

**SUPPORT TO CRIMINAL JUSTICE REFORM
IN UKRAINE**



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**OPINION OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE
OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF
EUROPE ON THE DRAFT LAW OF UKRAINE**

“ON POLICE AND POLICE ACTIVITY”

prepared on the basis of the contribution by
Ralph Roche and Francesc Guillen Lasierra

1. EXECUTIVE SUMMARY

1.1 The draft Law is a very thorough and comprehensive document.

1.2 It regulates and limits the exact nature and extent of police powers in a number of respects. The general reference in Article 2 paragraph 1 to ensuring the safety of persons, etc., is not sufficient and a binding general role for police in relation to the maintenance of public safety and security should be included.

1.3 We consider that the Law should be drafted with a long-term perspective. It is to be hoped that a robust reform process, with political consensus and support, will lead to a rapid increase in public confidence in the police and in the wider criminal justice system.

1.4 There are a number of European standards, compliance with which will assist the Ukrainian authorities in implementing a reform process which will ensure that the police become a democratic police service, orientated towards providing a service to the public.

1.5 These standards can be found in the case-law of the European Court of Human Rights, Guidelines of the Committee of Ministers of the Council of Europe, opinions and other documents of the Commissioner for Human Rights and various publications of the Council of Europe. There are also standards of the Organisation for Security and Co-operation in Europe relating to policing which can play a valuable role in the reform process.

1.6 A number of fundamental values provide guidance and direction for the police: accountability, professionalism, human rights and community policing (citizen focus).

1.7 There are a number of areas in which amendments to the draft would lead to a higher degree of compliance with European standards. These include:

- the police should have a formal role in relation to protecting the public and in preventing crime
- the role of the police should not be limited solely to detecting crime
- the role of the police as protectors of human rights should be more explicit
- the role of the proposed rapid response units should be clarified
- specialist public order units should be created
- appointment processes for police officers should be subject to some form of external scrutiny
- the provisions governing the use of force by police should be redrafted in order to ensure compliance with Article 2 of the ECHR
- the processing of personal data in police databases needs close regulation
- integrity testing for police officers should be limited and should be subject to strict procedural safeguards and necessity requirements
- the provisions governing career progression, salary and working time for police officers should be more flexible

- police schools should be required to maintain links with outside bodies and academia.

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3. INTRODUCTION

3.1 The opinion is based on the contribution of Ralph Roche and Francesc Guillen Lasierra, Council of Europe consultants.

3.2 Ralph Roche is a solicitor, admitted in Northern Ireland and in England and Wales. He has long experience of working in human rights, including at the Human Rights Chamber for Bosnia and Herzegovina and in Northern Ireland. In 2013, he co-authored a book entitled “The European Convention on Human Rights and Policing”, published by the Council of Europe. Ralph has worked for many years as a Council of Europe consultant in policing and human rights across Europe. He has advised on police reform in the former Yugoslav Republic of Macedonia, Moldova and Ukraine.

3.3 Francesc Guillen Lasierra is a senior civil servant at the Department of Interior of the Generalitat of Catalonia and lecturer on Constitutional Law and Criminology at the Open University of Catalonia and The Autonomous University of Barcelona. He has, among other publications on human rights or police, published a manual on “Police and security” in 2012. He has been involved in several Council of Europe activities dealing with police reforms or police training in Georgia, Turkey, Armenia, Albania and Moldova. He currently works as an expert in two projects managed by the European Forum on Urban Security.

3.4 This opinion is concerned with a review of the draft Law of Ukraine “On Police and Police Activity”, prepared by a group of Ukrainian civil society experts. It was submitted by the Ukrainian Parliament Commissioner for Human Rights to the Council of Europe for an expertise, on 16 September 2014. The opinion examines the compatibility of the draft law with Council of Europe standards and European best practices.

4. RELEVANT STANDARDS

4.1 The purpose of this section is to set out the Council of Europe standards relevant to the field of policing. It is hoped that this will assist the Ukrainian authorities in ensuring that the legislation on police and policing is adopted and implemented in a manner which ensures compliance with those standards.

4.2 There is no specific Convention or other Treaty relating to policing adopted under the auspices of the Council of Europe. The European Convention on Human Rights (ECHR) has a number of implications for Ministries of Internal Affairs and the police. A full analysis of those implications is beyond the scope of this opinion. A brief outline will be set out below and throughout the comments on individual Articles of the draft Law as necessary.

4.3 Recent events in Ukraine have highlighted the need for, and importance of, ensuring effective investigations in cases of serious human rights violations. Serious human rights violations are acts, in respect of which States have an obligation under the ECHR, to enact criminal law provisions. In other words, they include conduct that must be a crime in national law.

4.4 In this context, it is important to take account of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.¹

4.5 A handbook entitled “The European Convention on Human Rights and Policing” was published by the Council of Europe in 2013. It contains an analysis and explanation of the relevant standards of the ECHR as interpreted by the European Court of Human Rights (ECtHR), as well as the standards of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT), as well as other standards established within the framework of the Council of Europe. It is available in the Ukrainian language.²

4.6 The European Code of Police Ethics (ECPE) sets out detailed guidance, explaining the standards expected of the police in a democratic society. The Code is a comprehensive document, but we consider that the following provisions are of particular relevance to the draft Law and to the question of police reform in Ukraine:

- a) Protection of, and respect for, the individual’s fundamental rights and freedoms (Articles 1, 43, 48)
- b) Lawfulness as a basis for police activities (Articles 2-5, 38, 39)
- c) Respect for other actors within the Justice system (judiciary, prosecution service and lawyers) (Articles 6-11)

¹ <https://wcd.coe.int/ViewDoc.jsp?id=1769177>

² http://coe.kiev.ua/projects/cti/Handbook%20ECHR%20Policing_Ukr.pdf

- d) Accountability, both at the level of individual officers and at the organisational level (Articles 13-17, 59, 61, 62)
- e) Public orientation (Articles 18, 25, 44)
- f) Transparency (Articles 19, 45, 62)
- g) Police officers should enjoy the same rights as any other citizen (subject to very limited exceptions) (Articles 31-32)
- h) Impartiality and non-discrimination (Article 40)
- i) Use of force as a last resort (Article 37)
- j) Requirement for police ethics and integrity (Articles 20, 44, 63)
- k) Fair recruitment (Article 22-23)
- l) Fair treatment of detainees (Articles 49-58).

4.7 The Council of Europe Commissioner for Human Rights has issued a number of opinions and other documents on the subject of policing. These focus in particular on the need for independent oversight and accountability mechanisms. While they do not contain formal recommendations, they reflect the concerns identified with the Commissioner during his work. In February 2014, he issued a comment regarding the police, entitled “Police abuse – a serious threat to the rule of law”.³

4.8 The Organisation for Security and Cooperation in Europe (OSCE) has a particular focus on community policing, which it defines as: “*A philosophy and organizational strategy that promotes a partnership-based, collaborative effort between the police and the community to more effectively and efficiently identify, prevent and solve problems of crime, the fear of crime, physical and social disorder, and neighbourhood decay in order to improve the quality of life for everyone.*”⁴

4.9 The term “community policing” is often misunderstood, especially as it can be translated in a number of different ways. The OSCE definition can be summarised as involving the police and the community as working together to solve problems. This requires an open approach, with constant dialogue (both formal and informal) between the police and the public. This opinion is based on the assumption that a community policing approach is desirable for Ukraine. As stated in the “Law Enforcement Agencies Development Strategy” prepared by the experts’ council under the Ministry of Internal Affairs of Ukraine, the police in Ukraine still has a “militarized operating model inherited from the USSR”.⁵

³ Available at: <http://www.coe.int/en/web/commissioner/home>

⁴ “Good Practices in Building Police-Public Partnerships” OSCE 2008.

