness's name is being temporarily withheld;
 - (b) the particular protective measures that will apply to the witness;
 - (c) the duration of the application of the protective measures;
 - (d) that all persons with access to the protective measures order must not reveal the sealed order for protective measures;
 - (e) the consequences of revealing the contents of the sealed order for protective measures, including potential prosecution under Article 200 of the MCC; and
 - (f) the name of the court in which the decision was issued and the name and signature of the competent judge.
8. The order for protective measures must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.
9. Where an order for protective measures is not granted, a written and reasoned decision must be released within a reasonable time after the hearing on protective measures.
10. An order for protective measures and the written decision on protective measures under Article 147(1)(a)–(e) must not contain any information that could lead to the discovery of the identity of the witness under threat or the vulnerable witness or the family of the witness.
11. An order for protective measures and a decision on protective measures must not reveal the existence of, or expose to serious risk, the operational security of ongoing and confidential police investigations.
12. An order for protective measures or the refusal of the competent judge to grant an order for protective measures may be appealed by way of interlocutory appeal under Article 295.

Commentary

Paragraph 6: Paragraph 6 sets out in full the grounds that must be found for the competent judge to grant a witness protection order. Not only must the judge inquire into the credibility of the threat to a proposed witness under threat and the vulnerability of a potential vulnerable witness on the basis of substantiated facts, but also the judge must make a full inquiry into the credibility of the witness by questioning the witness at the hearing. The drafters of the M CCP had at a certain point considered whether a hearing on witness protection measures was required in every case. It was considered imperative that, with the exception of the temporary removal of the accused under Article 147(f), a hearing always be conducted, given the need to verify the credibility of the witness. Another element of the judge's reasoning on whether or not to grant a witness protection measure is the balancing of the need to protect the witness and the needs of the criminal investigation with the rights of the suspect or the accused. This is a fundamental element in the determination of any measure of witness protection or witness anonymity because these measures impact upon the rights of the suspect or the accused.

Article 152: Records Relating to a Protective Measures Hearing

1. A closed protective measures hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. Information relating to the protective measures hearing, and all other information relating to protective measures, including the original motion for protective measures, must be sealed and stored in a secure place, under lock, and separately from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

To protect the identity of the witness under threat or vulnerable witness, all documentation and recordings of the hearing on protective measures must be sealed. The court file may record that a witness is subject to an order for protective measures. It will also

contain the order and the written and reasoned judgment. However, the full record of the hearing must be removed and stored in a secure location so that no one except the judge and the prosecutor, and where there is an appeal under Article 295, the appeals court may have access to it. The records should be stored in a separate locked room.

Article 153: Service of an Order for Protective Measures

The order for protective measures and the written decision must be served under seal upon the prosecutor and the suspect or the accused in accordance with Article 27.

Commentary

The person who serves the order for protective measures or the decision must not have access to the information contained in either. In practice, this means that the judge must sign and seal the order and decision, which must then be served, untampered with, to the suspect or the accused and the prosecutor. Ideally, the order or decision should be accompanied by a note to inform the recipient that he or she should have received a sealed package and, if otherwise, to report this immediately to the competent judge.

Article 154: Amendment of an Order for Protective Measures

1. Where an order for protective measures has been granted, it may be amended upon the motion of the party who filed the initial motion. The competent judge may decide upon the motion without a hearing, or the judge may convene a hearing in accordance with Article 151.
2. The order for protective measures may be amended only by the judge who made the original order for protective measures. If the competent judge is not available, another judge must be designated by the judge administrator.

Commentary

Paragraph 1: The need to amend an order for protective measures may arise, for example, where an additional protective measure is required to adequately protect the witness.

Paragraph 2: In the unlikely event that the original judge who issued the order is unavailable, for example, due to illness or incapacity, another judge must be designated. The judge administrator should select a suitable judge, who must then make himself or herself familiar with the motion, the order, and the decision and who can have access to the records of the hearing prior to determining a motion for the amendment of the original motion.

Article 155: Appeal

A decision to grant or not to grant an order for protective measures may be appealed under Article 295.

