Warsaw, 1 December 2014
Opinion-Nr.: GEN-UKR/260/2014 [AIC]

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OPINION

ON THE DRAFT LAW OF UKRAINE
ON POLICE AND POLICE ACTIVITIES

based on an English translation of the draft law provided by
the Ukrainian Parliament Commissioner for Human Rights

This Opinion has benefited from contributions made by the
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Annex: Draft Law of Ukraine on Police and Police Activities (this Annex constitutes a separate document)
I. INTRODUCTION


2. On 23 September 2014, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Law with international human rights standards and OSCE commitments.

3. This Opinion was prepared in response to the above-mentioned request of 16 September 2014. The Opinion has been the subject of informal consultations with the European Union Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM Ukraine).

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the Draft Law, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the police and criminal justice system in Ukraine.

5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Law. The ensuing recommendations are based on international and regional standards relating to democratic policing, human rights and fundamental freedoms and the rule of law, as well as relevant OSCE commitments. The Opinion will also highlight, as appropriate, good practices from other OSCE participating States in this field.

6. This Opinion is based on an unofficial translation of the Draft Law provided by the Ukrainian Parliament Commissioner for Human Rights, which is attached to this document as an Annex. Errors from translation may result.

7. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to legislation and policy regarding the police and criminal justice system reform in Ukraine, that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, it is noted that this Draft Law contains many positive aspects which correspond to international standards and good practices. These include in particular the reference to certain safeguards when implementing coercive measures (e.g., the compliance with the principles of prevention, exclusiveness and proportionality) and their detailed explanation (Article 30); certain measures relating to personal data protection (Chapter 4); the provisions relating to the clear identification of police officers (Article 41) and the introduction of measures to prevent corruption in the police (Article 42).

9. At the same time, despite the Draft Law’s attempt to address police reform in a comprehensive and integrated manner, the co-ordination and co-operation mechanism
between the police, and other actors in the criminal justice system in Ukraine would benefit from clarity, and overall improvement. Moreover, certain provisions of the Draft Law could potentially lead to serious interferences with human rights and fundamental freedoms. In particular, the Draft Law does not provide for substantive and procedural safeguards relating to the exercise of police powers, particularly as regards document checks, powers to search individuals, vehicles, homes and other property, measures of expulsion from Ukraine, and the policing of assemblies, amongst others.

10. Further, the Draft Law lacks precise and clear provisions relating to accountability and oversight, particularly in terms of public complaint mechanisms. The Draft Law also does not sufficiently address gender equality and non-discrimination, particularly towards national minorities and ethnic groups. Given the key role that the police should play in providing assistance to victims and preventing victimization, the Draft Law should also adopt a victim-centred approach, which would involve protecting and assisting victims of crimes, and treating them with compassion and respect for their dignity.1

11. In order to ensure the compliance of the Draft Law with international standards, the OSCE/ODIHR thus has the following key recommendations:

A. to clearly set out in the Draft Law the different roles and responsibilities of individual police authorities/units, and relevant inter-agency cooperation mechanisms; [pars 20, 22, 43, 45, 48, 51-52, and 56-57]

B. to amend or remove potentially discriminatory provisions from the Draft Law; [pars 30-31]

C. to ensure that the Draft Law includes the main conditions and modalities for considering and responding to complaints concerning alleged human rights violations (including discrimination) and abuse of power by police officers, and to consider creating, for this purpose, an Independent Oversight Body that will investigate such complaints; [pars 56, 64-67, and 123-124]

D. to amend Article 44 of the Draft Law to state that police officers shall not be obliged by their superiors to perform any unlawful activities, in particular in cases of torture or inhuman and degrading treatment, and that superiors shall also be held liable if they issue unlawful orders; [pars 58-60]

E. to enhance relevant provisions pertaining to police measures (including search and seizure, custody and detention) so that they are in line with relevant international human rights standards on the right to liberty and security, the right to respect for private life, and the principle of non-refoulement, among others: [pars 76-87, 100-110]