⁵ “Development Strategy for Police Reform” September 2014.

4.10 The OSCE has issued a number of publications relevant to policing.⁶ They have two main objectives. A large number of them focus on offering guidelines for the work of police according to human rights and democratic policing, establishing standards and gathering good practices that can be a reference for police services. Those publications deal with police-public partnerships, use of physical force, community policing, police integrity or police reform. A second important group of their publications focus on police training by offering proper training programmes for areas such as human rights, fighting hate crimes, domestic violence or public assembly management.

Values underpinning policing

4.11 There are a number of values, which police officers and police services should reflect and uphold. These are summarised briefly below. We consider that these principles would, if adopted, facilitate an increase in public confidence in the Ukrainian police.

Accountability

4.12 Accountability requires that those who perform official duties are held responsible for their actions, as well as having an effective disciplinary system in place to hold officers to account for their actions. It also requires that the reasons for police actions are explained, e.g. to an arrested person or during the conduct of a search.

4.13 The police should commit to providing to the public the greatest possible amount of quality, timely and accessible information concerning their work.

Professionalism

4.14 A professional and competent, human rights-compliant police service is fundamental to any democratic society. In the absence of effective policing, people are unable to enjoy their rights. The rule of law would be undermined unless the police are in a position to discharge their functions properly. Human security is impossible unless the police protect the human dignity and rights and freedoms of all in the society, without distinction on any ground, such as national or ethnic origin, religion, political belief, or any other personal characteristic or status. This principle of equality and non-discrimination is set out in the Constitution of Ukraine, and in the ratified international treaties, as well as in numerous legal acts.

⁶ See, for example, the following: Reference guide to criminal procedure (2007); Guidebook on Democratic Policing (2007); Good Practices in Building Police-Public Partnerships (2008); Good Practices in Basic Police Training – Curricula Aspects (2009); Guidelines for the Use of Physical Force, Special Means and Firearms Involved in Public Order Management (2011); Guidelines on Human Rights Education for Law Enforcement Officials (2012); Training Against Hate Crimes for Law Enforcement (TAHCLE): Programme Description (2012); Police response to domestic violence: Manual for specialized course on combating domestic violence for the faculties of public security policing of higher educational institutions of the Ministry of Interior of Ukraine (2012); Guidelines for police officers involved in community policing (2012); Toolkit on police integrity (2013); Training Manual on Public Assembly Management for Internal Affairs Bodies (2013); Police Reform within the Framework of Criminal Justice System Reform (2013).

Human Rights

4.15 There is no conflict between protecting human rights and ensuring that the law is upheld. The route to one passes through the other. The role of police is to protect human rights. For example, when they are protecting a person from unlawful violence, they are not just preventing a crime, they are also protecting the right to life and protection from inhuman and degrading treatment. When police investigate crime involving theft of property, they are not just fulfilling their legal obligations, they are securing the right to a fair trial and the right to peaceful enjoyment of one's possessions. Every police action has an impact upon human rights. It is the responsibility of the police to ensure that the impact is positive.

Cooperation with the citizens, communities and all stakeholders – "citizen focus"

4.16 Community policing sits at the heart of professional policing in a democratic society. Through close co-operation with the community, the police should work on solving problems and preventing and detecting crime. The term "community policing" is interpreted differently in different countries, often because of linguistic differences. When we refer in this opinion to community policing, we mean a philosophy of policing which is oriented towards partnership and problem-solving. It involves the police working together with the public, so that problems can be solved together. In addition, it means that the police are oriented towards providing a service to the public, and requires the police and community to maintain a close dialogue through formal and informal structures, so that the needs and expectations of the public are understood.

5. ANALYSIS

General comments

5.1 The draft regulates the exact nature and extent of police powers in a number of respects. It also limits those powers in a number of aspects. In addition, it does not include among the obligations of the police a general role in relation to the maintenance of public safety and security. While there is a reference to this in Article 2 of paragraph 1, it is not set out in a binding manner, for example through requiring this to be a strategic focus of the police or to be included in police plans. It may be that the extremely low levels of confidence in the police in Ukraine have created such a climate of mistrust, that it was felt necessary to limit the powers of the police to the absolute minimum. It is not the purpose of this opinion to comment on the role of the police in recent events in Ukraine. However, the political context in the country is such that mistrust in the police is almost universal. Any draft Law giving police additional powers or discretion is therefore likely to be unacceptable. We consider that the Law should be drafted with a long-term perspective. It is to be hoped that a robust reform process, with political consensus and support, will lead to a rapid increase in public confidence in the police and in the wider criminal justice system.

5.2 The draft is a very detailed document and sets out a range of procedural protections for the individual in terms of how the police may take intrusive actions towards them.

5.3 The draft contains a lot of detail concerning a wide range of issues connected to the functions and organisation of the police. The draft roots those functions firmly and almost completely in the enforcement of the law, and does not include general functions such as providing assistance to the public, as commonly found in similar laws in other countries.

5.4 It is undeniable, as clearly established in the ECPE, that legality should be the basis for all police actions. This helps to prevent arbitrariness and abuse by the police. It also provides a guarantee for the citizens. However, respect for the law is only a *sine qua non* for police actions. The police should also be citizen or community oriented. This requires that the work of the police should provide the public with security, within the legal framework. Accordingly, it would be desirable that the law, without diminishing its stress on the requirement for legality in police actions, introduced the concept of providing a service to the citizen or ensuring people's security.

5.5 The citizen should be placed as a relevant actor in police work, not only in the passive sense, but also as an active subject. They should not only be "consumers" of security as provided by the police. They should also be security "providers", working in partnership with the police. The public should be given the chance to communicate their needs to the police and to have a key role in determining the societal needs for policing.

Specific comments

Article 2

5.6 The first sentence of this Article sets out the central task of the police, which is to “provide police services on securing public order by ensuring safety of persons, society and state from unlawful acts.”

5.7 Limiting police functions to “unlawful acts” appears very strict, insofar as it is interpreted to mean acts which involve the elements, or the “*actus reus*”, of a crime. There are acts that are not clearly criminal, that can still cause fear among the public, and undermine security. For example, public assemblies involving the expression of issues of controversy will not, of themselves, involve any criminal actions. Unlawful actions may potentially arise, depending on the actions of participants and others in the area. This can cause conflict and insecurity. If the role of police is limited strictly to dealing with criminal acts, they would have no role in facilitating peaceful assembly and in seeking to reduce tensions. Police services and forces across Europe increasingly focus on “prevention”, i.e. working in partnership with the community to seek to avoid problems deteriorating into criminal or other socially harmful activity.⁷ This is particularly the case in certain aspects of police work, e.g. dealing with children and young people, where a prevention approach has been proven to reduce criminal offending and to increase the positive outcomes for children and young people.⁸

5.8 The precise manner in how this is expressed is a matter for the Ukrainian authorities. It could be expressed in terms of a function such as “to reduce fear of crime” or to “work in partnership with local communities, including individuals and associations”, and to seek to “improve the security of members of the public”. This would also incorporate a community policing ethos in the police, which means that the police are oriented towards providing a service to the public. This is critical in order to increase levels of confidence, which are extremely low.⁹

5.9 We are not aware of whether there are any changes proposed to the role of the State Emergency Service of Ukraine. This Agency may continue to retain the primary role in the protection of the population and territory from emergency situations. However, it is clear that the police will have some role to play in any emergency situation, as they are likely to be the first responders. Accordingly, it is worth considering whether the Law should contain a provision related to emergencies, or provision of support to people in cases of accident or disaster.

