

Chapter 9: Arrest and Detention

Part 1: Arrest

Article 169: The Right to Presumption of Liberty and Freedom from Arbitrary Arrest or Detention

1. No person may be subjected to arbitrary arrest or detention.
2. No person may be deprived of his or her liberty except on such grounds and in accordance with such procedures as prescribed by the applicable law.

Commentary

Paragraph 1: The right of a person to not be arbitrarily arrested or detained is found in Article 9 of the Universal Declaration of Human Rights, Article 9(1) of the International Covenant on Civil and Political Rights, Article 6 of the African Charter on Human and Peoples' Rights, Article XXV of the American Declaration of the Rights and Duties of Man, Article 7(3) of the American Convention on Human Rights, Article 20 of the Cairo Declaration of Human Rights in Islam, and Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The concept of arbitrariness applies to both the law under which a person is arrested and to the application of the law. An arrest or detention may be arbitrary if the law is arbitrary or if the actions of a criminal justice actor (e.g., a police officer) are arbitrary. The term *arbitrary* has been interpreted as meaning an arrest or detention that includes elements of inappropriateness, injustice, and lack of predictability and due process of law (see the United Nations Human Rights Committee case of *Albert Womah Mukong v. Cameroon*, UN document CCPR/C/51/D/458/1991 [1994], paragraph 9.8). The United Nations Human Rights Committee has stated that arbitrariness is broader than the concept of "unlawfulness." Amnesty International's *Fair Trials Manual* further provides that "an arrest or detention which is lawful may nonetheless be arbitrary under international standards, for example, if the law under which the person is detained is vague, overbroad, or is in violation of other fundamental standards" (Section 1.3). The International Bar Association's *Manual on Human Rights and the Administration of Justice* states that "the prohibition of arbitrariness also of

course means that deprivations of liberty must not be motivated by discrimination” (Chapter 5, Section 4.2). This would also be a breach of the individual’s right to freedom from discrimination set out in Article 55 of the MCCP.

The definition of *arrest* may be found in Article 1(3) of the MCCP; the definition of *detention* may be found in Article 1(13).

Paragraph 2: In addition to the prohibition on an arrest being arbitrary, an arrest or detention must not be unlawful. This prohibition is found in international instruments such as the International Covenant on Civil and Political Rights (Article 9[1]), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[1]), and the African Charter on Human and Peoples’ Rights (Article 6). There are two elements to unlawfulness here: (1) “on such grounds” is a substantive requirement that the grounds of arrest or detention are valid, and (2) “in accordance with such procedures as prescribed by the applicable law” requires that the legally required procedures are complied with. The European Court of Human Rights has stated that in order to assess the lawfulness of arrest or detention, the arrest or detention must be in conformity with the substantive and procedural rules of domestic law (see *Kemmache v. France* [no. 3], application no. 17621/91 [1994], ECHR 41 [November 24, 1994], paragraph 42). If, for example, a person is arrested under the MCCP without a warrant where none of the grounds for a warrantless arrest under Article 170(1) exist, the arrest would be unlawful. If a person is arrested without probable cause, under Article 171, the arrest would also be unlawful.

Article 170: Arrest without a Warrant

1. The police may arrest a person without a warrant where:
 - (a) he or she is found in the act of committing a criminal offense;
 - (b) the police are in hot pursuit of a person immediately after commission of a criminal offense;
 - (c) probable cause exists that a person has committed a criminal offense and that there is a likelihood that before a warrant could be obtained the suspect will flee or destroy, hide, taint, or falsify evidence of a criminal offense, or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice; or
 - (d) probable cause exists that a suspect has violated one of the restrictive measures imposed on him or her under Article 184.
2. Where the police arrest a person without a warrant, they must orally notify the prosecutor immediately.

3. In addition to the notification requirement contained in Paragraph 2, the police must also, without undue delay, submit a report of the arrest to the prosecutor. The report must detail the circumstances in which the arrest was made.
4. Where the prosecutor establishes that:
 - (a) he or she will not file a motion for detention; or
 - (b) he or she will not initiate or continue an investigation
 the prosecutor must order that the arrested person be released.
5. A person arrested without a warrant under Article 170 must be brought before the court promptly and no later than seventy-two hours after arrest to determine the issue of detention under Article 175.

Commentary

Article 170 sets out grounds upon which a person may be arrested without a warrant. The first ground is where a person is found in the act of committing a criminal offense. It is near universal practice that a person may be arrested when he or she is caught in the act of committing a criminal offense (sometimes known as “in flagrante delicto” meaning “when the crime is blazing”). The second permissible ground for a warrantless arrest is known as the “hot pursuit” exception. This means that where a police officer is chasing a person who is suspected of committing a criminal offense, the police officer may make an arrest without a warrant. The concept of “immediately after” is interpreted differently across jurisdictions. In some jurisdictions, it means seventy-two hours after the crime was committed, although in general it means several hours (see Amnesty International, *Understanding Policing: A Resource for Human Rights Activists*, page 157). The third ground for a warrantless arrest is where police have probable cause to believe that the person has committed a criminal offense but that before a warrant could be obtained the person will either flee or interfere with the evidence of a victim, a witness, or an accomplice. These are the same grounds that are provided in Article 177(2)(a) and (b) with regard to detention. Finally, a police officer may arrest a person where he or she reasonably suspects that the person has violated the restrictive measures imposed upon him or her.

Where a warrantless arrest is made, the police officer must make an immediate report to the prosecutor, who is in charge of leading the investigation. The prosecutor will then decide how to proceed, as provided for in Paragraph 4.

It is worth noting that in some legal systems, when a person is arrested, that is taken to mean that he or she is both apprehended and taken into police custody. In other legal systems, the term *arrest* is taken to mean only apprehension. For a person to be taken into police custody, a separate detention warrant is required. The MCCP envisages the former system of arrest.

Paragraph 5: Article 9(3) of the International Covenant on Civil and Political Rights, Article 7(5) of the American Convention on Human Rights, Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article XI of the Inter-American Convention on Forced Disappearance of Persons, Article 10(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, and Principle 11(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment all require that an arrested person be brought “promptly” before a judge. No definition of promptly is provided in international law. General Comment no. 8 of the United Nations Human Rights Committee states that “delays should not exceed a few days.” The European Court of Human Rights has set no limit to the meaning of promptly; rather time limits have been assessed on a case by case basis. The European Court has ruled that holding a person for four days and six hours is a violation of Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (see *Brogan v. United Kingdom*, application nos. 11209/84, 11266/84 [1988] ECHR 24 [November 29, 1988]). In another case, it found that four days is consistent with Article 5(3) (see *Egue v. France*, application no. 11256/84).