Section 2: Witness Anonymity for Witnesses under Threat

General Commentary

Where witness anonymity is granted by a court, the identity and whereabouts of a witness will be withheld from the public, the press, and the defense. The granting of witness anonymity is an exceptional measure and applies only to a witness under threat as defined in Article 148 and not to a vulnerable witness. In addition, witness anonymity may be granted only where protective measures are insufficient to guarantee the witness's safety and that of the witness's family. It is worth noting that witness anonymity may be granted in favor of a *precious witness*, meaning a witness, such as an undercover agent or an informant, for whom a public interest exists not to reveal his or her identity because this would compromise their future deployment. Under international human rights jurisprudence, a precious witness may benefit from a witness anonymity order only where the precious witness falls into the category of a witness under threat.

Witness anonymity can be applied for at any stage of the proceedings, not just during the investigation of a criminal offense. For example, the prosecutor could make a motion for witness anonymity during the trial of an accused.

Witness anonymity is rarely granted because it impacts greatly on the fundamental rights of the accused such as the right to examine or have examined witnesses against him or her (contained in Article 64). The rationale for allowing such intrusive measures is based on the need to protect the rights of witnesses during trial. Thus, the rights of the accused are balanced with the rights of the witness. The European Court of Human Rights has sanctioned the use of witness anonymity measures in exceptional circumstances. In *Doorson v. Netherlands* (application no. 20524/92 [1996] ECHR 14 [March 26, 1996]), the European Court ruled that the use of anonymous witnesses does not automatically vitiate the rights of the accused to a fair trial. It further stated that countries “should organise their criminal proceedings in such a way that those interests [of witnesses] are not unjustifiably imperilled” and advocated a balancing of interests in determining the appropriateness of an order granting witness anonymity: “[P]rinciples of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify” (paragraph 70). The use of anonymous witnesses has also been approved of by the International Criminal Tribunal for the former Yugoslavia (see *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995). Anonymous witness legislation has been introduced in some post-conflict states, such as Kosovo and Bosnia and Herzegovina, in the form of UNMIK Regulation 2001/20 on the Protection of Injured Parties and Witnesses during Criminal Proceedings and the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, respectively. In contrast, some other states prohibit the use of witness anonymity on account of the constitutional prohibition on interference with the accused’s right to examine or to have examined witnesses against him or her.

Where witness anonymity has been allowed in both domestic and international settings, its use has been carefully regulated. It should not be employed where “a less restrictive measure can suffice” (*Van Mechelen v. Netherlands*, application no. 21363/93, 21364/93, 21427/93 [1987] ECHR 90 [April 23, 1997], paragraph 58). A number of guiding principles to regulate witness anonymity have been articulated by the European Court of Human Rights, where the issue of witness anonymity has been litigated. For example, the European Court has articulated the following requirements:

- (1) The granting of an anonymous witness order should be an exceptional measure (*Van Mechelen v. Netherlands*, paragraph 56).
- (2) The need for anonymity must be objectively demonstrated in respect to each witness (*Van Mechelen v. Netherlands*, paragraphs 60–62).
- (3) The use of anonymous witnesses must be “sufficiently counterbalanced by the procedures followed by the judicial authorities” (*Doorson v. Netherlands*, paragraphs 72 and 75). The mechanism by which such a balance can be struck

should be an independent “verification procedure” (see Council of Europe Recommendation no. R (97) 13 [1997], paragraph 10). The European Court in *Van Mechelen* found that where an investigating judge had assessed the reliability and credibility of the anonymous witness, without the authorization of a judge (acting as an independent verifier) not involved in the main trial, that assessment represented a breach of the rights of the accused.

- (4) The judge, in considering whether or not to grant an order of anonymity, must undertake a thorough “examination into the seriousness and well-foundedness” of the fears of the witness seeking anonymity (*Visser v. Netherlands*, application no. 26668/95, [2002] ECHR 108. [February 14, 2002]).
- (5) Any conviction should not be based solely or to a decisive extent upon anonymous statements (*Doorson v. Netherlands*, paragraph 76; *Visser v. Netherlands*, paragraphs 50 and 54; and Council of Europe Recommendation no. R (97) 13, paragraph 13).