5.10 We advise that the Law include reference to a function focusing on “taking steps to ensure security” of the public. This would allow the police to take appropriate actions, in conjunction with the public and other relevant

⁷ “Good Practices in Building Police-Public Partnerships” OSCE 2008.

⁸ CommDH/PositionPaper(2010)1 Positions on children’s rights (3rd May) available at: <https://wcd.coe.int/ViewDoc.jsp?id=1621589>

⁹ Point 7 of the Development Strategy for Police Reform” September 2014.

stakeholders, to secure public safety at a range of events, for example, sports events and other public manifestations.

5.11 Another notable omission is that the concept of the police as protectors of the citizens' rights is absent from the draft. As explained in section 4 above, the role of police is to protect the rights of citizens. This includes protecting them from crime and also taking positive steps to ensure the enjoyment of human rights. It is not sufficient that the role of the police be limited to the negative obligations set out in the ECHR. The fact that police activity is, as set out in Article 3, to be based on a number of principles, including "observance of human rights and fundamental freedoms" does not, in our view, necessarily remedy this lacuna. This is because human rights protection should not just be a principle, but the main function of the police.

Article 3

5.12 It is our understanding that in Ukrainian law, the term "principle" as used in this Article does not have a specific meaning, different to the ordinary meaning of the word. A principle is, in general terms, an abstract guiding rule or norm but does not generally have a binding or obligatory character in its own right.

5.13 It is of course welcome that the Article refers to issues such as the observance of human rights and fundamental freedoms and co-operation with civil society as principles underlying police activity. However, it would be better if they were given a more formal, binding character than a "principle". Human rights protection is a fundamental requirement of all aspects of police activity. This applies, whether it is done through conducting effective investigations into allegations of serious human rights violations, or through upholding the right to freedom of association by ensuring that persons are able to hold public assemblies.

5.14 Specifying the principles as having a legally binding character would provide a much stronger basis for the Ukrainian public to know what are the standards they are entitled to expect from their police service. This could be achieved through linking the principles to specific powers and obligations arising from this Law.

Article 4

5.15 Article 4 paragraph 1 states that police activity shall be "directed and co-ordinated" by various Ministries. In relation to the sphere of finance, this activity is to be regulated by the responsible Ministry. "Direction and co-ordination" indicates that the relevant Ministry would have an executive role in day-to-day financial issues. Control over such issues is fundamental to the management of an executive authority body's tasks, as any inability to control finances reduces its ability to carry out its role independently.

5.16 It is important that Article 4 does not operate in such a manner as to allow any Ministry to interfere with the independent discharge by the police of its

responsibilities, within the oversight and accountability framework provided for by the Law.

5.17 Article 4 paragraph 3 refers to inspection and secret inspections of the integrity of police officers. Any such investigative measures should be conducted in accordance with the Criminal Procedure Code (CPC), and it is important that they are carried out in full compliance with the rights of the police officers involved. Police officers do not lose the protections afforded by the ECHR by virtue of their status as such.

Article 6

5.18 The draft law on local police, when finalized, needs to be harmonized closely with this Law in order to avoid conflicts.

5.19 Paragraph 4 should include reference to the securing of public order through the taking of positive actions, and not only through actions necessarily related to administrative or criminal offences.

5.20 Paragraph 6 states that the number of residents to be taken into account in determining numbers of local police includes only permanent residents. There may be a need for the numbers of tourists in a particular area (assessed or actual) to be taken into account in determining the need for local police. The role and profile of local police seems ideally suited to the provision of services to tourists.

5.21 Furthermore, in larger metropolitan areas there is usually a large floating population, for example workers who commute from surrounding Districts, or shoppers. In many countries, these people are increasingly taken into account in determining the numbers of police, as it is very relevant in terms of assessing and meeting the demand for police services.

5.22 Article 85 paragraph 22 of the Constitution of Ukraine gives the Verkhovna Rada competence to determine the numerical strength of a range of bodies, including the Ministry of Internal Affairs. The ratio set out for local police in the draft law is 10 officers per 10,000 permanent residents. Accordingly, a town with a population of 50,000 would have 50 local police. Section 2 of Chapter 3 of the draft Law (Articles 54 to 56) sets out provisions concerning the working conditions of police officers. In summary, an officer's working week is 39 hours. In addition, officers are entitled to annual leave, rest time during a shift, and there are strict limits on the amount of overtime they may perform. Police officers may suffer sickness and are also required to undergo periodical training and other professional activities. The cumulative effect of this is that an establishment of 50 officers for a town of 50,000 may mean that very few officers are available for duty at any given time.

5.23 We suggest that consideration be given to increasing the number of local officers. In the alternative, there should be a more flexible mechanism to be devised for calculating the established number of such officers.

Article 7

5.24 Paragraph 4 refers to the creation of a rapid response service, which shall have the responsibility for termination of “mass riots”. Paragraph 5 states that it shall have no more than 2,000 police officers.

5.25 “Rapid response” could mean many things. It could mean a special unit designed to respond rapidly to emergencies of particular types. It may be assumed that, in the context of this Article, it is designed as a unit intended to respond to large-scale public disorder, by taking immediate measures.

5.26 As such, the rapid response unit can be seen as a replacement for the “Berkut” units, which were disbanded after their role in the Maidan demonstrations.¹⁰ We believe that greater care and detail is needed in specifying what the role and purpose of this kind of unit could be. For example, European countries usually have Special Intervention Teams (SIT), which are very highly-trained units which deal with the most dangerous situations. Examples of situations they would deal with are hostage situations, executive action in counter-terrorist operations, dangerous armed individuals, etc.¹¹ They tend to be relatively small units, who perform their role full-time. The highly specialised nature of their functions means that they are required to train to an extremely high-level.

5.27 Police units for dealing with large-scale public order situations have a different set of requirements than SITs. They tend to be much larger in number and have a different skill-set. While SIT teams are intended to conduct very targeted interventions, public order units may be required to conduct large scale operations, involving large numbers of persons.

5.28 Public order situations require a wide range of skills and responses from police.¹² They need to operate within a coherent command structure and within a flexible framework, which allows for a range of responses to different situations. The dynamic nature of public order policing makes it very challenging. The ethos of police units is critical in how such situations develop.

5.29 In many cases, a dialogue approach by the police can reduce tensions. There are situations where force is required to be used, and this will be perfectly lawful if done properly. The actions of the Ukrainian police in general, and of the Berkut units in particular during the Maidan demonstrations, as documented by various organisations, involved numerous serious violations of human rights¹³.

¹⁰ Office of the United Nations Human Rights Commissioner for Human Rights “Report on the human rights situation in Ukraine” 15 July 2014 at paragraphs 98 to 126.

¹¹ Examples include the GEOs (*Grupos Especiales de Operaciones*) in the Spanish National Police, GAR (*Grupos Antiterroristas Rurales*) in the also Spanish Guardia Civil, GIS (*Gruppo di Intervento Speciale*) within the Italian *Carabinieri*, the COE (*Companhia de Operações Especiais*) within the Portuguese *Guardia Nacional Republicana* and the GSG 9 in the German *Bundespolizei*.

¹² Murdoch J. and Roche R. “The European Convention on Human Rights and Policing” Council of Europe 2013, page 93 et seq.

¹³ Office of the United Nations Human Rights Commissioner for Human Rights “Report on the human rights situation in Ukraine” 15 July 2014 at paragraphs 98 to 126.

