

**SUPPORT TO CRIMINAL JUSTICE REFORM
IN UKRAINE**

MINISTRY OF FOREIGN
AFFAIRS OF DENMARK



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**COMMENTS
ON COMPLIANCE OF AMENDMENTS TO LAW OF UKRAINE
"ON POLICE" REGARDING TERMS OF APPLYING FORCE, SPECIAL MEANS
AND FIREARMS IN THE AREA OF ANTI-TERRORIST OPERATION"
WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EUROPEAN
STANDARDS**

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INTRODUCTION

1. The purpose of this report is to assess the compliance of certain recent amendments to the Ukrainian Law on Police with the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) and other applicable European standards.
2. The report will analyse the amendments and set out any difficulties that may arise in terms of their compliance with the ECHR and European standards. It will also make suggestions for avoiding any possible violations of those standards, during such time as the amendments are in force.
3. It is intended that this report be of assistance to the Ukrainian authorities in their efforts to ensure that the actions of the police and other law enforcement agencies are in compliance with Ukraine's international obligations.

AMENDMENTS

4. The amendments¹ to the Law on Police are as follows:
 - a. Insertion of words "as well as in a region of anti-terrorist operations" at the end of the existing text of Article 12;
 - b. Insertion of words "Policemen may use firearms in a region of anti-terrorist operations" at the end of the existing text of Article 15.
5. An official press release from the Office of the President of Ukraine stated that the rationale for the adoption of the amendments was that they give *"the right to law enforcers to apply without warning measures of physical effect, special means and firearms against persons who are recognized terrorists under the Law of Ukraine "On struggle against terrorism". It will allow increasing the safety level of law enforcers in the course of holding the (anti-terrorist operations) and facilitate more efficient fulfilment of tasks on neutralization of terrorists."*²

APPLICABLE EUROPEAN STANDARDS

6. The primary applicable legal standard is the ECHR, as interpreted by the ECtHR. Ukraine is a member of the Council of Europe and a signatory to the ECHR.
7. Under Article 1 of the ECHR, signatory States undertake to "secure" the rights and freedoms set out in it to persons within their jurisdiction.
Positive obligation – "legal and administrative framework"
8. Article 2 of the ECHR protects the right to life. This imposes a number of obligations on Ukraine as a contracting party to the ECHR. The most relevant of these is the requirement

¹ Law № 1633-VII "On amendments to the Law of Ukraine "On police" regarding terms of applying force, special means and firearms in the area of anti-terrorist operation" signed by the President of Ukraine on 18 August 2014.

² <http://president.gov.ua/en/news/31014.html> accessed on 7 September 2014.

that the right to life be adequately protected by the domestic legal system. The Grand Chamber of the ECtHR has said that Article 2 “involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.”³

9. The ECtHR, while noting that Article 2 does allow for the use of lethal force by police, emphasized that it does not grant *carte blanche* in this regard and stated that “(u)nregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.”⁴

10. The Court also⁵ highlighted that “a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect” and made specific reference to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“the Basic Principles”).⁶

11. In *McCann v United Kingdom*⁷, the ECtHR considered the compliance with Article 2 of the killing of three Irish Republican Army terrorists by members of the British Army.

12. The legal provisions governing the use of force stated that the force used in any situation be no more than was “reasonably justifiable”, which on its face appears to grant law enforcement officers a very wide discretion regarding the circumstances in which they may use lethal or potentially lethal force. The ECtHR examined the legal provisions closely, as well as how they had been interpreted and applied by the domestic court. It found that in practice the courts had interpreted the provisions in a restrictive manner. The domestic case-law required that any use of lethal force be, in effect, absolutely necessary to protect life. The ECtHR concluded that the legal rules governing the use of force were sufficiently strict to ensure compliance with Article 2.⁸

13. The Court held that, even though the relevant provisions of domestic law did not state specifically that lethal force must only be used where absolutely necessary, it was satisfied that “the rules of engagement issued to the soldiers and the police in the present case provide a series of rules governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard.”⁹

14. It is therefore clear that it is possible for appropriately strict interpretation of legal provisions regarding the use of force to satisfy the requirements of Article 2.

³ *Makaratzis v. Greece*, judgment of the Grand Chamber of the European Court of Human Rights of 20 December 2004 at paragraph 57.

⁴ *Makaratzis*, *op. cit.*, at paragraph 58.

⁵ At paragraph 59.

⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

⁷ *McCann and Others v. United Kingdom*, judgment of 27 September 1995.