The MCCP sets seventy-two hours as the upper limit. This is toward the far end of the period within which a person should be brought before a judge in most states, but the drafters considered it preferable to allow for a slightly longer period given the inevitable resource and other constraints faced by post-conflict states. Ideally, the authorities will bring the person before a judge in advance of this time limit, particularly in the case of juveniles (see Article 333[1]). Where an arrested person is brought before the judge only after seventy-two hours, the police or the prosecutor should justify to the court why it took so long to bring the arrested person before it.

Article 171: Arrest under Warrant

1. Except as otherwise provided for in Article 170, a warrant is required for the arrest of a person.
2. The prosecutor may make an application for an arrest warrant where:
 - (a) probable cause exists that the person has committed a criminal offense; and
 - (b) reasonable grounds for detention under Article 177(2) exist.
3. The application for an arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offense and a specific reference to the criminal offense for which the arrest of the

- suspect is sought, including a reference to the relevant legal provisions;
and
- (c) a request to the competent judge to issue an arrest warrant.
4. Where the requirements of Paragraph 2 are met, the competent judge may issue an arrest warrant.
 5. The arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offense and a specific reference to the criminal offense for which the arrest of the suspect is sought, including a reference to the relevant legal provisions;
 - (c) the authority authorized to execute the arrest warrant;
 - (d) the date of the arrest warrant; and
 - (e) the signature of the competent judge.
 6. A person arrested under a warrant must be brought before the court promptly and no later than seventy-two hours after arrest to determine the issue of detention under Article 175.

Commentary

An arrest is an obvious interference with a person's right to liberty, yet it can also be a necessary measure in criminal proceedings. As outlined in Article 169, the arrest must be both nonarbitrary and lawful. Under the M CCP, an arrest is lawful only where a warrant is obtained or where the grounds for an arrest without a warrant as defined in Article 170(1) are present. In some legal systems, when a person is arrested, it is taken to mean that he or she is both apprehended and taken into police custody. In other legal systems, the term *arrest* is taken to mean only apprehension. For a person to be taken into police custody, a separate detention warrant is required. The M CCP envisages the former system of arrest.

An arrest under warrant of the sort contained in Article 171, namely a police arrest that is ordered by a judge, will likely be used rarely. Under the M CCP, the grounds upon which an arrest may be made are limited to those that are strictly necessary. In many states, a person may be arrested where there is a "reasonable suspicion" or "probable cause" (see the definition in Article 1[40]) that he or she committed a criminal offense. The M CCP contains this standard in part but adds to it that an arrest warrant may be issued only where the grounds of detention set out in Article 177(2) are present. In all other cases, except those specified in Article 170(1), a suspect should not be arrested. The prosecutor will continue the investigation, and if the prosecutor finds valid grounds to pursue the prosecution, the prosecutor may present an indictment to the court under Article 195.

The rationale for limiting the scope for use of an arrest warrant is that the drafters of the Model Codes believed that an arrest should not be used automatically for all suspects, especially for suspects in less serious crimes and for suspects who do not present a flight risk or a danger to the community. According to Amnesty International's *Understanding Policing: A Resource for Human Rights Activists*, "the decision as to whether or not to arrest a person depends on many factors such as the actual offense, the behavior of the suspect, as well as the experience and the skill of the police officer" (page 156). All too often, arrests leading to pretrial detention are conducted as a matter of common practice, leading to gross prison overcrowding and the unnecessary pretrial detention of suspects.

Paragraph 5: Reference should be made to the commentary to Article 170(5) for the discussion of the meaning of Paragraph 5.

Article 172: Procedure upon Arrest

1. When a person is arrested pursuant to an arrest warrant under Article 171, the police must give the arrested person a copy of the arrest warrant.
2. At the time of arrest, the police must orally inform the arrested person, in a language he or she understands, of:
 - (a) the reasons for his or her arrest;
 - (b) his or her right to remain silent; and
 - (c) his or her right to notify a family member or another appropriate person and his or her counsel.
3. An arrested person must also be informed, both orally and in writing, in a language he or she understands, that he or she has the right to:
 - (a) silence and not to incriminate himself or herself, and to be cautioned that any statement he or she makes may be recorded and used in evidence;
 - (b) legal assistance of the arrested person's choice or if he or she qualifies for it, the right to be provided with free legal assistance in accordance with Article 67 or 68;
 - (c) contact counsel and communicate with him or her freely and confidentially;
 - (d) the presence of counsel during all questioning by police;
 - (e) notify or require the police to notify a family member or another appropriate person of his or her choice about the arrest, place of detention, and any transfer of detention;

- (f) be brought promptly before a judge no later than seventy-two hours after arrest in order for the judge to assess the legality of arrest;
 - (g) contact and communicate orally or in writing with a liaison office, consular post, or the diplomatic mission of the state of which he or she is a national, if the suspect is a foreign national, or with the representative of the competent international organization, if he or she is a refugee or is otherwise under the protection of an intergovernmental organization;
 - (h) petition the court for release from any unlawful arrest or detention by filing a motion for habeas corpus under Chapter 16 of the MCCP;
 - (i) the assistance of an interpreter, free of cost, if the arrested person cannot understand or speak the language being used for questioning, and such translations as are necessary to meet the requirements of fairness; and
 - (j) access to a doctor, including the right to be examined if the arrested person so wishes. If no doctor is available, the arrested person has the right to be examined by a nurse or another medical professional.
4. No later than six hours after arrest, an arrested person must be given a written record specifying the reasons for arrest and providing details of his or her rights.
 5. Upon being given a written record of his or her rights, the arrested person must be asked by the police to sign the record acknowledging receipt of this record. Where the person refuses to sign the record, this must be noted in the record, as well as the reasons for the refusal to sign the record.
 6. An arrested person must be given written notification of the charges leveled against him or her.
 7. The arrested person must be registered by the police in accordance with the Model Detention Act and follow the other procedures set out in the Model Detention Act.