Public confidence, as indicated above, in the police is very low. The creation of a specialist unit for dealing with public disorder, based on principles of negotiation, transparency, minimum use of force and co-operation, may assist in increasing such confidence.

5.30 Accordingly, it is not appropriate, in our view, for an SIT to be responsible for dealing with large-scale public disorder. This would be likely to lead to lethal or potentially lethal force being used in situations where it is not necessary and consequently to violations of Article 2 of the ECHR. We recommend that a full-time SIT covering all of Ukraine, with an appropriate number of officers, be created and that there be provision for specialist units to deal with large-scale public disorder. The precise composition and role of such units should be the subject of detailed consultation with civil society and the public.

5.31 In addition, consideration could be given to the possibility of having units with training in public order that could work as routine police patrols in general tasks of security, but that could be used as a riot unit when necessary. This is the case, to a certain extent, of the *Compagnies Républicaines de Sécurité* – CRS- in the French National Police, the *Gendarmerie Mobile* also in France or the *Bereitschaftspolizei* in Germany. In addition, police services across the United Kingdom have what are called “Level 2 public order units”. These are comprised of officers who work in a range of different functions but who are available for deployment alongside specialist public order units (“Tactical Support Groups”) when required.

5.32 This is not only efficient in terms of resources, but also ensures that there is a cadre of officers who are trained in public order but who also have daily experience of dealing with the public in normal policing scenarios.

Article 9

5.33 It is our understanding, based on previous work in Ukraine, that the term criminal police refers to police involved in investigating all crimes, ranging from minor thefts to murder. The maximum number of criminal police foreseen (30,000) appears very high. Once the Law on Misdemeanours is established, the workload of the criminal police will reduce and their numbers should be reconsidered.

5.34 Research on police activities has clearly shown that, in fact, police devote no more than 20% of their time to tasks related to crime. Furthermore, the existence of large police services who do not wear uniforms can cause insecurity in the population. This is because they do not see an overt police presence and they can be afraid of being under permanent surveillance by the State. In some countries the predominance of uniformed police officers has been considered a guarantee for citizens. This drives the public service ethos of the police.

5.35 However we do not think that this poses any particular difficulties in terms of compliance with European standards. The accountability mechanisms for criminal police are not materially different than for those in respect of other branches of the police system (e.g. the administrative police). Accordingly, there is no question that the size or nature of the tasks of the criminal police will, by itself result in a diminution of the level of accountability for police.

Article 11

5.36 Article 11 governs the financial police and states that they are to be “managed and coordinated by the Ministry responsible for State policy in the sphere of finance.” This would appear to mean that all aspects of the work of the financial police would be outside the competence of the MIA. This requires close attention, in order to ensure that they do not lead to a lack of strategic focus and executive authority. In addition, it is important that the financial police and other police do not hamper each other’s investigations and that the provisions of Article 216 of the Criminal Procedure Code are complied with.

Article 13

5.37 Article 13 governs the border police and sets out their functions. It does not make specific reference to their role in relation to ensuring compliance with Ukraine’s international obligations of relevance in this sphere. Ukraine acceded to the United Nations Convention Relating to the Status of Refugees on 10 June 2002. Border police have a key role in receiving applications for asylum and consideration should be given to reflecting this role in Article 13.

5.38 Further comment in relation to the role of the border police are set out in respect of Article 23.

Article 16

5.39 We consider that Article 16 introduces a very positive innovation into policing in Ukraine, through providing for a community input into the appointment of the Head of local police.

5.40 It may be worthwhile to consider the possibility of limiting the number of times that a head of local police can be reappointed.

5.41 Our understanding is that a police officer, after the end of any mandate as a head of local police, would revert to their previous role.

Article 17

5.42 Article 17 paragraph 1 provides that the heads of the various branches of police are ‘appointed to office and fired’ by the Cabinet of Ministers of Ukraine, upon submission of the Prime Minister, based on a proposal of the relevant Minister. While this process does provide for some transparency and procedural safeguards, it is an entirely political process. The importance of the role of head of branch of police is very significant. We believe that consideration should be

given to incorporating a degree of external scrutiny into the appointment and termination procedures for such appointments. There are a number of examples from across Europe (e.g. senior officers in the Police Service of Northern Ireland are appointed by the independent Policing Board, which comprises political and civil society representatives). In light of the history of political interference in policing in Ukraine, such a procedure could assist in increasing public confidence in the independence and professionalism of the police. An initial step in this regard could involve a process of public consultation about the candidates before the appointments are made.

5.43 Article 17 paragraph 3 sub-paragraph 4 requires that the Head of the various branches of the police must, amongst other requirements, speak two foreign languages. We are not convinced of the necessity for this requirement. While speaking foreign languages is an advantage, and a positive matter in its own right, there has been no explanation given for the specific need for this requirement. It could operate so as to exclude excellent candidates who meet all of the other requirements but who, for whatever reason, do not speak two foreign languages.

Articles 18 to 20

5.44 These Articles set out a range of procedures related to the development, agreement and implementation of 4-year and annual plans. These are very positive developments. Public participation can be crucial in terms of increasing public engagement with policing. It keeps the public informed about the issues that the police consider to be of most importance. It can also facilitate and shape a dialogue between the police and the public regarding what the needs and expectations of the public are.

5.45 Both programmes are to include “measures of cooperation with the public”, which is a very positive development. The value of this may be increased further by stating (not necessarily in the Law) what is included within the scope of such measures.

5.46 Article 19 regulates the adoption of the plans. It is worthy of consideration whether there should be a specific duty to consult with the public and relevant stakeholders on the contents of the plans. This should include not only local police plans, but also the plans of the administrative, criminal and financial police. At present, there is no formal requirement to do so and we consider that such a duty may be beneficial.

Article 23

5.47 This Article does not include a provision requiring the border police to “facilitate the proper flow of persons through the borders”. The issue of Integrated Border Management is a very important one, and one where there has been a significant amount of work done with Ukraine in recent years.¹⁴ A fuller discussion of this issue is outside the scope of this opinion, but there may

¹⁴ For example, the EUBAM Mission.

well be expertise and resources within the existing Border Service, which the Ukrainian authorities can draw upon to provide advice regarding any appropriate wording.

5.48 Paragraph 5 refers to the role of the border police in the “forceful return” of foreigners and stateless persons to their country of origin or third countries. While the detailed regulation of this area may be contained in different Laws, it is in our view important that this Article requires a clear and unequivocal statement of compliance with the principle of *non-refoulement* and other obligations of Ukraine.

Article 25

5.49 The power to limit, etc., access to certain places should not be expressed in such generic terms. It should be limited to situations where such limitation is necessary for the discharge of a police function, or analogous wording.

5.50 The current text could be interpreted as an “open door” to allow police officers do whatever they want to do. This may violate the requirement of proportionality. Any decision by a police officer to limit access to a certain area should involve consideration of the effects of such a limitation. For example, if a street is closed due to an incident, those affected may need to simply walk down another street. However, if a person is unable to enter their home during an incident, and therefore cannot access medical supplies which are required by them, the interference is much greater. A provision requiring police officers to balance the competing interests involved in each case may assist.

Article 26

5.51 The provisions of this Article do not accord with Article 233 of the CPC. Article 233 of the CPC allows investigators and prosecutors to enter premises without warrant “*only in urgent circumstances related to saving human life and property or in a hot pursuit of persons suspected of committing a crime*”. This provision therefore allows entry in cases of hot pursuit of suspects.