⁸ *Makaratzis*, *op. cit.*, at paragraph 155.

⁹ At paragraph 159.

15. In *Nachova and Others v. Bulgaria*,¹⁰ applying *McCann*, the ECtHR stated that “*the national legal framework regulating arrest operations must make recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed.*”

“*Absolute necessity*”

16. Article 2 also requires that lethal or potentially lethal force be used only in situations where it is absolutely necessary. This is a test of strict proportionality and has the practical consequence that such force should be used only as a last resort.

17. The Court examined the circumstances in which it is permissible to use lethal force in the *Nachova* case. This case concerned the use of lethal force against two Army conscripts who were attempting to flee from the military base where they were stationed. They were unarmed and had not committed any crimes involving violence. There was no information to suggest that, if they escaped, they would imminently seek to injure or kill any person.

18. A member of the military police shot and killed them both. The justification put forward for this was that they were committing an offence by attempting to flee. Bulgaria argued that Article 2(2)(b) of the ECHR permits the use of lethal force in such situations.

19. The ECtHR examined the relevant Bulgarian law, which allowed for the use of lethal force to apprehend fugitives. The law did not include a requirement that any such use be limited to situations where it was a last resort. It interpreted the provisions of Article 2 in a limited manner, in light of the overriding objectives of the ECHR. It stated that “*potentially deadly force cannot be considered absolutely necessary where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence.*”¹¹

20. The Court concluded that Article 2 must be interpreted so as to allow the use of lethal or potentially lethal force solely where it is necessary to protect persons from an immediate threat to their lives.

21. In examining whether any use of lethal or potentially lethal force was lawful, the Court would also assess the training given to officers and the rules (for example the Decrees and internal regulatory acts of the Ministry of Internal Affairs) governing the use of force or other applicable instruments.

22. In *Kasa v. Turkey*, the ECtHR found no violation of the right to life where Turkish police used lethal force, which resulted in the deaths of five members of a terrorist organisation. The Court said that it “*could not with detached reflection substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment*” in a scenario “*where the police officers had to act rapidly when confronted with armed persons in a public place.*”¹²

¹⁰ Judgment of the European Court of Human Rights of 6 July 2005 at paragraph 96.

¹¹ At paragraph 95.

¹² Judgment of the European Court of Human Rights of 20 May 2008 at paragraph 87.

23. It is therefore clear that the use of lethal force against terrorists will be lawful where it is absolutely necessary in the circumstances.

Obligation to conduct effective investigations

24. Article 2 also requires that there be an effective investigation into deaths resulting from the use of force by agents of the State. The ECtHR has developed an extensive jurisprudence setting out the details of this obligation. In the case of *Ramsahai and Others v. the Netherlands*, the Court explained the importance of an effective investigation as follows: “What is at stake here is nothing less than public confidence in the State’s monopoly on the use of force.”¹³

25. It is clear that Ukraine is facing a sustained armed campaign by irregular armed groups involving attacks on the armed forces of Ukraine, the police and civilians, as well as large-scale destruction of property. Ukraine is entitled and indeed obliged to defend its citizens from attack. There may be situations where lethal force is required to be used in this context. It is important to note that the ECHR does not prohibit the use of such force. Instead it subjects it to rigorous scrutiny in order to uphold the right to life, one of the most fundamental rights.

26. The rules regarding the use of force apply in all situations, even including the fight against terrorism. Ukraine has classified the activities of the irregular armed groups operating in the south east of the country as terrorism and the stated objective of the amendments to the Law on Police is to assist in the fight against terrorism.

27. The ECtHR has recognised and understood the significant difficulties faced by countries in dealing with terrorism. In a case concerning the Chechen conflict, the Court noted that “the situation that existed ... at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency.”¹⁴

28. However, the Court has made it clear that even in the fight against terrorism, the protections of the ECHR regarding the right to life must be applied. It has therefore adopted what could be described as a contextual analysis. In this analysis, the concept of “absolute necessity” is interpreted and applied by reference to the prevailing context in which the force in question was used, and referring to the overall requirement to protect the right to life. For example, the level of force that is “absolutely necessary” in the context of an armed robbery of a shop by a single criminal will differ markedly from what is “absolutely necessary” in the context of an organised campaign of insurgency such as that faced by Ukraine. This does not mean that the standards required of the security forces are lower, but rather that the context is taken into account in assessing the lawfulness of any use of force.

¹³ Judgment of the Grand Chamber of the European Court of Human Rights of 15 May 2007 at paragraph 325.

