

**Programmatic Cooperation Framework for
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus**



**Joint Programme between the European Union and the Council of Europe
“Strengthening the implementation of European human rights standards”**

**COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND
RULE OF LAW (DIRECTORATE OF HUMAN RIGHTS) OF
THE COUNCIL OF EUROPE**

**ON THE DRAFT LAWS OF UKRAINE
ON “INTERNAL AFFAIRS BODIES” and “NATIONAL POLICE”**

prepared on the basis of the contribution by

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1. INTRODUCTION

1.1 The purpose of this report is to review of the draft Law of Ukraine “On National Police” (“the draft Police Law”) and the draft Law of Ukraine “On Internal Affairs Bodies” (“the draft Internal Affairs Law”) submitted to the Council of Europe for an expertise, on 04 June 2015, at the request of Mr Andriy Kozhemyakin, Head of the Committee of the Verkhovna Rada of Ukraine on Legal Support of Law Enforcement. The primary basis for the review is European standards, in particular human rights norms. The two draft laws will, taken together, provide a foundation for the further democratisation of security provision in Ukraine. As the two laws are closely interrelated, this opinion deals with them together.

1.2 The authors of this report are Ralph Roche and Francesc Guillen Lasierra, Council of Europe experts.

1.3 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.

1.4 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 holds a Ph.D. on “Models of policing”. 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.

2. EXECUTIVE SUMMARY AND RECOMMENDATIONS

2.1 The draft Law of Ukraine “On Internal Affairs Bodies” (“the draft Internal Affairs Law”) provides a basis for the democratic control and oversight of the law enforcement bodies. It incorporates principles such as human rights civilian oversight and accountability, which is positive.

2.2 More detailed regulation of the establishment and operation of databases by internal affairs bodies would be beneficial, in order to ensure compliance with the right to respect for private life as set out in Article 8 of the European Convention on Human Rights (“ECHR”).

2.3 The draft Law of Ukraine “On National Police” (“the draft Police Law”) is a thorough and comprehensive document, in particular concerning personnel issues.

2.4 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 role of the National Police and individual police officers as protectors of human rights should be more detailed in specific areas, for example the prevention and combating of crime and police investigations. Thresholds for police powers of arrest, search, etc., should be explicitly set out.
- The ethos of the National Police as a public service should be more explicit. This can be done in a number of ways, including through the inclusion of a requirement for a Code of Ethics and through greater involvement of the public and civil society.
- The processing of personal data in police databases should be subjected to stricter regulation, e.g. as regards retention periods and subject access rights.
- Provisions governing career progression for police officers should be more flexible and be based on competition rather than on seniority alone. Provisions allowing for repeated extensions of contracts should be reconsidered.
- Incorporation of the standards set out in the European Code of Police Ethics.
- Adoption of a previous opinion of the Council of Europe concerning thresholds for the use of force in areas designated as areas of ‘anti-terrorist operations’.
- The structures of the different units of the National Police should be set out in a degree of detail to ensure compliance with relevant European standards.
- The powers of the chief of National Police are extremely broad leading to an undue concentration of power in one individual.

2.5 It is advisable that the draft Police Law 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.

2.6 There are a number of European standards, which can assist the Ukrainian authorities in implementing a reform process, which will assist in ensuring that the police is transformed into a democratic police service, orientated towards providing a service to the public. These standards include 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.

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

RECOMMENDATIONS

Recommendation 1: the provisions in the draft Internal Affairs Law establishing healthcare institutions in the Ministry of Internal Affairs should be reconsidered.

Recommendation 2: the draft Internal Affairs Law should provide for the establishment of bodies to ensure human rights compliance by the National Police and by individual police officers.

Recommendation 3: the draft Internal Affairs Law should provide for the recording of each act of access to personal data contained in databases maintained by the Ministry of Internal Affairs.

Recommendation 4: the draft Internal Affairs Law should contain an increased emphasis on accountability.

Recommendation 5: the draft Police Law should set out the principles underpinning police investigations such as human rights protection, impartiality, etc.

Recommendation 6: the draft Police Law should, when the National Police assume full responsibility for public order, include explicit reference to the need to uphold the right to freedom of assembly and association in the context of public order.

Recommendation 7: the draft Police Law should include reference to the fact that policing is a public service.

Recommendation 8: A reference to the need to draft and adopt a Code of Police ethics should be included in the draft Police Law.

Recommendation 9: The draft Police Law should include a requirement that the Ministry promote research in areas concerning policing and the need to co-operate with universities.

Recommendation 10: Article 2 of the draft Police Law should refer to ensuring public order and the security of all persons.

Recommendation 11: Article 2 of the draft Police Law should include a reference to preventing and combating crime.

Recommendation 12: Article 2 of the draft Police Law should refer to administrative offences as being within the scope of police functions.

Recommendation 13: Article 3 of the draft Police Law should include a reference to the European Convention on Human Rights.

Recommendation 14: Article 4 of the draft Police Law should include a requirement for international cooperation in the field of police ethics and human rights.