5.52 It would in our view be curious that investigators and prosecutors would have greater powers to enter premises than police officers. Accordingly we recommend that Article 26 of this Law provide police officers with equivalent powers in relation to entry to premises without warrant as those provided by Article 233 of the CPC, subject to appropriate safeguards.

5.53 Paragraph 1 of the Article refers to “valuable property” as a basis for justifying entry. We are not aware of whether there is a specific definition of this term in Ukrainian law or whether it is something that is to be assessed in relation to the circumstances of each individual case.

5.54 The primary focus of this provision is to ensure compliance with the right to respect for home and private life, as set out in Article 8 of the ECHR. Any interference with this right resulting from any entry should be the minimum

possible, while allowing police to discharge their obligations in relation to the protection of the right to life, and prevention and detection of crime. The primary beneficiary of the rights under Article 8 in this instance is the resident (or residents), not the owner. These may be the same person in many cases, but the Article should make reference to the protocol being provided to the resident (dweller) of the premises.

Article 27

5.55 This is a very long Article and there is scope to refine the drafting in order to make it less cumbersome.

5.56 The opening sentence states that police custody “shall” be applied to a range of persons. The use of this term indicates that it is mandatory, so that if a person falls into any of the categories set out in paragraph 1 of the Article, they must be taken into police custody. This would be highly undesirable, as it would prevent police officers, who are trained professionals, from using their judgment about whether an arrest was needed in each case. For example, if a minor under 16 who was left unattended came into contact with police, the officer should be able to assess whether the minor was in a vulnerable position. Any requirement that the minor be taken into custody solely by virtue of the fact that they were under 16 would be both unlawful in terms of Article 5 ECHR and highly undesirable in terms of protecting the best interests of the child.¹⁵

5.57 In paragraph 3 there appears to be a contradiction: police cannot search somebody in custody, but they can take any weapon or dangerous item that the person may have in their possession. It will not always be possible for an officer to know whether a person is in possession of a dangerous instrument unless they conduct a search.

5.58 It is necessary that police officers have a power to search persons in custody, subject to a requirement for there to be some suspicion. This is because such a search is important in ensuring the safety of the officer and the person under arrest. A better formulation of this provision could be: “police can only search a person in custody in the event that they suspect that he/she is in possession of any dangerous instrument” or another equivalent formulation.

5.59 In paragraph 4 in case that the person has no mental capacity to understand the situation, the protocol should be delivered to some relative or person with whom he/she lives (in the event that there is one).

Article 28

¹⁵ As required by Article 3 of the United Nations Convention on the Rights of the Child, which Ukraine ratified on 28 August 1991.

5.60 Articles 208 to 213 of the Ukrainian CPC regulate the procedure for arrest by police officers and other competent officials, without judicial authority. There is scope for differing interpretations as between Article 28 of this draft and the relevant provisions of the CPC. This is because the procedural safeguards for detainees set out in Article 212 of the CPC are more detailed than those set out in Article 28. It would be desirable for Article 28 to refer to the procedural safeguards for persons in police detention as contained in the CPC, and acknowledge their binding nature. There should also be an explicit reference to the need to prevent torture or other conduct in violation of Article 3 of the ECHR.

5.61 Unless provided for in other legislation, there should be a specific statement that a person in police custody is entitled to communicate in a language they understand and to an interpreter if necessary.

Article 29

5.62 It is our understanding that the term “physical influence” covers the use of force by police officers.

5.63 It is the practice in a number of countries for the specific equipment available to police to be spelt out in legislation, either the Law on Police or a special Law governing the use of force by police. In some countries, the Law sets out a procedure for the approval of specific types of equipment, within defined categories of what is permissible.¹⁶ In any case, it is important to ensure that in the event of technological developments or other changes, the procedure to authorise new types of use of force, after appropriate testing and consultation, is not too bureaucratic.

Article 31

5.64 It is unduly restrictive to limit police use of physical restraint in order to detain somebody or for the other limited reasons as set out in the first sentence of Article 31. There are many other cases in which police may be required to use measures of physical restraint. Examples include “to protect somebody from unlawful violence” or “to save somebody that is in danger due to an accident, flooding, fire....”, or “to manage large movements of persons in the event of large public events or disasters”.

5.65 The definition of situations in which police can use physical restraint should be widened, to include not only detention but also cases in which it is necessary to protect the rights of others. The police have a range of positive obligations under the ECHR, including to protect life and also to take measures to protect persons from torture or inhuman or degrading treatment by private individuals. It may be necessary for police to use measures of physical restraint in order to comply with such obligations.

¹⁶ For example, in Article 92 of the Law on Police of the former Yugoslav Republic of Macedonia 2006 (as amended in 2009).

Article 32

5.66 The deployment and use of dogs and horses should be limited to situations where they are the most appropriate tactic to be utilised to deal with the specific situation concerned.

Article 33

5.67 Article 33 paragraph 1 sub-paragraph 1 sets out a definitive list of situations where special tools may be used. In our opinion, this list is too restrictive and may lead to unintended consequences. For example, the list does not include a single individual in a confined space, armed with a knife or firearm and threatening harm to themselves or others. This kind of scenario occurs frequently across European countries and often involves an individual suffering some form of acute emotional distress. The use of rubber bullets can, in certain situations, provide a less lethal capacity, as an alternative to firearms. We are not recommending that rubber bullets be used in such circumstances, but highlighting that it is dangerous to exclude them from consideration. In our view, it would be better to subject any use of special tools or other means of the application of force to strict oversight and accountability.

5.68 Paragraph 2 sub-paragraph 3 of the Article limits the parts of the body at which rubber bullets can be aimed to the lower legs. There have been cases before the European Commission of Human Rights concerning deaths resulting from the use of rubber bullets in public order situation.¹⁷ The Commission highlighted the need to ensure, as far as possible, the safety of bystanders and to avoid ricochet or overshooting. Due to the relatively small mass of a person's legs when compared to other parts of their body, the potential for a rubber bullet to miss and hit a bystander is high. Consideration should be given to amending the prescribed area at which such bullets should be aimed.¹⁸

5.69 Paragraph 2 sub-paragraph 4 states that water cannon may not be used at temperatures of less than 10 degrees Celsius. It is not clear whether this refers to the air temperature or the temperature of the water itself. In addition, the pressure at which water can be discharged should be regulated.

Article 34

5.70 We consider that paragraph 2 could be rephrased in order to provide specific reference to the need to facilitate freedom of assembly. In our opinion, the paragraph should focus on the need for the police to seek to prevent confrontations between groups involved in rival demonstrations. This would ensure that the Law complies with the positive obligations on police in terms of protecting the right to freedom of peaceful assembly.

¹⁷ E.g. *Stewart v United Kingdom*, decision of the European Commission of Human Rights of 10 July 1984.

¹⁸ In Northern Ireland, Attenuating Energy Projectiles (which are similar in some respects to rubber bullets) must be aimed at a person's belt buckle in order to reduce the likelihood of the projectile missing.

Article 35

5.71 Article 35 does not comply in full with Article 2 of the ECHR. Article 2 requires that any use of lethal or potentially lethal force be no more than absolutely necessary for the protection of life. This is a test of strict proportionality. Various provisions of the Article allow for the use of force in situations which go significantly beyond what is allowed under Article 2.

5.72 Paragraph 1 sub-paragraph 2 of the Article allows for the use of firearms in the event of an attack on certain convoys of persons. It is not limited to situations involving an armed attack or where there is an immediate threat to life. This is too broad, as it would allow the use of firearms against a person attacking a relevant convoy with non-lethal weapons. This would not comply with the requirements of Article 2.