Commentary

Paragraph 1: Principle 12(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that an arrested person receive a record of the arrest. Paragraph 1 partially gives effect to this international standard by requiring that the arrest warrant be made available. Possessing this information will be crucial where an arrested person seeks to challenge the lawfulness of his or her arrest under Chapter 16 or where the person is later seeking compensation for unlawful arrest under Chapter 17. It is also important to have the arrest warrant and

surrounding information as part of the “facilities” required to facilitate the right to prepare a defense under Article 61.

Paragraph 2: The MCCC requires that the police give the arrested person some preliminary information at the exact moment of arrest. First, the person must be informed of the reasons for the arrest, as required by Article 9(2) of the International Covenant on Civil and Political Rights, Article 5(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(4) of the American Convention on Human Rights, and Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As is common in some states, the MCCC also requires that the arrested person be informed of his or her right to silence (see Article 57 and its accompanying commentary). Finally, the arrested person must be informed immediately of his or her right to contact a family member or another appropriate person and his or her counsel. Rule 92 of the United Nations Standard Minimum Rules for the Treatment of Prisoners requires the immediate notification of this right. To facilitate this, some states provide that arrested persons are given standard information when they are arrested by a police officer that may go as follows: “You are being arrested on the suspicion of committing an offense under Article XX of the Model Criminal Code. You have the right to remain silent. You do not have to talk to me if you do not wish to do so. Anything you do say could be used in evidence against you in a court of law. You have the right to contact a family member and your lawyer. If you do not have a lawyer, you have the right to legal assistance of your choice or to be provided with legal assistance if you qualify under the law.”

Paragraph 3(a): This paragraph gives effect to the right to silence and the right to freedom from self-incrimination set out in Article 57 of the MCCC.

Paragraph 3(c): The right to communicate confidentially with counsel is protected under Article 70 of the MCCC and is discussed in detail in the accompanying commentary.

Paragraph 3(d): Reference should be made to Article 71 and its accompanying commentary.

Paragraph 3(e): Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that, promptly after arrest, an arrested person be allowed to inform a family member or another appropriate person of his or her arrest. The arrested person should be informed both orally and in writing of this right at the moment of arrest. The police should give an arrested person the opportunity to make telephone contact with a family member if this is feasible. If it is not feasible, the police must ensure that the family is informed of the arrest and the place of detention in some other manner. Family members also need to be informed of any transfers of an arrested person from one detention center to another. Reference should be made to the Model Detention Act.

Paragraph 3(f): Reference should be made to Article 170(5) and Article 171(6), which describe the arrested person’s right to be brought promptly before a judge.

Paragraph 3(g): The right to consular support for arrested persons derives from a number of sources, including the Vienna Convention on Consular Relations (Article 36[a]), the International Convention on the Protection of All Persons from Forced Disappearances, Article 17(2)(d), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 16[2]), and the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Article 10). It is incumbent upon the police to facilitate direct contact between the arrested person and the consular or diplomatic representative. The police must also permit full access by the representative to the arrested person.

Paragraph 3(h): This paragraph requires the police to inform a person about his or her right to challenge the lawfulness of his or her detention at any stage of the proceedings. This right is set out in Chapter 16 and is given effect under Articles 339–345.

Paragraph 3(i): Paragraph 3(i) requires that the arrested person be informed of his or her right to an interpreter. The right to an interpreter is found in Article 59 of the MCCP.

Paragraph 3(j): General Comment no. 20 of the United Nations Human Rights Committee states that the protection of a person from torture or cruel treatment or punishment (contained in Article 58 of the MCCP) requires that the person must have access not only to a lawyer and family members but also to a doctor. This right is also contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 24), the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 24), and the European Prisons Rules (Rule 29). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has advocated this “trinity of rights” for arrested and detained persons (see *12th General Report*, CPT/Inf [2002] page 12, paragraph 40) and has further stated that there should be a formal legal recognition of this right. Where an arrested person requests, the police must call a doctor without delay and must not filter such requests (paragraph 42). The arrested person has the right to be fully examined by the doctor. Furthermore, the right of access to a doctor includes the right to a doctor of the person’s choice (e.g., his or her own doctor), if he or she so wishes, or the right to a second medical examination (Principle 25 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). The examination of the arrested person must take place out of hearing, and preferably out of sight, of police officers (see CPT, *2nd General Report*, CPT/Inf [1992], page 3, paragraph 38). The results of this examination as well as relevant statements of the arrested person and the doctor’s conclusions must be formally recorded and made available to the arrested person and his or her lawyer (Principle 26, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Paragraphs 4 and 5: Beyond the obligations to provide information regarding the arrested person’s rights under Paragraph 2 at the moment of arrest, additional obligations must be met at a slightly later stage. At that point, the person must be informed of his or her rights both in writing and orally in a language that the person under-

stands. This means that the police should have a standard form that sets out the rights of an arrested person in various languages and is handed to the arrested person once the contents of the form have been read to him or her. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommends “that a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights and that such a measure would be easy to implement, inexpensive and effective in protecting an arrested person from any potential incidences of torture or other mistreatment” (European Committee for the Prevention of Torture (CPT) and Inhuman or Degrading Treatment or Punishment 6th General Report, CPT/Inf (1996), page 21, paragraph 16). It is standard practice in many states that an arrested person is asked to sign the custody record verifying that he or she has been provided with a written copy of his or her rights. The right to be informed of a person’s rights is crucial to their realization. Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that any person from the moment of arrest be provided by the authorities with information on and an explanation of his or her rights and how to avail himself or herself of those rights. Note that the rights listed in Paragraph 3 also apply during the course of any period of detention, as stipulated in Paragraph 7.

Paragraph 6: As required by Paragraph 2, an arrested person must be informed of the charges against him or her at the exact moment of arrest. Paragraph 6 requires that later on in the arrest procedure, the arrested person be given a written notification of the charges against him or her. This is usually contained in a charge sheet that is presented to an arrested person by the police. The charge sheet does not have to provide a very detailed explanation of the full charges against the arrested person. Such detail is required only when the arrested person is formally accused of the criminal offense at the confirmation hearing under Article 201. At that point, the accused must be informed *in detail* of the charges against him or her. This right is set out in Article 60, which should be referred to for further discussion on its meaning.

Paragraph 7: Reference should be made to Section 2 of the Model Detention Act and its accompanying commentary, which discusses the importance of accurate record keeping at the time of arrest.