Recommendation 15: Section II of the draft Police Law should include references to key principles from the ECPE.

Recommendation 16: Article 8 of the draft Police Law should include a reference to freedom of information as a default principle, limited only in individual cases with a demonstrated requirement.

Recommendation 17: Article 10 of the draft Police Law should include a specific reference to community-policing.

Recommendation 18: Articles 12, 13 and 22 of the draft Police Law should specify the functions of the different units and the central management body of the National Police.

Recommendation 19: Article 17 of the draft Police Law should include a requirement for police officers to “protect” human rights.

Recommendation 20: consideration should be given to the need for the extent of the powers given to the chief of the National Police in Article 21 of the draft Police Law.

Recommendation 21: Articles 27 and 28 of the draft Police Law, or other appropriate mechanism, should include stricter regulation of the use (processing) of personal data and other interferences with the right to respect for privacy.

Recommendation 22: Article 32 of the draft Police Law should include a reference to “reasonable suspicion” or other equivalent term, consistent with Ukrainian legal practice, as a justification for intrusive action by police.

Recommendation 23: Article 37 of the draft Police Law should include a limitation on the power to restrict persons or property.

Recommendation 24: Article 4 of the draft Police Law should include more specific detail regarding the thresholds for entry into private property.

Recommendation 25: Article 44 of the draft Police Law should include more detailed regulation of the situations where force may be used, based firmly on the case-law of the European Court of Human Rights.

Recommendation 26: The provisions of the draft Police Law should comply with the recommendations set out in Council of Europe Directorate of Human Rights opinion DGI (2014) 20 of 29 September 2014.

Recommendation 27: civil society should be involved in police training.

Recommendation 28: Article 54 of the draft Police Law should provide for appeals against decisions of the Police Commission.

Recommendation 29: Article 75 of the draft Police Law should be reviewed to reduce the scope for misuse of the power to issue repeated extensions of contracts for police officers.

Recommendation 30: Promotion and other forms of advancement for police officers should be based on objective competitions, and not solely on seniority.

Recommendation 31: Article 84 of the draft Police Law should provide for a right of appeal against decisions imposing a reduction in rank.

Recommendation 32: Article 86 of the draft Police Law should allow the person to be affected by a resolution of no confidence to be heard during the procedure.

Recommendation 33: Article 89 of the draft Police Law should provide for time-limits for responding to complaints.

3. RELEVANT COUNCIL OF EUROPE AND OTHER EUROPEAN STANDARDS

3.1 The purpose of this section is to set out the Council of Europe standards relevant to the field of policing, in particular human rights standards. It is hoped that this will assist the Ukrainian authorities in ensuring that the draft laws are adopted and implemented in a manner that ensures compliance with those standards.

3.2 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 report. A brief outline will be set out below and throughout our comments on individual Articles of the draft laws as necessary.

3.3 Recent events in Ukraine have highlighted the need for, and importance of, ensure 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.

3.4 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

3.5 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, 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

3.6 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 the following provisions are of particular relevance to the draft Police 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)
- b. Lawfulness as a basis for police activities (Articles 2-5, 38, 39)

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

² <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/EuropeanConventionHandbookForPolice.pdf>

- c. Respect for other actors within the Justice system (judiciary, prosecution service and lawyers) (Articles 6-11)
- 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. Principles for police investigation (Articles 47 to 53)
- h. Police officers should enjoy the same rights as any other citizen (subject to very limited exceptions) (Articles 31-32), with possibility to get the disciplinary measures reviewed by an independent body or a court.
- i. Impartiality and non-discrimination (Article 40)
- j. Use of force as a last resort (Article 37)
- k. Requirement for police ethics and integrity (Articles 20, 44, 63)
- l. Fair recruitment (Article 22-23)
- m. Fair treatment of detainees (Articles 49-58).

3.7 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

3.8 The concept of community policing can be described as a European standard. 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

3.9 The term “community policing” is often misunderstood, especially as it can be translated in a number of different ways. It can also be described as citizen-focussed policing. 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 report is based on the assumption that a community policing approach is desirable for Ukraine. As stated by the MIA, the police in Ukraine still has a “militarized operating model inherited from the USSR”.⁵

3.10 The OSCE has issued a number of publications relevant to policing, which 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

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.

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 publications focus on police training by offering proper training programmes for areas such as human rights, tackling hate crimes, domestic violence and public assembly management.

3.11 A full list of the relevant standards is set out at Appendix 1.

Values underpinning policing

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

Accountability

3.13 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.

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

Professionalism

3.15 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. Recent events in Ukraine demonstrate this all too clearly. This principle of equality and non-discrimination is set out in the Constitution, and in the ratified international treaties, as well as in numerous legal acts.

Human Rights

3.16 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 (for a suspect) and the right to peaceful enjoyment of one's possessions (for a victim). 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*

3.17 A focus on citizens 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 reference is made in this report to community policing, it means 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.