5.73 Sub-paragraph 3 of paragraph 1 allows for the use of firearms to detain an armed person. The fact that someone is armed does not, of itself, justify the use of firearms against that person. They may have no intention of using the weapon. This would not be in compliance with Article 2, as it is necessary that the use of a firearm against a person be “absolutely necessary”.

5.74 Sub-paragraph 4 of paragraph 1 allows firearms to be used for the apprehension of a person being prosecuted for a grave crime involving violence. This is problematic as it assumes that the person is guilty, even though they are still being prosecuted. In addition, the fact that a person is being prosecuted for a grave crime involving violence does not necessarily mean that they pose an immediate and grave threat to life. The ECtHR has made it clear that lethal force cannot be used against a person seeking to escape custody unless they are suspected of intending to carry out an act of violence imminently.¹⁹ In addition, from the perspective of the ECPE, it would violate Articles 37 and 48, which require that any use of force be proportionate to the situation and respect for the right to presumption of innocence.

5.75 We consider that the provision allowing the use of firearms for “filing an alarm or call for assistance” is problematic, as any bullets fired into the air may cause injury or death. The justification would need to be stronger.

5.76 Paragraph 2 allows for firearms to be used without warning “only in emergency cases concerning saving people’s lives”. This highlights the fundamental problem with Article 35. Firearms should only ever be used, whether with or without a warning, when it is absolutely necessary to protect life. There may be situations where giving a warning would be clearly pointless or would create further risk to life. In such situations, warnings may be dispensed with. However this does not lower the threshold for the use of firearms.

5.77 The provisions of paragraph 3 do not comply with Ukraine’s obligations under the ECHR. As pointed out above, the use of lethal force solely to prevent

¹⁹ *Nachova v Bulgaria*, judgment of the European Court of Human Rights of 6 July 2005.

an attack or escape is not lawful. The use of lethal force must be restricted to situations where it is absolutely necessary to protect life. If a person, in seeking to escape from police custody, immediately threatens a person's life, the use of firearms may be justified as a last resort. It is the threat that they pose which provides the justification for the use of firearms, not the fact that they are seeking to escape.

5.78 The third indent of paragraph 3 refers to allowing a police officer to use firearms for the purpose of causing the death of a person in defined circumstances. Police officers and other State officials can never intend to cause the death of a person. They may, in accordance with Article 2 of the ECHR, use lethal force which has, as an unintended outcome, the effect of causing a person's death. This is a material and fundamental difference, which needs to be reflected in Article 35.

5.79 In conclusion, we recommend that Article 35 be redrafted so that it makes it very clear that firearms may be used only where absolutely necessary to protect a person's life.

Article 36

5.80 Article 36 states that the register of pre-trial investigations, information in police personnel database or police databases for candidates for the post of policeman should be excluded from the oversight regime in the Law. It is important that all of those databases should respect the provisions of Article 8 of the ECHR and of European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and all its protocols and amendments. It is, however, understandable to a certain extent that the "database on individuals involved in the confidential cooperation" should remain out of the system established by this particular law. Other measures to ensure compliance with the relevant legal provisions specified above need to be applicable and implemented.

Article 37

5.81 The provisions governing the length of time various categories of information can be retained for have obviously been the subject of careful consideration. We would suggest that, in cases where a person's data is in a police database as a result of a mistake (e.g. where a person is arrested as they match a description but upon examination, it is clear that they are innocent), their data should be removed from the searchable database and stored solely for the purpose of facilitating any investigation or civil proceedings. The precise manner in how this would be achieved is a matter for the Ukrainian authorities.

5.82 There should be, either in this Law or in another Law regulating the processing of personal data, provisions preventing the inappropriate use of data by police. For example, problems have arisen in many European countries where information regarding a person (e.g. the fact that they were arrested) has been used to prevent them from obtaining employment. In the event that such

information is to be disclosed to potential employers, a detailed range of procedural safeguards is necessary.²⁰ Another area of potential abuse is where information is used to place persons under surveillance; this should also be the subject of detailed procedural safeguards.

Article 38

5.83 When police personnel access a database, they are not exercising a “right” but rather they are conducting actions, which are necessary for the proper performance of their functions. A “right” is something that a person enjoys in the context of their relations with others, and cannot be enjoyed by a State official in the course of their professional duties. We would suggest that the word “right” be changed to “power” or “authority”.

Article 41

5.84 The provision in paragraph 3, requiring an officer’s name to be displayed on a badge is a welcome one, as it is part of a community policing approach. It can help in creating an image of normality and a realisation amongst the public that police officers are ordinary people too. There may be situations, however, where it would not be realistic for an officer to display their name. This could arise in cases where officers are dealing with dangerous criminals or terrorists. Accordingly, we would recommend that provision be made for officers not to have to wear such badges in specified cases. In addition, it is important that officers can be identified, either by a unique number or some other method, in all situations, including public order deployments.

Article 43

5.85 The issues referred to in paragraph 1 sub-paragraphs 9 and 10 are not rights, for the reasons set out in the discussion under Article 38 above. It may be worthwhile to include a provision setting out the extent to which officers may engage in political activity. The case-law of the ECtHR allows for interferences with the rights of officers to engage in political activity, where there are relevant and sufficient reasons for doing so. It has also made clear that police officers owe a special duty of loyalty, reserve and discretion.²¹ A clear statement in the law concerning whether officers are allowed to be members of political parties, or whether they are allowed to take any active role in campaigning for such parties, may be beneficial.²²

5.86 In the event that officers (as proposed in Article 41) wear a badge displaying their name, it may not be necessary for them to show an official ID every time that they talk to somebody, unless the person asks for it specifically.

²⁰ *M.M. v. United Kingdom*, judgment of the European Court of Human Rights of 13 November 2012.

²¹ *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, judgment of the European Court of Human Rights of 25 September 2012.

²² The case of *Rekvényi v Hungary* (judgment of the European Court of Human Rights of 20 May 1999) provides useful guidance regarding how the political rights of police officers should be regulated.

In the case of detectives or other officers who do not wear a name badge, it is reasonable for them to be required to show an official ID when dealing with the public.

5.87 It would be advisable to include a duty such as “to be attentive to public needs” or any other equivalent expression that gives an idea about the need to be proactive to provide the public with a good security service. This can work towards the embedding of a community policing philosophy amongst police officers.

5.88 The final two paragraphs of the article deal with integrity tests, which are to be carried out annually in respect of each officer. The results of such tests cannot be used to bring criminal or disciplinary proceedings against the officer concerned. It is not entirely clear what the purpose of this provision is. There are documented instances of corruption being a widespread phenomenon in Ukraine, and this has had an extremely negative impact on the relationship between the police and the public. Accordingly, it is understandable that radical measures, designed to increase those levels of trust, are being considered. However we would suggest that a detailed rationale be provided in terms of the expected outcomes of such integrity testing. Although the prohibition on criminal and disciplinary proceedings may reduce the possibility of entrapment, officers could still suffer stigmatisation. This could arise in the context of reduced career opportunities or other consequences. Any secret operation or inspection needs to be carried out in such a manner as to ensure that officers are not lured into committing actions that they would not otherwise commit²³. In addition, covert operations should only ever be conducted where there is a clearly identified need and other options would be ineffective.

5.89 Nothing in the comments above detracts from the need to have effective internal oversight of the conduct of police officers, which can investigate credible allegations of violations of the law, in conjunction with external investigative mechanisms for more serious violations.