¹⁴ *Isayeva v. Russia*, judgment of the European Court of Human Rights of 24 February 2005 at paragraph 180.

ANALYSIS OF AMENDMENTS

29. The amendments to the Law on Police represent a significant departure from the previous provisions of the Law. Article 12 now allows for police officers to use force, impact weapons and firearms without warning in the region of anti-terrorist operations. On a literal interpretation, this amendment could be understood as meaning that police officers would be justified in using lethal or potentially lethal force in any region where anti-terrorist operations are declared to be on-going, without warning, solely by virtue of the officer's presence in such a region. An alternative interpretation would be that the amendments merely remove the requirement to give warnings in such regions, and do not derogate from the general conditions for the use of force, which are set out in Article 15 of the Law on Police.

30. In its case law, the ECtHR has placed significant emphasis on the use of warnings by police before they resort to the use of force. The Basic Principles also place considerable stress on them. Warnings can be seen as an opportunity to allow persons to desist from their unlawful conduct and also assist in ensuring that they are aware of the fact that the persons engaging with them are police officers. However, the Court has acknowledged that there may be cases where it is either impractical or impossible to expect warnings to be given. In addition, the Basic Principles acknowledge that there may be situations where warnings are impracticable¹⁵.

31. Accordingly, any legal provision, which removes the need for warnings to be given in an entire category of situations, is likely to pose significant problems in terms of compliance with Article 2.

32. Article 15 regulates the use of firearms in general. It sets out a range of circumstances where firearms may be used as a measure of last resort. These circumstances include:

- To protect citizens from attacks threatening to their health and life and to release hostages, and
- To repel an assault on guarded facilities, escorts, residential properties of citizens, premises of public and civil enterprises, institutions and organisations and release them if seized.

33. The amendment adds the following text to the end of Article 15: "Policemen may use firearms in a region of anti-terrorist operations."

34. The use of the term "as a last resort" in Article 15 may be assessed as operating as an important safeguard. It applies to the use of force in all of the circumstances set out in the Article, including the recent amendment. This provision could operate to restrict the lawful use of firearms to the circumstances where it is absolutely necessary to protect life, as discussed in the analysis of the *Nachova v. Bulgaria* case above.

¹⁵ Principle 10: "law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

35. However, the question of the necessity of the recent amendments must be considered. The previous text of Article 15 allowed for the use of firearms in certain defined circumstances. These would include situations where a police officer believed that their use was absolutely necessary in order to protect his life, or those of civilians or other police officers. Accordingly, the previous text of Article 15 allowed the police in Ukraine to use lethal force when absolutely necessary (“as a last resort”) against terrorists. It is therefore not immediately apparent what the necessity or purpose of the amendment is. It is of concern that the amendment appears to be capable of an interpretation, which would allow firearms to be used without any of the existing safeguards provided by domestic law.

36. The new amendment may, either explicitly or implicitly, be relied upon by police officers and the legal system of Ukraine, to determine that they may use firearms in a broader set of circumstances than currently provided for by the Law on Police. For example, an officer may consider that the mere fact that he suspects a person to be a terrorist is sufficient justification for using firearms against him without warning. This would be in violation of both the role of the police officer and of Article 2. Police officers, as upholders of the law, are not authorised to use force to punish people. They are only authorised, in ECHR terms, to use force where this is absolutely necessary to protect life. If police officers encounter suspected terrorists, they should, if possible, seek to arrest and detain them. If the terrorists resist arrest and are believed to be about to use firearms against police, appropriate force could be used, even if this results in the death of the terrorists. As discussed above, the case-law of the ECtHR recognises the difficulties inherent in the fight against terrorism and the fact that police officers often need to make split-second decisions in situations where their lives or the lives of others are at risk.

POTENTIAL NEGATIVE EFFECTS OF ADOPTION OF THE AMENDMENTS

37. There are a number of consequences that could result from the adoption of the amendments.

38. The first and most of these is that persons could be deprived of their lives as a result of force used in situations where such use was not in compliance with Article 2 of the ECHR. This would constitute a violation of the right to life of that person. It may also lead to violations of the rights of members of their families.

39. Article 2 also requires there to be an effective investigation of any deaths resulting from the use of force by State agents. Such investigations are necessary in order to “*secure the effective implementation of the domestic laws which protect the right to life*” and ensure the accountability of those responsible.¹⁶ In the *Ramsahai* case the ECtHR said “*(w)hat is at stake here is nothing less than public confidence in the State’s monopoly on the use of force.*”¹⁷

40. Any investigation, which does not apply the appropriate standards in examining any use of force, will itself be likely to result in a violation of Article 2. Accordingly, the investigation is unlikely to be effective.