These fundamental principles have been integrated into Section 2 and also in Article 263 of the MCCC, which provides that a conviction may not be based solely or to a decisive extent upon anonymous statements.

In addition to the foregoing safeguards, Section 2 incorporates a number of additional safeguards articulated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* decision; namely, that the evidence must be sufficiently important to make it unfair for the prosecutor to proceed without it (see Article 157[1][b]), that the judge know the identity of the witness and inquire into the reliability of the person for whom the order is sought (Article 157[1][c]), and that the defense be given the opportunity to examine the witness on all issues except the identity and whereabouts of the witness or his or her family members (Article 244[3]).

Article 156: Witness Anonymity

1. Witness anonymity refers to the absence of revealed information regarding the identity or whereabouts of a witness under threat or the identity of a family member of a witness under threat.
2. Witness anonymity is an exceptional measure and must be granted only in exceptional circumstances in favor of a witness under threat where protective measures under Articles 147–155 are insufficient to guarantee the protection of the witness under threat.

Commentary

Paragraph 1: See Article 148(a) for a definition of “witness under threat.”

Paragraph 2: This paragraph sets out the principle enunciated by the European Court of Human Rights, and discussed above in the general commentary to Section 2, that witness anonymity should be an exceptional measure. If a judge finds that the safety and security of a witness may be protected through any of the protective measures listed in Article 147 or any combination of them, then witness anonymity should not be granted.

Article 157: Grounds for Seeking an Order for Witness Anonymity

1. An order for anonymity may be granted in favor of a witness under threat where:
 - (a) a serious risk to the witness under threat or to a family member of the witness under threat exists if complete anonymity is not granted;
 - (b) the testimony of the witness during the investigation or at trial is relevant to a material issue in the case so as to make it unfair to compel either the defense or the prosecutor to proceed without it;
 - (c) the credibility of the witness has been fully investigated and disclosed to the court in closed session by the party who filed the motion for witness anonymity and where the court determines that the witness is fully credible; and
 - (d) the need for anonymity of the witness outweighs the interest of the public, the suspect or the accused, and his or her defense counsel in knowing the identity of the witness.
2. A “witness under threat” has the same meaning as in Article 148(a).

Commentary

The criteria set out in Article 157 for the granting of an anonymous witness order were derived from the jurisprudence and international standards on the use of anonymous witnesses discussed in the general commentary to Section 2. Reference should be made to the general commentary for further discussion on these standards.

Article 158: Procedure for Seeking a Motion for Witness Anonymity

1. The prosecutor or the defense may file a motion for witness anonymity.
2. The motion for witness anonymity must be filed in a sealed envelope to the registry of the competent trial court clearly indicating on the outside that this envelope contains a motion for witness anonymity and only the competent judge and the prosecutor may have access to the sealed contents.
3. The motion for witness anonymity must contain:
 - (a) the name of the competent trial court to which the motion is being submitted;
 - (b) the name of the party filing the motion;
 - (c) the name of the proposed witness under threat;
 - (d) information concerning the criminal proceedings in which the proposed witness under threat is to testify in, including the name of the suspect or the accused and the criminal offense that he or she is suspected or accused of;
 - (e) a description of the factual circumstances that substantiate the need to declare the witness to be a witness under threat;
 - (f) the facts that indicate a serious risk to the witness under threat or to a family member of the witness under threat if complete anonymity is not granted as set out in Article 157(1)(a);
 - (g) information relating to the evidence the proposed witness under threat will provide at the trial of the criminal offense, including its materiality to the case as set out in Article 157(1)(b);
 - (h) the investigations undertaken by the party filing the motion into the credibility of the witness as set out in Article 157(1)(c); and
 - (i) a request to the competent judge to grant an order of anonymity.
4. The registry must forward the sealed motion immediately to the competent judge.