Article 173: Questioning of an Arrested Person

The questioning of an arrested person must be conducted in accordance with Articles 106–109.

Article 174: Conditions of Detention of an Arrested Person

The Model Detention Act applies to all persons arrested under the MCPP.

Part 2: Review of Legality of Arrest and Initial Detention Hearing

Article 175: Initial Hearing before a Judge after Arrest

1. The purpose of the initial detention hearing is to review the lawfulness of the arrest and to determine whether there are grounds for detention, bail, or restrictive measures other than detention or bail.
2. The prosecutor, the suspect, and the suspect's defense counsel must be present at the initial detention hearing.
3. At the commencement of the initial hearing, the competent judge must:
 - (a) inform the suspect of the rights to which he or she is entitled during the investigation under Articles 54–71 and Article 172;
 - (b) ensure that the rights of the suspect have been respected, particularly the right to legal assistance under Articles 65–71; and
 - (c) inform the suspect of his or her right to silence and not to incriminate himself or herself during the hearing.
4. The suspect, either personally or through his or her defense counsel, may raise objections before the competent judge concerning any allegations of ill treatment, violations of his or her rights by police or other authorities, or the unlawfulness of his or her arrest or detention.
5. Where the suspect chooses to make a statement, the competent judge, the prosecutor, and the counsel for the suspect may ask pertinent questions of the suspect with respect to his or her statement. The suspect is not obliged to respond to any questions posed by the judge or the prosecutor, if doing so would violate his or her right to freedom from self-incrimination.
6. The competent judge must assess whether the arrest of the suspect was lawful based on information submitted by the prosecutor and the suspect, if he or she chooses to make a statement, personally or through defense counsel.
7. If the arrest is deemed to have been unlawful, the competent judge must order that the suspect be released immediately. The order must be executed immediately. The competent judge must inform the suspect of his or her right

to seek compensation under Chapter 17. The competent judge must notify the office of the prosecutor to investigate the matter.

8. If the arrest is deemed to have been lawful, the arrested person must be released unless the prosecutor submits an application for detention, bail, or restrictive measures other than detention under Article 186.

Commentary

Article 175 gives effect to the arrested person's right to be brought promptly before a judge that is expressed in Article 172(3)(f). Reference should be made to the commentary to Article 170(5) for a discussion on the meaning of this right. Promptly, and within the time frame of seventy-two hours, whether it is on a weekday or weekend, the arrested person must appear before a judge, who is tasked with assessing the lawfulness of the arrest and determining whether the arrested person should be detained, subject to bail, or subject to restrictive measures other than detention or bail. The arrested person and his or her counsel must be present at the hearing. The arrested person may give evidence before the court, but he or she is not obliged to. The judge is required to "ensure" that the arrested person's rights have been respected and must inform the arrested person of all his or her rights. Under Paragraph 6, the arrested person must be given the opportunity to make allegations of mistreatment or unlawfulness of arrest or detention. The European Committee for the Prevention of Torture (CPT) recommends that the judge record any allegations of mistreatment in writing and order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated (*12th General Report*, CPT/Inf [2002], page 14, paragraph 45). This should be done even where the person does not bear visible external injuries.

After assessing all the evidence, both from the prosecutor and from the arrested person, the judge must either confirm the arrest or deem the arrest to be unlawful. In assessing the lawfulness of arrest, similar factors to those outlined in the commentary to Articles 169 and 177 apply. Thus, the judge must assess all the circumstances surrounding the arrest, including compliance with the procedural requirements of the applicable law but also the probable cause that underpinned the arrest and the legitimacy of the purpose of the arrest.

Paragraph 4: Principle 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that when an arrested person is brought before the judge, he or she must be given the opportunity to make a statement on the treatment received by him or her while in custody.

Part 3: Detention, Bail, and Restrictive Measures Other Than Detention

Section 1: General Provision

Article 176: Detention, Bail, and Restrictive Measures Other Than Detention

The following warrants may be made against a suspect or an accused:

- (a) a warrant for detention or continued detention;
- (b) a warrant for bail; or
- (c) a warrant for restrictive measures other than detention.

Commentary

The general rule is that a person must be afforded his or her personal liberty and not be held in detention pending trial. General Comment no. 8 of the United Nations Human Rights Committee states that “[p]re-trial detention should be an exception and as short as possible” (paragraph 3). In some cases, a suspect will not have been arrested. In other cases, an arrested person will have been released under Article 175 and will be at liberty pending trial. In exceptional circumstances, and only as provided for in Chapter 9, Part 3, a person may be subject to a restriction on his or her personal liberty or other restrictive measures. These measures must always be applied for by a motion of the prosecutor and should be determined by a judge at a hearing. A written warrant from a judge is necessary before any of the measures contained in Article 176 can be undertaken.

Section 2: Detention

Article 177: Grounds for Detention

1. Except as otherwise provided for in the MCCP or the applicable law, a warrant of the competent judge is necessary for the detention to be valid.
2. Detention may be ordered against an arrested person only where there is probable cause that:
 - (a) the suspect will flee to avoid criminal proceedings;
 - (b) the suspect will destroy, hide, taint, or falsify evidence of a criminal offense or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice;
 - (c) the suspect will commit a criminal offense, repeat a criminal offense, complete an attempted criminal offense, or commit a criminal offense that he or she has threatened, if released. In considering this ground, the seriousness of the criminal offense of which the person is suspected, the manner or circumstances in which it was committed, and the suspect's personal characteristics, past conduct, the environment and conditions in which he or she lives, and other personal circumstances must be taken into account to ascertain this risk; or
 - (d) public safety may be endangered if the suspect remains free.

Commentary

Paragraph 1: Principle 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires a written warrant of a judge for police to lawfully detain a person. Where a person is under detention without a written warrant for detention, he or she must be released immediately.