¹⁶ *Nachova, op. cit.*, at paragraph 110.

¹⁷ *Op. cit.* at paragraph 325.

41. In the event that the relevant provisions are relied upon on a large scale, there is potential for many people to be killed or seriously injured as a result. Apart from the obvious violations of the right to life of those individuals, this would have an extremely negative impact on the rule of law in Ukraine. It could undermine fatally the confidence of the population of Ukraine and of the international community in the country's commitment to the rule of law and could hamper efforts to progress towards European integration. In addition, those who opposed Ukraine's territorial integrity may use such killings to challenge the country's legitimacy. If such killings became widespread, an institutionalised practice of unlawful or extra judicial killings in Ukraine might develop.

42. If effective investigations are not carried out, a culture of impunity could be fostered which would have extremely corrosive consequences for the rule of law in Ukraine.

43. An analysis of the ECtHR's case-law shows, the obligation to conduct an effective investigation is not time-limited. If people cannot receive justice before the Ukrainian Courts, they will bring their cases to Strasbourg.

44. Examples of these include *Jordan v. United Kingdom*¹⁸ (re shooting of a suspected Irish Republican Army terrorist in 1993), *Korbely v. Hungary*¹⁹ (re deaths during the Soviet invasion of Hungary in 1956), *Janowiec and Others v. Russia*²⁰ (re the Katyn massacre of Polish officers in 1941).

45. The ECHR is in force in respect of Ukraine and no derogation has been made under Article 15 of the ECHR. It is only to be expected that a similar situation could arise in respect of Ukraine.

46. This could pose significant challenges. Examples include the loss of international reputation resulting from findings of repeat violations or even of an institutionalised practice of unlawful killings, claims that Ukraine offers a climate of impunity to State agents who commit serious human rights violations, as well as the significant resources which such cases would require.

MEASURES TO AMELIORATE POTENTIAL DIFFICULTIES IN TERMS OF COMPLIANCE WITH EUROPEAN STANDARDS

47. As discussed above, the provisions pose significant problems in terms of their compliance with European standards. However, as is so often said, adopting a law is one thing but its implementation is another. It would be preferable for the amendments to be repealed as soon as possible. This would remove the actual and potential difficulties highlighted above and would not materially reduce the ability of police to carry out their difficult and dangerous tasks.

48. However, pending the repeal of the amendments, it is necessary to consider what measures, if any, could be taken by Ukraine to ameliorate the potential difficulties highlighted.

¹⁸ Judgment of the European Court of Human Rights of 4 May 2001.

¹⁹ Judgment of the Grand Chamber of the European Court of Human Rights of 19 September 2008.

²⁰ Judgment of the Grand Chamber of the European Court of Human Rights of 21 October 2013.

- a. As discussed above at paragraphs 10 to 14, judicial decisions circumscribing the effect of provisions of domestic law can secure compliance with the “absolute necessity” requirement of Article 2. It would be extremely valuable if such judicial clarification by the relevant Ukrainian court could be sought. The precise mechanism for this will of course depend on the particular procedures in the domestic legal system. It may be possible for the appropriate higher Court to issue guidance to ensure a consistent application of the law, or it may be necessary to await a judgment of a superior court in a specific case. The precise mechanism is of course a matter for the Ukrainian authorities.
- b. Either as a result of, or independently of, the judicial intervention referred to above, the appropriate administrative acts of the Ministry of Internal Affairs setting out how force is to be used by police could reflect European standards and clarify the circumstances in which lethal, or potentially lethal, force may be used by police. The United Nations Basic Principles on the Use of Force and Firearms could serve as a useful point of reference in this regard.
- c. Training of police officers should reflect the relevant European standards set out in this report. This can be critical in fostering a culture where human rights are respected.
- d. Internal and external oversight mechanisms could monitor how force is used by police in practice and highlight any difficulties that arise. They could take or recommend appropriate remedial action within the scope of their powers.
- e. Effective investigations, based on European standards, would be instrumental in ensuring compliance with the right to life.

CONCLUSION

49. The amendments to the Law on Police pose significant issues of compliance with Article 2 of the ECHR. This could have a range of negative consequences both for individuals affected, and for Ukraine. It would be preferable for the amendments to be repealed as soon as possible. Pending any repeal, favourable consideration should be given to the adoption of the measures set out above. This would reduce the potential for negative impact.