Commentary

Just like with a motion for protective measures, a motion for witness anonymity can be submitted by either the prosecutor or the defense. In the case of witness anonymity, however, in contrast to witness protection measures, a witness cannot submit a motion. The motion for witness anonymity is filed in much the same way as a motion for protective measures. The ultimate aim of the requirements set out in Article 158 is to ensure that no one except the party submitting the motion, the judge, and the prosecutor has access to the sensitive information contained in the motion.

Article 159: Witness Anonymity Hearing

1. Upon receipt of the motion for witness anonymity, the competent judge must set a date for a witness anonymity hearing in closed session.
2. Where the motion for witness anonymity has been submitted by the suspect or the accused, the suspect or the accused, the prosecutor, and the potential witness under threat must be informed of the date and time of the hearing under a sealed notice served in accordance with Article 27. The prosecutor must also be present at the hearing on a motion for witness anonymity.
3. Where the motion for witness anonymity has been submitted by the prosecutor, the prosecutor and the potential witness under threat must be informed of the date and time of the hearing under a sealed notice served in accordance with Article 27. The suspect or the accused and his or her defense counsel may not be present at a hearing on a witness anonymity motion filed by the prosecutor.
4. The witness anonymity hearing must be held in closed session and may include only the prosecutor, the witness in question, the suspect or accused, his or her defense counsel, where the application has been made by the suspect or the accused, and essential court and prosecution personnel.
5. At the witness anonymity hearing, the competent judge must consider all the issues set out in Article 157(1) through questioning of the witness and other persons that the judge considers necessary to question.
6. Where a witness is examined at the witness anonymity hearing, he or she must make a solemn declaration under Articles 247, 248, or 249. The competent judge must issue the warning set out in Article 252. The competent judge must also inform the witness of his or her right to be free from self-incrimination under Article 251.

7. The judge may grant an order for anonymity where the conditions in Article 157 are met.
8. The order for witness anonymity must specify:
 - (a) the fact that an order for witness anonymity has been granted;
 - (b) that all persons with access to the witness anonymity order must not reveal the contents of the sealed order;
 - (c) the consequences of revealing the contents of the sealed order for witness anonymity, including potential prosecution under Article 200 of the MCC; and
 - (d) the name of the court in which the decision was issued and the name and signature of the competent judge.
9. The order for anonymity must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.
10. Where an order for witness anonymity is not granted, a written and reasoned decision must be released within a reasonable time after the hearing on witness anonymity.
11. The order for witness anonymity, if granted, and the written decision on witness anonymity must not contain any information that could lead to the discovery of the identity of the witness under threat or his or her family, or that could reveal the existence of, or expose to serious risk, the operational security of ongoing and confidential police investigations.

Commentary

Unlike in the case of a motion for protective measures where the judge has discretion to call a hearing or not, when a motion for witness anonymity is submitted to the court, the competent judge must schedule a closed hearing. This hearing will always be attended by the judge, essential court personnel (e.g., to record the session), the potential witness under threat, and the prosecutor. Where the motion for witness anonymity is filed by the suspect or accused person, he or she and counsel for the suspect or the accused may also be present. At the hearing, the judge, through questioning the potential witness under threat and any other person, must ascertain whether the criteria set out in Article 147(1) are met. Where the judge finds that an order for witness anonymity is necessary, he or she must write up an order immediately and later draft a written judgment. Where no order for witness anonymity is granted, the judge must also draft a written judgment. This judgment will be important if a person seeks to appeal the decision not to grant the order under Article 162. It will be equally important if the defense seeks to appeal a decision to grant an order for witness anonymity under the same article. The judgment and the order must be scrutinized prior to transmission

to ensure that no information concerning the identity of the witness under threat is revealed and that no information concerning other ongoing investigations is revealed.

Article 160: Records Relating to an Order for Witness Anonymity

1. The closed witness anonymity hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. Information relating to the witness anonymity hearing, and all other information relating to witness anonymity, including the original motion for witness anonymity, must be sealed and stored in a secure place, under lock and separate from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

It is important that the witness anonymity hearing be recorded, particularly where an appeal against the decision is filed. It is equally important that the information derived from the hearing not be accessed by any person who was not present at the hearing or who does not have a right to this information. Thus, the transcript of the proceedings, or a summary as the case may be (see Article 37 for a discussion on records of hearings), must be removed from the general case file. The order and the decision can remain in the file. They must, however, be sanitized to make sure that they contain no information that identifies the witness under threat or his or her whereabouts. Provision should be made in the courthouse for separate storage of sealed documents under lock and in a restricted area.