Article 44

5.90 The idea of establishing, as a fixed criteria, that the officer in command, when there are officers with the same rank, is to be the oldest one could be problematic. It could hinder the reform process. It is reminiscent of military discipline, which is not appropriate in a civilian organisation.

5.91 Paragraph 4 mixes two different concepts, “criminal” and “illegal”. An order may be illegal but not criminal, although in many cases it will constitute both.

5.92 It is an interesting innovation that police officers can ask for written orders in cases where they doubt its legality. However, if after receiving any

²³ See, for example, *Teixeira de Castro v Portugal*, judgment of the European Court of Human Rights of 9 June 1998 and *Ramanauskas v Lithuania*, judgment of the European Court of Human Rights of 5 February 2008.

such order, they still consider that it is clearly illegal they should be able not to obey them.

Article 47

5.93 Article 47 paragraph 5 provides for polygraph tests to be conducted on candidates for the position of police officer. Paragraph 6 states that a negative result in a polygraph test is not, of itself, a reason to deny appointment to a candidate. This raises the question of the utility of such a test. If a person fails a test, this may be retained on their personal file and could be seen as a negative issue in terms of their career progression. Polygraph tests are not accepted as being wholly accurate and it is possible for them to be manipulated. Their value as a tool in assessing the honesty of candidates is therefore limited. Any reliance on them should be given very careful consideration.

Article 53

5.94 Article 53 states that the term of being in each special rank is 8 years and that there shall be no early promotion to a higher rank. This means that an officer cannot progress through the ranks earlier than as provided for by law.

5.95 Police officers will have various career paths in mind when they join the police service. Some will wish to remain in their initial roles and ranks for their entire service, for personal or professional reasons. They may wish to join a particular unit and gain specialist training or experience, and deploy that training and experience in the service of the Ukrainian people for their entire careers. Articles 59 (secondments), 60 (professional training), 62 (evaluation) and 63 (internships) of the draft Law are welcome initiatives in this regard.

5.96 Others will wish to seek promotion to management or other roles as part of their career progression. It is important that there be provision, in an employer the size of the MIA, for differing career aspirations to be accommodated. This is common to police services across Europe, where police officers may remain in their initial rank for their entire careers, or seek promotion.

5.97 If police officers are unable to obtain expedited promotion in any circumstances, they are less likely to use their initiative to learn new skills or to provide a service beyond the minimum of what is required. This could lead to a lack of motivation and ultimately to the provision of a lower level of service to the people of Ukraine. In addition, officers who wish to remain in their initial rank should not be automatically promoted after a specified number of years of service. We believe that for many officers career progression is extremely important, not only in terms of the potential for increased salary but also in terms of the recognition of their efforts.

5.98 We recommend that the provisions be amended so that there is provision for more rapid career advancement for certain officers and that officers who wish to remain in their initial rank for their entire careers are able to do so. This should be a part of an overall career management structure for officers. In

addition, officers should be able to move to different roles, at the same rank, if they meet the relevant criteria for such roles.

Articles 54 to 56

5.99 The provisions of Articles 54 to 56 regulate the working hours of officers. They set out extremely strict regulation of the hours that officers may work on individual days, and set strict rules regarding aggregate hours that may be worked over weeks, months and years.

5.100 We are not familiar with the details of Ukrainian labour law, which presumably is a highly-developed branch of the legal system. It may be that it is normal practice and convention for working hours and conditions of public officials to be regulated in such detail in a Law. If this is the case, it is of course normal that this should be done in this Law. However, if it is not normal practice, we would advise that a greater degree of flexibility be retained.

5.101 The role of police is a very dynamic and challenging one. Officers may be required to work past their scheduled hours for a number of reasons, for example if they are deployed to a crime scene or in public order situations. This is inherent to the role of police and their obligations to protect the public. The provisions of the Law, as currently drafted, are probably impossible to comply with in practice. Drafting rosters of police duty is a complicated and skilled task, usually performed by experienced officers, increasingly with the aid of computer software. It requires detailed information regarding the demand for police officers at particular times, so that the events, etc., which may be taking place can be catered for. A significant degree of flexibility is required.

5.102 We recommend that the provisions of Articles 54 to 56, if possible within the framework of Ukrainian labour law, be redrafted so as to allow for a greater degree of flexibility for the MIA, while taking into account the rights of police officers and their families.

Article 61

5.103 Care should be taken to ensure that the Attestation Commission operates in an effective manner, and that it avoids an unduly bureaucratic approach. In particular, there should be provision for special appraisals in specific cases. The methods used to assess performance should reflect the realities of the work of the police in general and the specific duties carried out by the officer.

Article 62

5.104 Appraisals of officers in management positions should also take due account of the performance of the units, etc., managed by that officer. This should include an assessment of whether relevant goals (e.g. in a police plan) have been achieved. Relations with the community and other stakeholders should also be taken into account.

Article 64

5.105 We consider that there should be provision for a police officer's salary to reflect their specific tasks, e.g. the level of danger they face or the level of qualifications required.

5.106 The salary co-efficient for heads of local police is, in our opinion, low and does not reflect fully the importance and difficulty of such positions.

5.107 Basing an officer's salary solely on years of service may result in demotivation of officers. While understanding the particular difficulties in Ukraine, we consider that some form of performance related pay would be a valuable initiative. Some objective parameters should be established to assess performance in order to avoid arbitrariness in rewarding effort and good performance.

Articles 66 to 80

5.108 Articles 66 to 80 regulate the conduct of disciplinary proceedings against police officers. It is beyond the scope of this opinion to comment on the detailed procedural aspects of these provisions. In our opinion, the fundamental guarantees of fairness appear to be secured through the current draft.

Articles 81 to 84

5.109 Articles 81 to 84 establish Police Commissions, which have a range of functions related to the appointment of police officers and conduct of disciplinary proceedings against them, as well as the adoption of alternative reports on police activity. They have a broad membership, which is representative of the relevant public authorities and civil society. We consider that, once Police Commissions are adequately resourced and are capable of discharging their functions, they can play a very important role in improving the relationship between the police and the public. They can result in additional transparency and accountability and can also facilitate community policing.

Article 85

5.110 The following provision appears curious: "Legislation on education does not apply to police schools". While police training does have some special characteristics and is different from general education, the tendency in some Western countries (e.g. the United Kingdom, Germany and Spain) is increasingly to subject police training to general education rules and to make it equivalent to different types of general education. Such a radical separation will contribute to the idea of the police as a special (isolated) body, which would run contrary to the aims of the Law and the values set out by us in section 4 above.

5.111 The system of police school should be required to establish and maintain links with relevant groups, including the Police Commission, universities and professional associations (lawyers, psychologists, criminologists, etc.). There should also be a requirement to maintain contact with civil society.

5.112 Article 27 of the ECPE states: “General police training shall be as open as possible towards society”. This should be reflected in the Law.

Article 86

5.113 It would be useful to include a requirement to maintain links with academia in the field of research.

6. Recommendations

General

6.1 We consider that, in addition to the positive developments contained in this law, it would be beneficial to create mechanisms for public participation or partnership between the police and society. Such mechanisms take a range of forms and they can be adapted to the particular circumstances and requirements of Ukraine.

6.2 Two relevant examples are the Spanish *Juntas Locales de Seguridad* (municipal security councils) or the French *Conseil local de sécurité et de prévention de la délinquance* (municipal council for security and prevention of criminality). In both cases, they involve the municipal authority (Mayor), state authorities and all police services working in the municipality. Local associations are normally invited to take part in the meetings and have a say in the main decisions. They imply partnership and a degree of public participation, while leaving the taking of substantive decisions to the relevant public authorities.