The fundamental importance of police in a democratic society

3.18 It is relevant to consider briefly the fundamental importance of law enforcement bodies in producing security in a democratic society. In a recent report entitled “State of Democracy, Human Rights and the Rule of Law in Europe”,⁶ the Secretary General of the Council of Europe pointed out in respect of Ukraine that “widespread corruption, a lack of independent institutions and the mismanagement of power weakened the country...” He highlighted the importance of “democratic security”, noting that democratic systems provide checks on power, foster tolerance and allow for a genuine competition of ideas and stating that “democratic norms are vital foundations for lasting peace”.

3.19 The role of the National Police, and other law enforcement bodies, in producing security is key. Not only do the police produce “hard” security, or security as traditionally conceived, through preventing crime and bringing perpetrators to justice, they are also producers of a broader conception of security, which includes the rule of law and guarantees of individual liberty. It is important that the police are accepted as legitimate guarantors of security, if the State is to retain its monopoly on the use of force. The bedrock of this process is the adoption and implementation of an appropriate legal framework for the police to operate within. In the opinion of the authors of this report, the consideration and adoption of the comments set out below will assist greatly in ensuring that this occurs.

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<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2742889&SecMode=1&DocId=2263108&Usage=2>

4. ANALYSIS

A. General comments to the draft Internal Affairs Law

4.1 The draft Internal Affairs Law provides a basis for the democratic control and oversight of the law enforcement bodies. It adopts (in Article 1) a comprehensive definition of the term “internal affairs”, centred on the protection of human rights, as well as embedding this principle in the operation of all internal affairs bodies in Ukraine (Article 3). The focus on legality and transparency in Article 3 is positive, as is the reference to accountability.

4.2 It is unusual for the Ministry of Internal Affairs to have its own healthcare institutions (Article 8), as this could hamper the most efficient use of resources across the entire Ukrainian healthcare system. It may be that this is a continuation of a tradition of medical provision that began in Soviet times, but it should be reconsidered in light of the need to ensure value for money, while securing adequate medical protection to employees of internal affairs bodies.

Recommendation 1: the provisions in the draft Internal Affairs Law establishing healthcare institutions in the Ministry of Internal Affairs should be reconsidered.

4.3 The key tasks of the Ministry of Internal Affairs (Article 9) appear comprehensive. It would be useful to set out a requirement that the Ministry of Internal Affairs should establish bodies or mechanisms to guarantee human rights protection and respect by the National Police and individual police officers. For example, a requirement to establish a complaints system could be included.

4.4 There are a number of different models which can be used. The minimum European standard is that complaints regarding allegations of violations of the right to life (Article 2 ECHR) and the right to freedom from torture and inhuman and degrading treatment and punishment (Article 3 ECHR) must be conducted by a body independent of the law enforcement authority concerned. For example, in England and Wales, the Independent Police Complaints Commission investigates such complaints itself and can supervise investigations into less serious matters. In the Republic of Ireland, the Garda Síochána Ombudsman Commission has a similar role, and supervises the investigation of complaints by the Garda Síochána (police) Discipline section. Useful information regarding the European standards in this area is set out in an opinion of the Council of Europe Commissioner for Human Rights⁷, which refers to the need for an independent police complaints body. Paragraph 34 states that it should have: “general responsibilities for oversight of the police complaints system and express responsibility for investigating Article 2 and 3 complaints in accordance with the ECHR independence principle. Arrangements in the form of, for instance, secondary legislation, regulations,

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<https://wcd.coe.int/ViewDoc.jsp?id=1417857&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>

statutory guidance and protocols, will be required to enable the police and IPCB to work together in partnership and ensure that all complaints are handled fairly, independently and effectively.”

Recommendation 2: the draft Internal Affairs Law should provide for the establishment of bodies to ensure human rights compliance by the National Police and by individual police officers.

4.5 Article 17 paragraph 3 sets out a large number of databases to be created and maintained by the Ministry of Internal Affairs. Although the list is comprehensive and does not contain any obvious gaps, it would be advisable to include a provision allowing for the creation and establishment of other databases, if there is a clearly demonstrated requirement for them. The nature of criminal activity is developing at such a rapid pace that new databases may be required in the future.

4.6 The list of databases maintained by other bodies which the Ministry of Internal Affairs shall have a right of direct prompt access to is very broad. There may be situations where access to these databases is required, and the law rightly provides for this. The myriad situations which can arise mean that such a list must be inclusive, rather than exclusive. However, the key issue is to ensure procedural safeguards. Each individual act of access by a Ministry staff member should require a specific basis (e.g. investigation of crime) and the law should specify this. Such safeguards are necessary in order to ensure compliance with the right to respect for privacy and data protection rules. This will assist in ensuring compliance with Article 8 of the ECHR, which protects the right to respect for private life. One of the requirements of Article 8 is that data must be relevant and not excessive in relation to the purposes for which they are stored. The data must also be stored in such a way as to ensure that afford adequate guarantees that it will be stored and shared properly. Data must also not be retained for longer than necessary.⁸

Recommendation 3: the draft Internal Affairs Law should provide for the recording of each act of access to personal data contained in databases maintained by the Ministry of Internal Affairs.