Article 161: Service of an Order for Witness Anonymity

The order for witness anonymity and the decision on witness anonymity must be served under seal on the suspect or the accused and the prosecutor in accordance with Article 27.

Commentary

The person who serves the order for witness anonymity or the decision must not have access to the information contained in either. The judge must sign and seal the order and decision, which must then be served, untampered with, to the suspect or the accused and the prosecutor. The order or decision should be accompanied by a note informing the recipient that he or she should have received a sealed package and, if otherwise, to report this immediately to the competent judge.

Article 162: Appeal

A decision to grant or not to grant an order for witness anonymity may be appealed under Article 295.

Commentary

The decision by the competent judge to grant or not to grant an order for witness anonymity can be appealed by either the defense or the prosecutor by way of interlocutory appeal. It may also be appealed by a witness, for example, where the judge refuses to grant an order for witness anonymity.

Section 3: Immunity from Prosecution for Cooperative Witnesses

General Commentary

Section 3 establishes a legal process where a person who is a suspect (as defined under Article 1[43]) may, through the prosecutor, request that the court declare that he or

she is a *cooperative witness*. The effect of being declared a cooperative witness is that the witness is immune from prosecution for a particular criminal offense or offenses that he or she was suspected of and that are the subject of the cooperative witness order. The offense or offenses for which the witness is granted immunity will be decided on by the court during the cooperative witness hearing, and the person will still be liable for prosecution for other alleged criminal acts.

The use of cooperative witnesses is an important tool for the police and prosecution in the investigation of criminal offenses, particularly those of a more serious nature. In cases such as organized crime, for example, it is extremely difficult to gather the testimony of witnesses. The evidence of a cooperative witness about an organized criminal group and its leaders can prove invaluable in facilitating a thorough investigation and presentation of evidence. The usefulness of cooperative witnesses has been recognized in the United Nations Convention against Transnational Organized Crime (Article 26[3]), which urges states parties “to consider providing the possibility ... of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offense covered by this Convention.”

It is important to consider the cooperative witness mechanism contained in the MCCP in comparison to other ways of securing the cooperation of witnesses who are suspected of committing a criminal offense. The sort of immunity provided under the MCCP is *full immunity* or *transactional immunity*, whereby prosecution of the cooperative witness for named criminal offenses is barred. In some states, *partial immunity* or *use immunity* is granted to a cooperative witness by a court. Use immunity means that the testimony a witness gives when cooperating with the authorities may not be used directly or indirectly in a subsequent prosecution against him or her. In other states, cooperative witnesses are granted immunity by the prosecutor rather than by the court through the drafting of nonprosecution agreements or cooperation agreements. Such an agreement may form part of plea bargaining, or, as the MCCP designates it, “Proceedings on Admission of Criminal Responsibility” (Article 87). Under a nonprosecution agreement, a prosecutor will grant full immunity from prosecution to a suspect for a particular criminal offense in exchange for his or her cooperation in another case. A cooperation agreement, on the other hand, focuses on the mitigation of a sentence, whereby the prosecutor agrees to file a motion with the court suggesting that the sentence of the accused person be reduced. The latter is not, however, a legally binding agreement, and a judge is not obliged to follow it. Under the MCCP, in addition to the cooperative witness mechanism in Section 3, a prosecutor could enter into a cooperation agreement with a witness. However, in accordance with Article 95(6) of the MCC, this agreement would not be binding upon the court in the determination of a penalty.