Paragraph 2: Detention is a measure of last resort. According to Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "except in special cases provided by law," a person is entitled to release pending trial subject to conditions that may be imposed in accordance with the law. Paragraph 2 provides a list of circumstances that would justify the detention of a suspect. In all cases, there must be probable cause (see Article 1[22] and its accompanying commentary for the definition of probable cause). The grounds set out in Paragraph 2 were arrived at after a survey of criminal legislation in states around the world and the conditions under which they sanction pretrial detention. These grounds have also

been scrutinized by international human rights bodies. The first ground for pretrial detention is found in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of *Yağci and Sargin v. Turkey*, the European Court held that in determining the risk of flight, the court must look not only at the seriousness of the criminal offense but also at “a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial” (*Yağci and Sargin v. Turkey*, application no. 16419/90;16426/90 [1995], ECHR 20 [June 8, 1995], paragraph 52). The ground for detention provided for in Paragraph 2(b) has been recognized by the European Court of Human Rights (see *Tomasi v. France*, application no. 12850/87 [1992], ECHR 53 [August 27, 1992], paragraphs 92–95), as has the risk of a person reoffending as set out in Paragraph 2(c) (see *Toth v. Austria*, application no. 11894/85 [1991], ECHR 72 [December 12, 1991], paragraphs 69–70). The final ground justifying pretrial detention on the basis of public safety is similar to the public order ground recognized by the European Court in *Tomasi v. France* (paragraph 91). The court found this ground to be an exceptional measure that can be employed only where there are concrete facts that the person’s release would prejudice public order. Furthermore, the court held that continued detention is permissible only where the public order continues to be threatened.

Article 178: Conditions of Detention

The Model Detention Act applies to a person detained under the M CCP.

Commentary

Article 178 relates to detainees as defined in Article 1(12), whereas Article 174 (which is similar in wording) relates to an arrested person as defined in Article 1(4).

Section 3: Bail

Article 179: Grounds for Bail

Bail may be granted where:

- (a) probable cause exists that a suspect or accused has committed a criminal offense;

- (b) the only basis for the detention of the person is a fear that the person may flee; and
- (c) the person has promised that he or she will not go into hiding or leave his or her place of current residence without permission.

Commentary

Article 9(3) of the International Covenant on Civil and Political Rights provides that release from detention may be conditioned by guarantees to appear for trial. This provision is also contained in Article 7(5) of the American Convention on Human Rights. As an alternative to detention, and as a means of ensuring the appearance of the accused at trial, a court may make the release of a suspect pending trial dependent upon the provision of bail. This is common practice in many states around the world. Under the MCCP, bail may be used as an alternative to pretrial detention where the court finds that the only possible ground upon which to detain the person is that there is a risk of flight. Given that pretrial detention should be a measure of last resort, the court should give serious consideration to whether bail is a viable option as opposed to detention in such a circumstance.

Article 180: Provision of Bail

1. Bail may be provided by the suspect or the accused. Bail may also be provided by a third party in the form of personal liability under Paragraph 3(e).
2. Bail consists of an amount of money determined in relation to the gravity of the criminal offense, the personal and family conditions of the suspect or the accused, and the material position of the person who gives bail. Where bail is posted by a third party under Paragraph 3(e), the court must examine the relationship of the suspect or the accused with the person providing the security.
3. Bail may be provided in:
 - (a) cash;
 - (b) securities;
 - (c) valuable objects and other movable objects of high value that may be readily converted into cash and deposited for safekeeping;
 - (d) a mortgage for the amount of bail on the real estate of the person who gives the bail; or

- (e) the form of personal liability of one or more persons who undertake to pay the amount of bail in case the suspect or accused flees.
4. The person posting bail must submit evidence to the competent court about his or her material position or the origin, ownership, or possession of any property posted as bail.

Commentary

The factors set out in Paragraph 2 are derived in part from the case law of the European Court of Human Rights. Bail is not a punitive sanction. The purpose in assigning a specific monetary value is to guarantee the accused's presence at trial. In the case of *Neumeister v. Austria* (application no. 1936/63 [1968], ECHR 1 [June 27, 1968]), the European Court held that “[t]he guarantee provided for by that Article (Article 5[3]) [of the European Convention] is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond” (paragraph 14). Bail should be deposited with the registry (see the commentary to Article 23 of the MCCP).

Article 181: Consequences of a Breach of a Warrant for Bail

1. The suspect or the accused, and the person posting bail, if different, must be informed of the consequences of noncompliance with a warrant for bail prior to it being issued by the competent court.
2. Where the suspect or the accused flees, the amount or the items posted as bail must be credited to the budget of [insert name of state].

Commentary

Where a person breaches a bail warrant, he or she forfeits whatever money or security was deposited with the court. Where a third party has undertaken to pay bail, he or she must pay this amount.

Article 182: Cancellation of a Warrant for Bail during Criminal Proceedings

1. The warrant for bail must be cancelled and a detention warrant for the suspect or the accused must be made by the competent court where:
 - (a) the suspect or the accused, after being summonsed under Article 28 or 29, fails to appear before the court or to justify his or her nonappearance;
 - (b) the suspect or the accused prepares to flee; or
 - (c) another ground for detention under Article 177(2) arises.
2. The suspect or the accused must be informed by the competent court of the grounds for cancellation of a warrant for bail prior to it being issued by the court.
3. Where the warrant for bail is cancelled, the money or items posted as bail must be returned or, if a mortgage was posted as bail, the mortgage must be removed.

Commentary

The cancellation of a bail warrant, under Article 182 in contrast to its breach under Article 181 where the suspect or accused flees, results in the return of whatever monies or securities were deposited with the court. It also results in the court issuing a detention warrant instead. The latter occurs only where the suspect or the accused casts doubt upon the sufficiency of bail as a measure to secure his or her appearance in court, for example, where he or she fails to appear at a pretrial hearing or he or she prepares to flee. In other instances, other grounds of detention, such as the potential for interference with witnesses or evidence, may come to light and the court may determine that the suspect or accused should be detained.

Article 183: Cancellation of a Warrant for Bail after the Completion of Criminal Proceedings

The warrant for bail must be cancelled when an investigation is discontinued under Article 98 or where criminal proceedings are terminated by way of a final judg-

ment. Where a penalty of imprisonment is imposed upon a convicted person, bail must be cancelled only after he or she has started to serve his or her term of imprisonment.