4.7 The provision in paragraph 6 of Article 17 is very welcome, as it requires compliance with European and other relevant standards concerning data protection. The requirement in paragraph 7 could be strengthened, either in the law itself or through some form of direction issued by the Ministry of Internal Affairs, setting out detailed procedural rules governing the issues listed in the previous paragraph.

4.8 Article 22 of the draft Internal Affairs law states that the control of operation of the internal affairs bodies and their accountability shall be governed by, amongst other legal norms, the Law of Ukraine on Democratic Civil Control of the Military Organisation and State Law Enforcement Bodies.

⁸ *Gardel v. France*, judgment of 17 December 2009; *S and Marper v. United Kingdom*, judgment of 4 December 2008 [GC]; *Draksas v. Lithuania*, judgment of 31 July 2012.

This law sets out a comprehensive set of “legal, organisation and information measures that enshrine adherence to the rule of law and transparency” in the activities of law enforcement bodies. In Article 6, it specifies the system of, and organisations involved in, civilian control. This comprehensive list includes civil society oversight, as well as the more traditional forms of oversight (e.g. by Parliamentary Committees). This provides a legal basis for comprehensive oversight of the internal affairs bodies. In order to ensure that this occurs in practice, there should be an increased emphasis on accountability.

Recommendation 4: the draft Internal Affairs Law should contain an increased emphasis on accountability.

4.9 In general, the draft Internal Affairs law is adequate in terms of facilitating compliance with European standards relevant to providing a legal basis for the operation of the National Police and other internal affairs bodies. Nevertheless, the introduction of specific mechanisms to monitor the activities of the internal affairs bodies activities in the area of human rights (with particular attention to privacy in data processing) would ensure compliance with the European standards incorporated in the draft. In addition, in order to foster accountability, the participation of the public also assist in this regard. Furthermore, the draft should avoid involving the Ministry of Internal Affairs in competences normally attributed to the Health System.

B. General Comments to the draft Police Law

4.10 The draft Police Law regulates, in detail, the nature and extent of police powers in a number of respects, including prescribing limitations on many aspects of those powers. It does not set out the principles that underpin police investigations or deprivation of liberty by the police, areas with a high risk of human rights violations. While these issues may be regulated in the Criminal Procedure Code and other appropriate legislation, the draft would benefit from containing explicit text on this topic.

Recommendation 5: the draft Police Law should set out the principles underpinning police investigations such as human rights protection, impartiality, etc.

4.11 The draft is very detailed concerning the different means that police may use, while carrying out their functions. However, the draft does not contain explicit principles governing the policing of public order incidents. Taking into account the recent history of the country and the demonstrated failing of the State in relation to public order issues,⁹ this would be advisable. It is envisaged that the public order police units will be reorganised, reformed and merged with the patrol police in the National Police. A reform of this magnitude and importance will take some time. On this basis, it is recommended that when the

⁹ See, for example, the Report of the International Advisory Panel on its Review of the Maidan Investigation:
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016802f038b>

when the National Police assume full responsibility for public order, the draft Police Law should make specific reference to the ECHR.

Recommendation 6: the draft Police Law should, when the National Police assume full responsibility for public order, include explicit reference to the need to uphold the right to freedom of assembly and association in the context of public order.

4.12 The draft contains significant amounts 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. The focus on the internal management of the National Police is entirely understandable, in the context of the lack of public confidence in the police and the context of the requirement to increase transparency and reduce opportunities for corruption. In addition, it will provide a basis for increased public confidence in the police.

4.13 It is beyond argument, 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. The idea of service is already present in some articles but in a very collateral way. Article 1 of the draft state that the police “serves society”, but there are no concrete mechanisms to embed the culture of delivering a service to the public in police operations.

Recommendation 7: the draft Police Law should include reference to the fact that policing is a public service.

4.14 The draft Police Law does not contain an explicit requirement for there to be a Code of Ethics. This is a feature of such laws in a number of countries, in particular where there is a need for significant police reform. It is also set out in Article 63 ECPE. For example, the law governing the police in Northern Ireland contains a specific requirement for a Code of Ethics “laying down standards of conduct and practice for police officers” and informing them of their rights and obligations under the ECHR.¹⁰

Recommendation 8: A reference to the need to draft and adopt a Code of Police ethics should be included in the draft Police Law.

4.15 The citizen should be considered 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

¹⁰ s. 52 of the Police (Northern Ireland) Act 2000:
<http://www.legislation.gov.uk/ukpga/2000/32/section/52>

“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 and priorities for policing.

4.16 Research is a key element in ensuring that developments in policing are implemented and incorporated in police practice. Co-operation with universities is an effective way of ensuring this. The reform process in Ukraine means that there is a large amount of scope to introduce change. In order that police managers are aware of developments, the law should include a requirement that the Ministry promote research in areas concerning policing and the need to co-operate with universities (although they may not necessarily provide training for police officers) as well in order to fulfil the requirements of Article 64 ECPE. The draft law on Internal Affairs Bodies reinforces this requirement, as it allocates the responsibility for training of the National Police to the Ministry (in Article 12).