6.3 We understand that it is intended that the State Bureau of Investigation, when established, will deal with complaints of a serious nature against police officers (and other public officials). We recommend that the public be entitled to participate in the management of the police complaints system. This would be highly beneficial in terms of transparency, accountability and public confidence. At a minimum, consideration could be given to whether the Police Commission should have some powers of scrutiny over the system and to ask for information or clarification when they consider that it is necessary.

6.4 A number of our comments throughout the draft concern a widening of police functions, to include preventive actions, managing conflicts, solving security problems, giving assistance to the public, etc. However, this should not be to the detriment of the police's role in upholding and enforcing the law, which should remain its primary function.

6.5 The police reform process should be based on the standards and values set out by us in section 4 of this opinion.

Article by Article

Article 2

6.6 The role of the police should be broadened to include a focus on prevention and on a community policing, partnership approach.

Article 3

6.7 The principles set out in Article 3 should have a specific binding character.

Article 4

6.8 The direction and co-ordination role given to different Ministries should not result in interference in the day-to-day work of the police.

6.9 Any inspections or investigations into police officers must respect their right to a fair trial.

Article 6

6.10 This Law and the draft law on local police need to be harmonized.

6.11 There should be reference to the securing of public order through the taking of positive actions.

6.12 Consideration should be given to increasing the number of local officers, a more flexible mechanism to be devised for calculating their numbers.

Article 7

6.13 The role and purpose of the proposed “Rapid response” should be specified with greater care and detail. There should be a clear delineation between a unit with a special intervention role and units with public order roles.

6.14 A specialist public order policing unit, with an appropriate ethos and training, should be created. Trained officers in other roles should also be able to formed into specialist public units as and when required.

6.15 A full-time Special Intervention Team covering all of Ukraine, with an appropriate number of officers, be created.

Article 11

6.16 There should be no conflict or overlap between the financial police and the other police units. Its work should not be hindered as a result of the fact that it is supervised by different Ministries.

Article 13

6.17 There should be specific reference to the role of the border police in ensuring compliance with Ukraine’s international obligations.

Article 16

6.18 Consideration should be given to the possibility of limiting the number of times that a head of local police can be reappointed.

Article 17

6.19 There should be a degree of external scrutiny in the appointment and termination procedures for senior appointments.

6.20 The requirement that candidates for certain senior positions speak two foreign languages should be reconsidered.

Articles 18 to 20

6.21 There should be a specific duty to consult on the contents of all police plans.

Article 23

6.22 There should be a provision requiring the border police to “facilitate the proper flow of persons through the borders”.

6.23 There should be a clear and unequivocal statement of compliance with the principle of *non-refoulement* and other legal obligations.

Article 25

6.24 The power to limit, etc., access to certain places should be limited to situations where it is necessary for the discharge of a police function, or analogous wording.

Article 26

6.25 This Article should be amended to ensure consistency accord with Article 233 of the Ukrainian Criminal Procedure Code (CPC).

6.26 Police officers should have equivalent powers in relation to entry to premises without warrant as those provided by Article 233 of the CPC subject to appropriate safeguards.

6.27 If not already, the term “valuable property” should be defined.

6.28 There should be a requirement that a protocol regarding the search, etc., is provided to the resident (dweller) of the premises.

Article 27

6.29 This Article should be redrafted in order to make it less cumbersome.

6.30 It should be clarified that custody is never a mandatory requirement; police officers should retain the power to decide if it is the best option in the particular circumstances of each situation.

6.31 Police officers should have the power to search persons in custody, subject to a requirement for there to be some suspicion.

6.32 Where a person lacks mental capacity, the protocol should be delivered to some relative or person with whom he/she lives.

Article 28

6.33 Article 28 should refer to the procedural safeguards for persons in police detention as contained in the CPC, and acknowledge their binding nature.

6.34 There should also be an explicit reference to the need to prevent torture or other conduct in violation of Article 3 of the ECHR.

6.35 Unless provided for in other legislation, there should be specific reference to the fact that a person in police custody is entitled to communicate in a language they understand and to an interpreter if necessary.

Article 31

6.36 Police use of physical restraint should not be allowed solely to detain somebody or for the other limited reasons as set out in the first sentence of Article 31. It should be provided for in other justified cases, for example where the police are obliged to act in order to protect an individual.

Article 32

6.37 The deployment and use of dogs and horses should be limited to situations where they are the most appropriate tactic to be utilised to deal with the specific situation concerned.

Article 33

6.38 The list of situations where special tools may be used is too restrictive and may lead to unintended consequences.

6.39 Consideration should be given to amending the prescribed area at which rubber bullets should be aimed.

6.40 It should be clarified whether the specified temperature for the water cannot refer to the air temperature or the temperature of the water itself. In addition, the pressure at which water can be discharged should be regulated.

Article 34

6.41 Paragraph 2 should be rephrased in order to provide specific reference to the need to facilitate freedom of assembly and should focus on the need for the police to seek to prevent confrontations between groups involved in rival demonstrations.

Article 35

6.42 Article 35 does not comply in full with Article 2 of the ECHR. It requires extensive redrafting, in order to ensure such compliance. It is extremely important that Article 35 makes it clear that firearms can never be used to intentionally kill a person and that they can only be used in situations where their use is absolutely necessary to prevent a loss of life.

Article 36

6.43 Article 36 should contain measures to ensure compliance with Article 8 ECHR and other relevant legal obligations.

Article 37

6.44 There should be provision for the immediate removal from databases of personal data concerning persons who have been arrested by mistake and in other similar types of situations.

6.45 There should be, either in this Law or in another Law regulating the processing of personal data, provisions preventing the inappropriate use of data by police.

Article 38

6.46 The word “right” should be changed to “power” or “authority”.

Article 41

6.47 There should be provision for officers not to have to wear name badges in specified cases. Officers must always be identifiable in some manner.

Article 43

6.48 The Law should set out the rights of police officers in relation to freedom of association.

6.49 If officers do wear name badges, they should not be required to display a warrant card on all occasions.

6.50 The Article should impose a duty “to be attentive to public needs” or similar community focus.

6.51 Any secret operation or inspection needs to be carried out in such a manner as to ensure that officers are not lured into committing actions that they would not otherwise commit.

Article 44

6.52 The fixed criterion that the longest-serving officer takes command should be reconsidered.

6.53 Officers should be able to refuse to carry out orders, even when given in writing, that are clearly illegal.

Article 47

6.54 Any reliance on polygraph tests should be given very careful consideration.

Article 53

6.55 The strict limits on career progression should be reconsidered in order to avoid demotivation.

Articles 54 to 56

6.56 The provisions governing the working hours of officers should be redrafted so as to allow for a greater degree of flexibility for the MIA, while taking into account the rights of police officers and their families.

Article 61

6.57 The Attestation Commission should avoid an unduly bureaucratic approach. The methods used to assess performance should reflect the realities of the work of the police in general and the specific duties carried out by the officer.

Article 62

6.58 Appraisals of officers in management positions should also take due account of the performance of the units, etc., managed by that officer.

Article 64

6.59 A police officer's salary should reflect their specific tasks, e.g. the level of danger they face or the level of qualifications required.

6.60 The salary co-efficient for heads of local police is, in our opinion, low and does not reflect fully the importance and difficulty of such positions.

6.61 Consideration should be given to the introduction of performance related pay.

Article 85

6.62 Police Schools should be required to have links with the education system, the Academy, professional associations and civil society.

Article 86

6.63 There should be a requirement to maintain links with academia in the field of research.