Some states have been reticent to introduce cooperative witness mechanisms that provide for full immunity from prosecution because, for example, domestic law provides for mandatory prosecution or because these states believe that cooperative witness mechanisms violate the principle of equality before the law and are open to abuse. The possible negative public reaction to the fact that a person suspected of a criminal offense was set free without prosecution has also made some states reticent to adopt such mechanisms. It is important to consider these factors, and particularly public perceptions, in determining whether to introduce a cooperative witness mechanism into domestic law, particularly in post-conflict states where a history of using “collabo-

rators of justice” to convict persons may exist. In some post-conflict states such as Kosovo, provisions on cooperative witnesses have been introduced into domestic law to address serious crimes like organized crime (see UNMIK Regulation 2001/21 on Cooperative Witnesses).

Reference should be made to Article 263(7), which provides that, in determining the outcome of a case, the judge or panel of judges not base a verdict “solely, or in the absence of corroborating evidence, to a decisive extent” on the evidence of a single cooperative witness.

Article 163: Definition of a Cooperative Witness

1. A cooperative witness is a person who is:
 - (a) suspected of having committed a criminal offense or who has been indicted, but where the indictment has not yet been read at the confirmation hearing under Article 201; and
 - (b) expected to give evidence in court that:
 - (i) is likely to prevent criminal offenses by another person or to lead to the finding of truth in a criminal proceeding or that may lead to the successful prosecution of the perpetrator of a criminal offense;
 - (ii) is voluntarily made with full agreement to testify truthfully in court; and
 - (iii) is judged by the court to be truthful and complete.
2. A person who has previously been granted witness anonymity under Chapter 8, Part 4, Section 2, may not be granted the status of a cooperative witness.
3. A person who has been granted the status of a cooperative witness may not subsequently be granted the status of an anonymous witness under Chapter 8, Part 4, Section 2.
4. No order may be issued if the person seeking cooperative witness status is suspected or accused of:
 - (a) genocide, crimes against humanity, or war crimes;
 - (b) a criminal offense that carries a potential penalty of more than fifteen years of imprisonment; or
 - (c) being the organizer or the leader of a group of two or more persons that committed a serious criminal offense that carries a potential penalty of

more than ten years of imprisonment or that resulted in the death or serious bodily injury of a person.

Commentary

Paragraph 1: A cooperative witness may be a person who has not been arrested or detained but is under investigation (whether the investigation has officially been initiated under Article 94 of the M CCP or not) and is suspected of committing a criminal offense. A suspect becomes an accused (as defined in Article 1[1]) upon the confirmation of an indictment against him or her under Article 201(7). Once the indictment has been confirmed, a person cannot qualify as a cooperative witness.

Paragraphs 2 and 3: The granting of an order for witness anonymity impinges greatly on the right of the accused to fully examine the witness, and this impedes his or her defense. If a person was granted anonymity and was simultaneously granted immunity from prosecution for another offense, the accused person would be at too great a disadvantage. Where a person is a cooperative witness and his or her identity is known to the accused, the accused can challenge the credibility of the witness or his or her evidence. This is important given the fears as to the reliability of statements obtained from cooperative witnesses, who have a great incentive to testify, given that the act of testifying will grant them immunity from prosecution.

Paragraph 4(a): Given the heinous nature of the criminal offenses of genocide, crimes against humanity, and war crimes, the M CCP does not allow the granting of immunity from prosecution in these cases. This is consistent with the practice of the Nuremberg Tribunal (Rule [2c] of the Rules of Procedure of the International Military Tribunal at Nuremberg), the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. In the words of Antonio Cassese, former president of the International Criminal Tribunal for the former Yugoslavia, “no one shall be immune from prosecution for crimes such as these, no matter how useful their testimony is” (UN document IT-29). To provide for immunity from prosecution for these crimes would be inconsistent with the principle of individual responsibility originally enunciated at Nuremberg.

Paragraph 4(b) and (c): In general, the purpose of a cooperative witness mechanism is to obtain the testimony of those involved in less serious crime, for example, those at the lower ranks of an organized criminal gang, against those involved at the highest level of an organized criminal gang. Consequently, Paragraph 4(b) and (c) precludes a person accused of an offense that carries a potential penalty of more than fifteen years or a person who is the leader of a group engaged in certain criminal activities that carry a potential penalty of more than ten years from obtaining cooperative witness status.