Recommendation 9: The draft Police Law should include a requirement that the Ministry promote research in areas concerning policing and the need to co-operate with universities.

C. Comments by Article on the draft law on “National Police”

Section I

General Provisions

Article 2

4.17 It would be advisable to include a reference to citizens and all persons in the first paragraph. Instead of “ensuring public order and security” it should say “ensuring public order and security and the security of all persons”. As currently formulated, the draft appears unduly state-focussed or centric. The draft Internal Affairs law reinforces that impression, since the functions attributed to the internal affairs bodies are very closely linked to the execution of “state policies”, without further references to citizens or the protection of human rights (see for example Article 4). The key tasks attributed to the Ministry of Internal Affairs in the same draft (Article 9) are also focussed heavily on “state policies”. The latter (Article 9) includes no mention of “rights” or even a reference to “citizens”. All of these issues, taken together, could be seen as creating the impression that, although the draft Police Law refers to citizens’ rights and imposes limits on the powers of police, behind it lies a conception of security focussed much more on the state and its protection, than on citizens.

Recommendation 10: Article 2 of the draft Police Law should refer to ensuring public order and the security of all persons.

4.18 Paragraph 3 should, in order to ensure consistency with the later parts of the law, also refer to, prevention of crime as a task of the National Police. A better formulation would be “preventing and combating crime”.

Recommendation 11: Article 2 of the draft Police Law should include a reference to preventing and combating crime.

4.19 There is no reference to administrative offences among police functions. However later on in the text there are references to administrative offences (see Article 23 paragraph 1 sub-paragraph 2). Reference to this category of offences should therefore also be included in this article, in order to ensure that they are within the scope of police functions.

Recommendation 12: Article 2 of the draft Police Law should refer to administrative offences as being within the scope of police functions.

Article 3

4.20 An explicit reference to the ECHR should be considered. While it is true that the “international treaties of Ukraine” are mentioned and that this includes it, explicit mention would stress the importance of human rights as a fundamental principle of policing.

Recommendation 13: Article 3 of the draft Police Law should include a reference to the European Convention on Human Rights.

Article 4

4.21 There should be reference (as in Article 64 ECPE) to a requirement for international cooperation in the field of police ethics and human rights.

Recommendation 14: Article 4 of the draft Police Law should include a requirement for international cooperation in the field of police ethics and human rights.

Section II

Principles of the National Police

4.22 Although the Section includes important provisions concerning human rights, it is quite general in nature. It does not set out specific safeguards that the police must secure to individuals in particular circumstances, especially during criminal investigations and when a person is arrested. At a minimum there should be explicit reference to:

- a. The presumption of innocence (Article 6(1) ECHR). All police investigations should be based on reasonable suspicion of an actual or possible offence or crime (Article 47 ECPE).
- b. The obligation to carry out fair police interviews, taking into consideration the needs of special victims (Articles 50 and 51 ECPE).
- c. The obligation to support, assist and provide information to victims (Article 52 ECPE).

- d. The respect for the dignity, vulnerability and personal needs of people when they are arrested (Article 54 ECPE).
- e. The duty to inform promptly persons deprived of liberty of the reasons for their detention and the charges against them (Article 55 ECPE).
- f. The duty of taking care of the health, hygiene and nourishment of detainees (Article 56 ECPE).
- g. The duty to respect and assist the work of defence lawyers (Article 10 ECPE).

4.23 While these guarantees are included in the Criminal Procedure Code and other applicable norms, they should also be included in the draft Police Law in order to highlight their fundamental importance to the work of the police. These guarantees should not be seen merely as procedural rights but rather as essential ingredients of the relationship between the police, as protectors of human rights, and the public. Accordingly, reference to them in this law would underline their importance.

Recommendation 15: Section II of the draft Police Law should include references to key principles from the ECPE.

Article 8

4.24 The final paragraph of this article limits any restriction on the provision of information to “cases and in the manner defined by laws of Ukraine”. This subjects freedom of information to a legislative principle, rather than a fundamental one. It is important to ensure that these laws are applied appropriately and that access can only be restricted where there are concrete and particular reasons indicating that unrestricted access would endanger police functions (e.g. individual safety, on-going investigations, state secrets). The article should set out freedom of information as a default position, with provisions for exceptions in certain legally-prescribed cases.

Recommendation 16: Article 8 of the draft Police Law should include a reference to freedom of information as a default principle, limited only in individual cases with a demonstrated requirement.

Article 10

4.25 The principles of cooperation should be made more precise, as opposed to the current formulation involving vague references to public participation. In addition consideration should be given to the addition of the following words at the end of the first sub-clause: “and in such a manner as to secure the confidence of the public.” This would provide a specific legal basis for a community-policing ethos.

Recommendation 17: Article 10 of the draft Police Law should include a specific reference to community-policing.