Section 4: Restrictive Measures Other Than Detention

Article 184: Restrictive Measures Other Than Detention

1. As an alternative to detention or bail, or in addition to bail, restrictive measures other than detention may be ordered against a suspect or an accused.
2. Restrictive measures include:
 - (a) house arrest of the suspect or the accused, alone or in the custody of another person;
 - (b) a regime of periodic visits of the suspect to an agency or authority designated by the competent judge;
 - (c) the prohibition of the suspect or the accused from leaving a particular area designated by the competent judge;
 - (d) the prohibition of the suspect or the accused from appearing at identified places or meeting a named individual(s);
 - (e) the confiscation of the passport of the suspect or the accused; or
 - (f) the prohibition of the suspect or the accused from staying in the family home, if the person is suspected or accused of domestic violence under Article 105 of the MCC.
3. Restrictive measures other than detention may be ordered upon the application of the prosecutor or by a competent judge, of his or her own motion.
4. Restrictive measures other than detention may be ordered only where there is a probable cause that restrictive measures are necessary to ensure:
 - (a) the presence of the suspect or the accused at trial;
 - (b) the integrity of evidence related to the alleged criminal offense; or
 - (c) the safety or security of a victim, a witness, and another person related to the proceedings.

Commentary

In lieu of detention or bail, or in addition to bail, the MCCP provides a list of restrictive measures that may be imposed upon a suspect or an accused. Unlike bail, which can be employed only where there is a risk of flight, restrictive measures may be employed as a less restrictive means to ensure the integrity of evidence or the safety of victims, witnesses, and other persons. In the latter case, restrictive measures may confine the suspect or the accused to a specified location (e.g., his or her home, an institution, or a specified geographical area), restrict his or her access to a location (e.g., the family home), or prohibit the suspect or the accused from appearing at an identified place or meeting with identified persons. In terms of securing the suspect's or the accused's presence at trial, a regime of periodic visits to an agency or authority appointed by the court or the confiscation of his or her passport may suffice instead of detention or bail. The competent judge must give due regard to the restrictive measures contained in Article 184 as an alternative to detention or bail. If restrictive measures are chosen, the judge should choose the options that are most necessary and proportionate in the circumstances.

Section 5: Initial Procedure for Seeking Detention, Bail, or Restrictive Measures Other Than Detention

Article 185: Prosecutorial Applications for Detention, Bail, or Restrictive Measures Other Than Detention

1. The prosecutor may file an oral application for detention, bail, or restrictive measures other than detention at the initial hearing before a competent judge under Article 175.
2. The prosecutor may also file a written application for detention, bail, or restrictive measures other than detention at any other time.

Commentary

Detention should not be viewed as an automatic consequence of a person being arrested. In order for a person to be detained past the initial seventy-two hour limit set out in Article 170(5) and Article 171(6), the MCCP provides that a detention warrant must be obtained from a judge. The prosecutor may file a motion for detention that

can be heard in the course of the initial hearing before the judge under Article 175. In some cases, the prosecutor may not file a motion for detention of an arrested person at the time of the initial hearing; the need to detain the person may arise later, and the prosecutor may then file a motion that will be heard in a separate hearing under Article 186.

Bail and restrictive measures other than detention also require the filing of a motion, followed by a hearing and a warrant issued by a competent judge. Like a motion for detention, a motion for bail or restrictive measures may be heard at the initial hearing under Article 175 or a motion may be filed subsequently and dealt with in a separate hearing under Article 186.

Article 186: Determination of an Application for Detention, Bail, or Restrictive Measures Other Than Detention at the Initial Hearing under Article 175

1. Where the prosecutor makes an oral application for detention, bail, or restrictive measures other than detention under Article 186, he or she must submit the written decision to initiate the investigation, along with any other evidence supporting his or her request for detention, bail, or restrictive measures.
2. The burden of proof is on the prosecutor to prove that continued detention, bail, or restrictive measures are necessary on the grounds set out in Articles 177, 179, and 184, respectively.
3. The standard of proof at the hearing is the balance of probabilities.
4. Upon hearing the submission of the prosecutor and any statement by the suspect, the competent judge may:
 - (a) where an application for detention has been filed, order the detention of the suspect where the grounds set out in Article 177(2) are found to exist on the balance of probabilities;
 - (b) where an application for detention has been filed, order the release of the suspect, where the grounds that are alleged under Article 177(2) are not found on the balance of probabilities;
 - (c) where an application for bail has been filed, order bail where the grounds set out in Article 179 are found to exist on the balance of probabilities;

- (d) where an application for bail has been filed, order the release of the suspect without bail where the grounds set out in Article 179 are found not to exist on the balance of probabilities or where bail is determined to be unnecessary to secure the presence of the accused at trial;
 - (e) where an application for restrictive measures has been filed, order restrictive measures other than detention where one of the grounds set out in Article 184(4) are found to exist on the balance of probabilities; or
 - (f) where an application for restrictive measures has been filed, order the release of the suspect without restrictive measures where the grounds set out in Article 184(4) are found not to exist on the balance of probabilities or where restrictive measures are determined to be unnecessary.
5. Where the competent judge orders the release of the suspect, the order must be executed immediately.
 6. Where the competent judge makes a warrant for detention, bail, or restrictive measures other than detention, the judge must inform the suspect of his or her right to appeal the warrant under Article 192.
 7. Where the competent judge makes a warrant for detention, bail, or restrictive measures other than detention, a written and reasoned decision must be issued by the competent judge within forty-eight hours of the conclusion of the hearing.
 8. The warrant for detention, bail, or restrictive measures other than detention 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.
 9. A warrant for restrictive measures other than detention, with the exception of house arrest under Article 170(2)(a), may be made for any period of time up until the final judgment.
 10. A warrant for bail may be made for any period of time up until the time the accused person is convicted, and subsequently imprisoned, or until the accused person is found to be not criminally responsible for the offense alleged.
 11. A warrant for detention or a warrant for the restrictive measure of house arrest under Article 170(2)(a) is valid for three months from the date the detainee was arrested. After three months, the warrant will expire and the suspect or the accused must be released or the prosecutor must seek another warrant for continued detention or a warrant for continuation of house arrest under Article 174.
 12. Where the prosecutor discontinues an investigation against a suspect or an accused who is subject to a warrant for detention, bail, or restrictive measures, the prosecutor must inform the competent judge who issued in the war-

rant in writing within twenty-four hours. The competent judge must cancel the warrant for detention, bail, or restrictive measures within twenty-four hours of receiving this notification, and the warrant must be executed immediately.