Article 164: Procedure for Seeking a Cooperative Witness Order

1. A prosecutor may file a motion with the registry of the competent trial court for a cooperative witness order.
2. The motion for a cooperative witness order must be submitted to the registry of the competent trial court in a sealed envelope clearing indicating on the outside that it is a motion for a cooperative witness order.
3. The motion for a cooperative witness order must specify:
 - (a) the name of the competent trial court and the name of the party submitting the motion;
 - (b) the name of the person for whom cooperative witness status is being sought;
 - (c) any prior criminal offenses that the person in question has been accused or convicted of;
 - (d) the criminal offense, or offenses, that the person in question is being investigated for or is suspected of perpetrating;
 - (e) the criminal offense for which the prosecutor is seeking to grant immunity from prosecution by way of a cooperative witness order;
 - (f) details of the criminal proceedings in which the person for whom cooperative witness status is being sought has agreed to testify in, including the name of the accused person in those proceedings; and
 - (g) the evidence that the person for whom cooperative witness status is being sought has agreed to provide in criminal proceedings.
4. The motion for a cooperative witness order by the prosecutor must be accompanied by a separate declaration of factual allegations against the suspect or the accused in the case in which the cooperative witness is expected to give evidence. The prosecutor may make a request to the competent judge to keep the factual allegations, and the reasons for such a request, secret from the defense.
5. The competent judge may, at any time after receiving a request from the prosecutor to keep the factual allegations secret from the defense, make an order for nondisclosure with respect to factual allegations contained in the separate declaration.

6. The registry must forward the sealed motion for a cooperative witness order immediately to the competent judge.

Commentary

A motion for cooperative witness status originates with the prosecutor, who will most likely have had in-depth discussions with the potential cooperative witness to discuss the submission of the motion and to get his or her agreement to testify. Given the sensitive nature of a motion for cooperative witness status, and the fact that it contains evidence relating to another criminal proceeding, the motion must be submitted under seal and its contents not revealed to any persons, including the staff of the registry. Under Paragraph 6, the registry is required to pass the sealed motion along to a competent judge. The prosecutor must provide the details required under Paragraph 3. In addition, a separate declaration of factual allegations against the suspect or the accused must be submitted to the judge. At this stage, the defense will not be aware that a motion for cooperative witness status has been made, nor should it be aware of the details of this motion. Under Paragraph 4, the prosecutor may request that the judge not disclose the information to the defense in a separate declaration.

Article 165: Cooperative Witness Hearing

1. Upon receipt of the motion for a cooperative witness order, the competent judge must set a time and date for a cooperative witness hearing in closed session.
2. The prosecutor, potential cooperative witness, and counsel for the potential cooperative witness must be informed of the time and date of the cooperative witness hearing under a sealed notice of a cooperative witness hearing served in accordance with Article 27.
3. The accused person against whom the potential cooperative witness may testify, and his or her defense counsel, must not be present at the cooperative witness hearing.
4. The cooperative witness hearing in closed session may include only the prosecutor, the potential cooperative witness in question, counsel for the potential cooperative witness, and essential court and prosecution personnel.
5. The prosecutor and counsel for the potential cooperative witness may participate in questioning the person for whom cooperative witness status is being sought to evaluate his or her credibility and to ensure that the requirements in Article 163 are met.

6. Before the potential cooperative witness is questioned, the court must warn the witness about the consequences of making false statements, including the possibility of prosecution for the criminal offense of “False Statements of a Cooperative Witness” under Article 199 of the MCC.
7. Statements made during questioning must not be used in criminal proceedings against the cooperative witness, or against any other person, as evidence to support a finding of criminal responsibility.
8. At the conclusion of the hearing, and if the competent judge is satisfied that the criteria in Article 163 are met, the judge may make an order declaring that a person is a cooperative witness.
9. The cooperative witness order must:
 - (a) state that there will be no initiation or continuation of criminal proceedings against the cooperative witness for the criminal offense(s) specified in the order, and that no penalty may be imposed for the criminal offense so specified;
 - (b) specify the criminal offenses for which the prohibition of initiation or continuation of criminal proceedings against the cooperative witness applies;
 - (c) specify the nature and substance of cooperation that has been or that will be given by the cooperative witness;
 - (d) specify the conditions for the revocation of the order;
 - (e) outline the consequences of giving false statements to the prosecutor, the police, and the court, including potential prosecution under Article 199 of the MCC;
 - (f) require the cooperative witness to report to the judge any promises to, threats against, or inducements, payments, or offers that the cooperative witness has received;
 - (g) contain a declaration that the granting of a cooperative witness order in favor of a person does not prohibit the initiation or continuation of criminal proceedings against him or her for other criminal acts not specified in the order; and
 - (h) contain the name of the competent trial court and the name and signature of the competent judge.
10. The cooperative witness order, if granted, must be served in accordance with Article 167.