Section III

System of the National Police and status of police officers

Article 12

4.26 There is no description of the functions of the different units or divisions of National Police. It has been clarified by the drafters of the legislation, the Ministry of the Interior, that the term “security police” refers to a guarding service within the police, rather than to a unit with competencies related to State security. On this basis, while it is not a formal requirement for the competencies of the different units within the National Police set out in Article 13 of the draft Police Law to be specified in detail in that Law, it would be useful for them to be set out in some publicly accessible document.

Articles 13 and 22

4.27 It would be beneficial to specify to some degree the structures of the central management body of the police. An undue concentration of power in the chief of the National Police is not positive in terms of fostering a democratic culture in the Ukrainian police and does not reflect fully the principles of Articles 17 (clear chain of command) and 18 (efficient structures of police) ECPE.

Recommendation 18: Articles 12, 13 and 22 of the draft Police Law should specify the functions of the different units and the central management body of the National Police.

Article 17

4.28 In coherence with the contents of Article 2, a police officer should not only “respect and avoid infringing human rights and freedoms” (Article 17 paragraph 1 sub-paragraph 3)), but should also “protect” them.

Recommendation 19: Article 17 of the draft Police Law should include a requirement for police officers to “protect” human rights.

Article 21

4.29 The chief of National Police is invested with an extremely wide range of powers. This concentration of powers in one individual does not give the impression of a flexible well-managed service, adhering to democratic principles. There is a credible risk of creating an undue concentration of power in one individual. It is questionable whether such a centralised agency can facilitate the level of co-operation with other agencies, local communities, non-governmental organisations and minority groups as provided for in Article 18 ECPE.

Recommendation 20: consideration should be given to the need for the extent of the powers given to the chief of the National Police in Article 21 of the draft Police Law.

Section IV

Powers of the National Police

Articles 27 and 28

4.30 In addition to the references to the Law of Ukraine on Data Protection, there should be stipulations regarding time-limits for the retention of certain types of information. The European Court of Human Rights has held that blanket policies of indefinite retention of categories of personal information is not in compliance with Article 8 of the ECHR.¹¹ This means that there must be rules tailored to each kind of information retained. While it is not necessarily a requirement to set out specific retention periods in the draft Police Law, there should be an overarching legally-enforceable framework to ensure that personal data are not retained indefinitely.

4.31 Police access to the databases specified in paragraph 3 should only be possible when it is necessary to carry out police functions, not in general terms, without justification. Otherwise it would constitute an unjustified violation of the right to privacy. As established by Article 41 ECPE “The Police shall only interfere with individual’s right to privacy when strictly necessary and only to obtain a legitimate objective”. Although it may be permitted in the Ukrainian legislation, it is necessary to include this principle in the law. Article 17 paragraph 7 of the current draft Internal Affairs Law would require there to be a system of recording access by police officials to the various databases and this is a key safeguard in terms of ensuring compliance with Article 28.

Recommendation 21: Articles 27 and 28 of the draft Police Law, or other appropriate mechanism, should include stricter regulation of the use (processing) of personal data and other interferences with the right to respect for privacy.

Section V

Police measures

Article 31

4.32 The title of this Article is not adequate in terms of describing the range of issues it covers. This is because the (“Preventive police measures”) measures contained in it can be preventive or reactive. For instance, “document check” or “stopping a vehicle” can be measures adopted to look for somebody who has already committed a crime, not only to prevent it from happening.

4.33 In addition, the difference between the measures foreseen in this article and the ones included in Article 41 (coercive measures) is minimal, in the sense that all of them are coercive, because the citizens cannot refuse a document check or a car stop ordered by the police. It would be better to establish a unique category of “police measures” because all of them can be reactive and preventive and all are coercive.

¹¹ *S. and Marper v. United Kingdom*, judgment of 4 December 2008 (Grand Chamber).

Article 32

4.34 In paragraph 1 sub-paragraph 4 the following words should be added: “If there is a reasonable suspicion” or other formulation in accordance with the standards in Ukrainian law for justifying intrusive action by police. Otherwise the possibility of asking for documentation in this case will be, in most cases, impossible. When a person does not wear weapons openly, before intervening on him/her the police cannot know whether or not he/she has a weapon. Accordingly, it would be better rewording it as follows: “If there is reasonable suspicion that the person has weapons....”

Recommendation 22: Article 32 of the draft Police Law should include a reference to “reasonable suspicion” or other equivalent term, consistent with Ukrainian legal practice, as a justification for intrusive action by police.

Article 37

4.35 In paragraph 6 there should be some specific temporal limit on the period for which a person’s or vehicle’s movements or physical possession of a thing may be restricted. Without this, it could constitute detention within the meaning of Article 5 ECHR. This would require that the guarantees required in situations of detention are secured to the person concerned.

Recommendation 23: Article 37 of the draft Police Law should include a limitation on the power to restrict persons or property.

Article 38

4.36 Paragraph 2 raises issues of potential compliance with Article 8 ECHR. The fact that an investigation is on-going into a person suspected of involvement in a crime is not, of itself, a sufficient basis to enter that person’s private property on the basis of a general police power. A warrant or other lawful authority specific to the individual case would be required, unless the case falls within the scope of the situations described in paragraphs 1 and 3.