13. At any time outside of a hearing on detention, the competent judge may of his or her own accord terminate a warrant for detention or a warrant for restrictive measures where the grounds for detention set out in Article 177(2) are no longer valid or the grounds set out in Article 184(4) for restrictive measures are no longer valid.
14. Termination of the warrant for detention or the warrant for restrictive measures may be done only with the consent of the prosecutor, except as provided for in Paragraph 15.
15. Where the competent judge and the prosecutor cannot reach agreement on the issue of termination of the warrant for detention or restrictive measures, the competent judge must request the appeals court to rule on the matter.
16. The appeals court must make a ruling within forty-eight hours of receiving the request from the competent judge.

Commentary

At the initial hearing before a judge under Article 175, the judge will determine the legality of the arrest. During the course of the hearing, the prosecutor may indicate to the judge that he or she wishes to make an oral application for detention, bail, or restrictive measures other than detention. Where the prosecutor seeks to make such an oral application, the competent judge must hear the application during the same hearing. The prosecutor must submit to the competent judge his or her decision to initiate an investigation and then prove to the judge that the grounds for detention set out in Article 56 exist. The fact that the burden is on the prosecutor to prove the grounds of detention is consistent with the presumption of innocence of the suspect set out in Article 59. The standard of proof applicable at the hearing is that of the “balance of probabilities.” It is a lesser standard than the “beyond reasonable doubt” standard set out in Article 216 that applies to the final determination of the criminal responsibility of the accused person. The balance of probabilities standard is sometimes called the “preponderance of evidence.”

Once the prosecutor and the suspect and his or her counsel have had the opportunity to make submissions to the court, the judge must issue the warrant for detention, bail, or restrictive measures other than detention or order the release of the suspect pending trial. A written decision should be issued after the conclusion of the hearing. This decision will be important if the suspect wishes to appeal it under Article 192.

A warrant for bail will be effective until the accused is either imprisoned or released pursuant to a finding that he or she is not criminally responsible for the offenses charged. A warrant for restrictive measures, except for house arrest (which follows the

same rules and principles applicable to detention), can last the duration of trial and until the final determination of the case. A warrant for detention and a warrant for house arrest, in contrast, are temporary measures (three months in duration) that must be renewed and reordered in order to make them effective. The issue of pretrial detention in post-conflict states was discussed extensively by the Model Codes drafters. In the past, illegal pretrial detention, or detention of persons beyond the legal limitations of a detention warrant, has been a huge problem in post-conflict states. People have been left in detention for long periods of time awaiting trial. Where there is no periodic review of detention by a judge, or no time limits on the detention warrant, this can lead to violation of the right to trial within a reasonable time set out in Article 63, and the associated right to trial without undue delay also in Article 63. By providing that detention warrants are temporary and by placing the onus on the prosecutor to renew the detention warrant, the drafters sought to address the problem of excessive pretrial detention.

Paragraph 8: Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a warrant for detention and the reasons for detention must be communicated fully and promptly to the detained person.

Article 187: Application for Detention, Bail, or Restrictive Measures Other Than Detention Other Than at the Initial Detention Hearing

1. The prosecutor may file a written application for detention, bail, or restrictive measures other than detention at any time with the registry of the competent trial court.
2. Upon receipt of the application, the registry must forward the application to the competent judge.
3. The competent judge must schedule a time and date for a hearing.
4. Notice of the hearing must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.
5. The provisions of Article 175 apply, with the necessary modifications, to a hearing on a written application for detention, bail, or restrictive measures other than detention.

Commentary

If, subsequent to the initial hearing where the suspect has been released without bail or other restrictive measures, the prosecutor believes that grounds for detention, bail, or restrictive measures have arisen, he or she may file a written application. The application will be heard at a separate hearing in the presence of the competent judge, the prosecutor, the suspect or the accused, and his or her lawyer. The hearing will be run in exactly the same way as the hearing of an oral application at the initial hearing (see Article 186).

Section 6: Procedure for Seeking Continued Detention or Continued House Arrest of a Suspect or an Accused

Article 188: Hearing on Continued Detention or Continued House Arrest

1. The suspect or the accused may be detained or held under house arrest after the expiration of a three-month warrant only when a warrant for continued detention or continued house arrest is obtained.
2. Continued detention or continued house arrest may be ordered only where the prosecutor demonstrates that:
 - (a) grounds for detention under Article 177(2) exist; or
 - (b) one of the grounds for house arrest under Article 184(4) exist; and
 - (c) all reasonable steps are being taken to speedily conduct the investigation.
3. The prosecutor must file a written application for continued detention or continued house arrest of a suspect with the competent trial court prior to the expiration of the previous detention warrant.
4. The competent judge must schedule a hearing on the application for continued detention or continued house arrest prior to the expiration of the warrant for detention or warrant for house arrest. The prosecutor and the suspect or the accused must be notified of the hearing in accordance with Article 29.
5. Article 186(3)–(16) applies, with the necessary modifications, to a hearing on continued detention or continued house arrest.
6. A warrant for continued detention or continued house arrest is valid for three months after the date of the hearing on continued detention or continued

house arrest. After three months, the warrant for continued detention or continued house arrest will expire and the suspect or the accused must be released or the prosecutor must seek another warrant for continued detention or continued house arrest under Article 187.

Commentary

As discussed in the commentary to Article 186, the detention of a suspect or accused will expire after three months. The purpose of Article 188 is to ensure that there is continual review of and oversight over detention. This is in line with Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that a judicial authority “shall keep the necessity of detention under review.” A number of post-conflict states have been criticized for their failure to provide for continuing review of detention. For example, the Organization for Security and Cooperation in Europe’s Legal Systems Monitoring Section (LSMS) in Kosovo criticized the United Nations Mission in Kosovo (which was charged with the power to make and administer criminal law) for its failure to amend the law to provide for periodic review of detention.

Section 7: Time Limits for Detention or House Arrest and Procedure for Seeking an Extension of Time Limits

Article 189: Time Limits for Detention or House Arrest

1. A suspect or an accused may be kept in pretrial detention or pretrial house arrest for no longer than is necessary to undertake an effective investigation of the criminal offense and to present an indictment under Article 195. The investigation must be concluded within a reasonable time, taking into account the complexities of the case and the conduct of the parties.
2. Except as provided for in Article 190, the maximum period of detention of a suspect or an accused prior to the presentation of an indictment under Article 195 is twelve months from the date of the suspect’s arrest.
3. Except as provided for in Article 190, the maximum period of detention of a suspect or an accused after the presentation of the indictment under Article 195 until the date of the commencement of the trial is twelve months.