Commentary

A motion for cooperative witness status must always be determined in a closed hearing at which the prosecutor, the judge, the potential cooperative witness, and counsel for the cooperative witness, if available, are present (see Article 151[2]). The details of the time and place of the hearing must be delivered under seal to the parties attending to ensure that no information regarding the motion or the potential cooperative witness is revealed to anyone else. In the course of the hearing, the potential cooperative witness will be questioned by the court, in addition to the prosecutor and counsel for the cooperative witness (if either choose to do so), to ascertain whether the cooperative witness meets the criteria set out in Article 163.

At the end of the hearing, the judge may issue a cooperative witness order. The order does not provide blanket immunity for a person from criminal prosecution in the future. It is specific only to those offenses that are stated in the order. The cooperative witness may subsequently be tried for other conduct not mentioned in the order.

Article 166: Records Relating to a Cooperative Witness Hearing

1. The closed cooperative witness hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. The information relating to the cooperative witness hearing and all other information relating to the cooperative witness, including the original motion for the cooperative witness order, the factual declaration, and the decision, must be sealed and stored in a secure place, under lock and separately from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

It is important that the cooperative witness hearing be recorded, but it is equally important that the information derived from the hearing not be accessed by any person who was not present at the hearing or who does not have a right to this information. Thus, the transcript of the proceedings, or a summary as the case may be (see Article 37 for a discussion on records of hearings), must be removed from the general

case file. The order and the decision can remain in the court file. The only person with access to the restricted data must be the competent judge and prosecutor. Provision must be made in the courthouse for separate storage of these sealed documents under lock and key in a restricted area.

Article 167: Service of a Cooperative Witness Order

The following persons must be served with a copy of the cooperative witness order within a reasonable time after the order is made:

- (a) the suspect or the accused against whom the cooperative witness is expected to testify and his or her counsel;
- (b) the cooperative witness; and
- (c) the prosecutor.

Article 168: Revocation of a Cooperative Witness Order and Liability for the Criminal Offense of False Testimony of a Cooperative Witness

1. The prosecutor may apply for the cooperative witness order to be revoked by filing a motion for revocation of a cooperative witness order with the registry of the competent trial court.
2. The motion for revocation of a cooperative witness order must be considered by a panel of three judges at a closed hearing.
3. The prosecutor, the cooperative witness, and counsel for the cooperative witness must be informed of the time and date of the cooperative witness revocation hearing under a sealed notice served in accordance with Article 27.
4. The cooperative witness order must be revoked by an order of the competent panel of three judges where it is established that the testimony of the cooper-

ative witness was false in any relevant part or that the cooperative witness purposely omitted to state the complete truth.

5. A cooperative witness whose testimony was false in any relevant part, or who purposely omitted to state the complete truth to the prosecutor, the police, or the court is liable for the criminal offense of “False Statements of a Cooperative Witness” under Article 199 of the MCC.

Commentary

At any time after the cooperative witness order has been made, the prosecutor by way of a motion may request that a panel of judges be convened to consider revoking the order. A panel of three judges will consider the motion at a closed hearing that the prosecutor and the cooperative witness attend. If the judges conclude that the cooperative witness has in fact made false statements, they will immediately revoke cooperative witness status, which leaves the former cooperative witness open to prosecution for the offenses that he or she previously had immunity as well as from prosecution under Article 199 of the MCC.