4.37 A recent example of this is the judgment of the European Court of Human Rights in *Kilyen v. Romania*, where the Court restated the requirement for laws granting police powers of entry to “define with sufficient clarity the scope of those powers and the manner of their exercise, so as to afford an individual adequate protection against arbitrariness” and highlighted the need for there to be “an individual authorisation of a search, delimiting its object and scope and drawn up in accordance with the relevant legal provisions either beforehand or afterwards”.¹²

4.38 Accordingly it is recommended that Article 38 should set out in more details the types of crimes, the investigation of which can justify entry into private property, and the prescribed procedure to be followed in each case.

¹² Application No. 44817/04, judgment of 25 February 2014 at paragraph 34.

Recommendation 24: Article 38 of the draft Police Law should include more specific detail regarding the thresholds for entry into private property.

Article 40

4.39 Citizens should have the possibility to access the footage where they can be identified, as this constitutes personal data. Denial of that demand should only be provided for in cases where there is a particular and concrete risk for police investigations.

Article 44

4.40 The use of any force should be limited to situations where it is necessary to do so, for example where the situation cannot be resolved by other means. The various situations set out where particular forms of special equipment may be used are quite restrictive. In light of the myriad situations which can arise in a country as large and diverse as Ukraine, a restrictive approach should not be adopted. It would be advisable to set out the relevant thresholds, as laid down by the European Court of Human Rights, for the use of lethal and potentially lethal force. This would provide an overarching framework, which could be developed in other documents (for example instructions concerning the use of individual types of special equipment).

Recommendation 25: Article 44 of the draft Police Law should include more detailed regulation of the situations where force may be used, based firmly on the case-law of the European Court of Human Rights.

Article 45

4.41 Paragraph 6 sub-paragraph 1 should be explained in more detail. The simple fact that police officers are in an area where an anti-terrorist operation is taking place does not lower the requirements for the use of firearms. If it is not strictly necessary (as foreseen in Article 37 ECPE) to obtain a legitimate objective the use of firearms with or without warning is not justified

4.42 Paragraph 6 sub-paragraph 4 should also be amended. The mere fact that somebody is trying to escape does not constitute sufficient ground to use firearms. In order to satisfy the Article 2 ECHR requirement as to absolute necessity for the use of lethal or potentially lethal force, there must be an immediate risk of death or serious injury. The European Court of Human Rights 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.¹³ 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 the right to presumption of innocence.

¹³ *Nachova v Bulgaria*, judgment of the European Court of Human Rights of 6 July 2005.

4.43 The provision allowing the use of firearms without warning for “filing an alarm or call for help” (paragraph 6 sub-paragraph) is problematic, as any bullets fired into the air may cause injury or death. The justification would need to be stronger. Firearms should only ever be used 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, the overriding requirement that any use of lethal or potentially lethal force be “absolutely necessary” remains.

4.44 Reference should be made to a previous opinion prepared by the Council of Europe, entitled “Comments on compliance of amendments to the Law of Ukraine “On Police” regarding terms of applying force, special means and firearms in the area of anti-terrorist operations with the European Convention on Human Rights and European standards”.¹⁴

Recommendation 26: The provisions of the draft Police Law should comply with the recommendations set out in Council of Europe Directorate of Human Rights opinion DGI (2014) 20 of 29 September 2014.

Section VI

Selection for the position of police officer

4.45 There should be a stipulation in one of the articles regulating recruitment of police officers that their training should be carried out in conjunction with civil society. This involvement should not include solely observation of training, but also involvement with the design of training curricula and training delivery. Examples of the types of groups who should be involved are NGOs active in the field of human rights monitoring and academic institutions. This would ensure compliance with Article 27 of the ECPE as well as increasing levels of transparency and public confidence in the police.

Recommendation 27: civil society should be involved in police training.

Article 49

4.46 Paragraph 2 provides for polygraph tests to be conducted on candidates for the position of police officer. However, candidates have to give their consent, which implies that they could refuse to submit to a test, but the law does not set out the consequences of denial (for example termination of consideration of an application). This raises the question of the utility of such a test. If a person fails or refuses to carry out the 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.

¹⁴ DGI (2014) 20 of 29 September 2014:
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800c6f81>

Article 51

4.47 Paragraph 4 establishes that promotion could take place by open competition or attestation (appraisal). However, later in the draft, in Article 81, it is stated that promotion will take place upon completion of the term of service in the previous rank or by getting particular degrees. No competition is provided for in this regard. Reference should also be made to the comments set out regarding this issue under section VI above.

Article 54

4.48 The possibility of appealing decisions of the Police Commission in competition procedures should be mentioned, including the possibility to submit those decisions to judicial scrutiny. Since those decisions can affect the rights of candidates the same as disciplinary decisions, they should be subject to review by an independent body or court (as set out in Article 33 ECPE).

Recommendation 28: Article 54 of the draft Police Law should provide for appeals against decisions of the Police Commission.