4. The two-year maximum period of pretrial detention may be extended under Article 190.

Commentary

A detained person has the right to a trial within a reasonable time or release pending trial. There is no objective standard as to what constitutes a reasonable time (see the commentary accompanying Article 63). Many criminal procedure codes around the world do not provide for a maximum period of pretrial detention. In some instances, this can lead to persons being detained for longer than the potential maximum penalty of the offense for which they are charged. This is the reason why the drafters of the MCCP decided to provide an upper limit on the time a suspect or an accused may spend in pretrial detention.

Article 190: Procedure for Extending the Time Limits for Detention or House Arrest

1. The prosecutor may apply to the judge administrator of the competent trial court for an extension of the maximum period of the preindictment detention or house arrest.
2. The prosecutor must file a written application for the extension of the maximum period of detention or house arrest with the judge administrator of the competent trial court prior to the expiration of the previous warrant for continued detention.
3. The judge administrator must schedule a hearing on the written application of the prosecutor for the extension of the maximum period of detention or house arrest. The prosecutor and the suspect or the accused must be notified of the hearing in accordance with Article 29.
4. The provisions of Article 186, with the necessary modifications, apply to a hearing on the extension of the maximum period of detention or house arrest.
5. The maximum period of detention or house arrest may be extended for up to twelve months only where:
 - (a) exigent circumstances exist; and
 - (b) the failure to present the indictment within twelve months from the date of the suspect's arrest or to commence the trial within twelve months after the confirmation of the indictment is due to the complexity of the

case or to other factors not attributable to the prosecutor or the competent judge.

6. The burden of proof is on the prosecutor to prove that the extension of the maximum period of detention or house arrest is necessary on the grounds set out in Paragraph 5.
7. The standard of proof at the hearing is the balance of probabilities.
8. Where the judge administrator finds that the grounds set out in Paragraph 5 have not been proven on the balance of probabilities, he or she must order the release of the suspect upon the expiration of the previous warrant for continued detention.
9. Where the judge administrator finds that the grounds set out in Paragraph 5 have been proven on the balance of probabilities, he or she may make a warrant for the extension of the maximum period of detention. The exact length of detention must be specified in the warrant.
10. The detention of a person subject to a warrant for the extension of the maximum period of imprisonment does not affect the application of Article 187. The prosecutor must apply for the continued detention of the suspect or the accused every three months under Article 187.
11. Where the judge administrator makes a warrant for extension of the maximum period of detention, he or she must inform the suspect of his or her right to appeal the warrant under Article 192.
12. Where the judge administrator makes a warrant for extension of the maximum period of imprisonment, a written and reasoned decision must be issued by him or her within forty-eight hours of the conclusion of the hearing.
13. The decision must be served upon the prosecutor and upon the suspect or the accused and his or her counsel in accordance with Article 29.

Commentary

The prosecutor's application for extension of the time limit for detention and house arrest proceeds in much the same way as an application for detention or continued detention. A hearing must be called with the suspect or accused and his or her counsel present, and the prosecutor must make a case for the extension of the time limits based on the existence of "exigent circumstances." As an additional criterion, the prosecutor must convince the court, on the balance of probabilities, that the failure to present an indictment or commence the trial before the expiration of the legal time limits is due to factors beyond the control of the prosecutor, for example, where a case involves a number of alleged complex transnational organized criminal activities.

Where the judge orders that a person may be detained beyond the expiration of the time limit, the detention must be renewed at three-month intervals upon the application of the prosecutor. If, after the expiration of another twelve months, the trial has not commenced, the detainee must be set free pending trial. If, upon hearing the application for the extension of the period of detention, the judge determines that the criteria set out in Paragraph 5 have not been proven, the detained person must be released pending trial.

Section 8: Detention and House Arrest after the Presentation of the Indictment and during the Trial

Article 191: Competent Judges to Hear Detention Issues after the Confirmation of the Indictment and during the Trial

1. After the indictment has been confirmed, the presiding judge assigned to hear the trial must review the detention or house arrest of the accused person as provided for in the MCCP.
2. It is the duty of the presiding judge to review the necessity of continued detention or continued house arrest. The prosecutor is not required to file a written application for continued detention or continued house arrest under Article 187.
3. The provisions of Article 186, with the necessary modifications, apply to the review of continued detention or continued house arrest during the trial.

Commentary

Prior to the confirmation hearing, in order to continue to detain or subject a person to house arrest, the prosecutor must file an application with the court and a hearing must be called in accordance with Article 188. This hearing is conducted by a judge assigned to hear the application (under the MCCP there is no one pretrial judge; individual trial court judges are randomly selected to hear matters relating to pretrial proceedings). Once the indictment has been confirmed under Article 201, either a single judge or a panel of judges will be selected to hear the trial. From this point on, the single judge or the presiding judge will be responsible for overseeing the continued detention or continued house arrest of an accused person.

The validity of continued detention or continued house arrest will have been decided upon at the confirmation hearing as required under Article 201. Article 202 requires that the trial must take place within a month. Thus, the first-time detention or house arrest will need to be reviewed by the single judge or the presiding judge of the panel during the trial three months after the confirmation hearing and every three months thereafter. Because the trial is ongoing and the prosecutor and the defense will be present during it, the requirement that the prosecutor file an application for continued detention or continued house arrest with the court and that there is a separate detention hearing is dispensed with per Paragraph 2. It is the duty of the presiding judge, at intervals of three months, to review the necessity for detention or continued detention.

Section 9: Appeals Relating to Detention, Continued Detention, or Restrictive Measures Other Than Detention

Article 192: Appeal of Orders for Detention, Continued Detention, or Restrictive Measures Other Than Detention

1. The defense may, under Article 295, appeal:
 - (a) a warrant for detention;
 - (b) a warrant for continued detention; and
 - (c) a warrant for restrictive measures other than detention.
2. The prosecutor may appeal a decision of the court to refuse a warrant for detention, continued detention, or restrictive measures under Article 295.

Commentary

An interlocutory appeal of the granting or the refusal to grant a warrant for detention, continued detention, or restrictive measures other than detention is permissible under the MCCP (see Articles 295–297 and their accompanying commentaries that set out the procedure to be followed in making such an appeal).