Section VII

General principles of service in the National Police

Article 75

4.49 This Article of the draft Law sets the retirement age for police officers at 45 and 50 years, depending on rank. Such an early age of retirement could constitute discrimination on grounds of age, contrary to Article 14 ECHR. The article includes the possibility to extend that age by up to 5 years and then, in exceptional circumstances, another 5 years. However, this provision is open to abuse as it reserves the power to issue extensions of services to the heads of police, and the repeated extension to the Head of National Police, without specifying the specific criteria to be applied, or other guarantees of procedural fairness. It would be advisable to widen it even more linking the possibility of continuity to the possession of the necessary capacities to perform properly police tasks. In case of senior police officers, whose tasks don't require that much Physical fitness, it seems reasonable to take advantage of the experience and knowledge beyond 55 years of age. In addition, the trend in Europe, due to the increased levels of longevity, is to delay the permitted retirement ages for police. While there is no European standard, there is definitely a movement towards flexibility, with some countries abolishing a mandatory retirement age for police and allowing for some degree of flexibility.

Recommendation 29: Article 75 of the draft Police Law should be reviewed to reduce the scope for misuse of the power to issue repeated extensions of contracts for police officers.

Article 79

4.50 As currently drafted, a significant and potentially excessive degree of power is given to the chief of the National Police and the President of Ukraine. In order to respect the principle of legality, the law should establish boundaries to the limits that can be established by the Chief of Police or the President of the country.

4.51 The ranks set out are quasi-militaristic ranks, which do not reflect the trend in Europe towards a civil police service. While there is no binding European standard in this regard, it is best practice to avoid such terminology. It is also important in reinforcing civil control over law enforcement bodies, as provided for in the Law of Ukraine “On Democratic Civilian Control of State Military Organisation and Law Enforcement Bodies”. For example, Belgium, the Spanish National Police and the French National Police use ranks such as Agent, Inspector, Commissars and Chief Commissars; Denmark uses Police Assistant, Vice Police Inspector. Germany uses “police master”, “police commissar”, “police chief Commissar” and “Police Counsellor”. Various other examples can also be found.

Article 81

4.52 Progression in a police career should not be automatic, for example after a specified time of working in a particular rank or getting a Bachelors’ or higher degree. Some officers may wish to remain in a particular rank for a number of years or for the entirety of their career, perhaps as they have developed particular skills which are best deployed at that level. While the police service must provide a range of promotion and development opportunities, it should also acknowledge that not every officer necessarily wishes to advance in rank. There should be objective tests (competitions) in order to show that the candidates for promotion have the requirements to perform the tasks of the new rank. Otherwise, it would be possible for a police officer to be promoted to superior ranks without having the knowledge and skills to perform their duties properly. In addition, such a rigid approach, based solely on length of service, risks making the police a very bureaucratic organisation, without the flexibility to respond to changing needs and priorities. Promotions should also occur solely to the extent necessary for the proper discharge of its responsibilities, and within the constraints of the prevailing financial situation. Such a system of promotions removes a primary motivation for good performance since, unless police officers are sanctioned, they would be promoted no matter how professional they are, once they have a specified number of years of experience or a specified qualification.

Recommendation 30: Promotion and other forms of advancement for police officers should be based on objective competitions, and not solely on seniority.

Article 84

4.53 A right of appeal should be provided for against decision made in accordance with this Article.

Recommendation 31: Article 84 of the draft Police Law should provide for a right of appeal against decisions imposing a reduction in rank.

Section VIII

Public control over the National Police

Article 86

4.54 Paragraph 3 of this Article allows for a head of a body (division) of the National Police to be the subject of a resolution of no confidence from the *Verkhovna Rada* of the Autonomous Republic of Crimea, Kyiv and Sevastopol city councils or district councils. The head of relevant body affected should have the possibility to be heard during the procedure, in order to ensure procedural fairness.

Recommendation 32: Article 86 of the draft Police Law should allow the person to be affected by a resolution of no confidence to be heard during the procedure.

Article 87

4.55 This article provides for liaison between the heads of the territorial bodies of the National Police and a specified range of local self-governance bodies. While liaison with civil society is provided for in the Law of Ukraine “On Democratic Civilian Control of State Military and Law Enforcement Bodies” which applies to the National Police due to the draft Internal Affairs law, it would be advisable to insert a specific reference to liaison with civil society in the draft Police Law also. NGOs and civilian associations, including those representing members of minority communities in Ukraine, should be included among the partners with which police should meet and whose needs must be taken into account.

Article 89

4.56 In order to give credibility to the willingness to accept complaints from the public the draft Police Law should include the obligation of formally answering all of them in a concrete period of time (one or two months depending on the capacity of police administration).

Recommendation 33: Article 89 of the draft Police Law should provide for time-limits for responding to complaints.

APPENDIX

LIST OF OSCE STANDARDS RELEVANT TO POLICING

- Reference guide to criminal procedure (2007)
- Guidebook on Democratic Policing (2007)
- Good Practices in Building Police-Public Partnerships (2008)
- 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)s
- 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)