F. to specify in the Draft Law the limitations and requirements concerning the use of force by the police, and transparent reporting of such cases; [pars 90-97]

G. to ensure that in the Draft Law, the selection and promotion of police officers is merit-based, transparent and dependent on a proper performance evaluation; [pars 116-117] and that integrity tests are held within the limitations set out by ECtHR case law; [par 37] and

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H. to see to it that further discussions on the Draft Law are conducted with all relevant stakeholders from different parts of society, and that it undergoes a proper and realistic impact assessment, including a full financial impact assessment. [pars 131-133]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Policing

12. The main duties of the police are to maintain public tranquility, law and order; protect the individual’s fundamental rights and freedoms; prevent and detect crime; reduce fear; and provide assistance and services to the public. 2 Given the scope of their powers, police forces may in certain circumstances encroach upon human rights and fundamental freedoms of individuals in the performance of their duties.

13. Key general international human rights instruments applicable in Ukraine are the International Covenant on Civil and Political Rights 3 (hereinafter “the ICCPR”) and the European Convention on Human Rights and Fundamental Freedoms 4 (hereinafter “the ECHR”). In addition, Ukraine has also ratified, among others, the UN Convention on the Elimination of All Forms of Discrimination against Women 5 (hereinafter “CEDAW”), the UN Convention on the Elimination of All Forms of Racial Discrimination 6 (hereinafter “CERD”), the UN Convention on the Rights of Persons with Disabilities 7 (hereinafter “CRPD”) and the Council of Europe Framework Convention for the Protection of National Minorities. 8

14. In addition, Ukraine has signed, though not yet ratified, the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter “the Istanbul Convention”); 9 this is the first legally binding

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3 UN International Covenant on Civil and Political Rights, adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. This Covenant was ratified by Ukraine on 12 November 1973.


instrument in Europe to create a comprehensive legal framework to protect women from acts of violence as well as prevent, prosecute and eliminate all forms of violence against women and domestic violence.

15. At the OSCE level, participating States have committed to take all necessary measures to ensure that when enforcing public order, law enforcement entities shall act in the public interest, respond to a specific need and pursue a legitimate aim, as well as use ways and means commensurate with the circumstances, which will not exceed the needs of enforcement (Moscow 1991). As per the OSCE Charter for European Security (1999), “the OSCE will also work with other international organizations in the creation of political and legal frameworks within which the police can perform its tasks in accordance with democratic principles and the rule of law”. Moreover, the 2006 Brussels Declaration on Criminal Justice Systems clearly states that law enforcement officials, while performing their duties, should respect and protect human dignity and maintain and uphold the human rights of all persons.

16. The ensuing recommendations will also make reference, as appropriate, to other specialized documents of a non-binding nature, which have been elaborated in various international/regional fora and may prove useful as they contain a higher level of detail. These documents include, amongst others:

- the UN Code of Conduct for Law Enforcement Officials (1979); and the UN Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials (1989);
- the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990);
- the European Code of Police Ethics (2001);
- the Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (2009);
- the OSCE Guidebook on Democratic Policing (2008);

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2. General Comments

2.1. Purpose and Scope of the Draft Law

17. Overall, it is positive that the Draft Law tries to streamline and simplify the organizational set-up of the police system in Ukraine, which appears to be overly complex and involves multiple bodies/entities. However, the proposed new structure and organization still retains aspects that seem to be quite complex; in particular, it does not clearly delineate the respective roles and responsibilities of entities involved and there seem to be certain overlaps between them (see also comments on the overall structure and organization of the police in pars 43, 45, 48, and 51-52 infra).

18. Article 2 of the Draft Law makes reference to the investigation of criminal offences. Given the potential encroachment on human rights and fundamental freedoms of individuals, the Draft Law should clearly specify that these should be carried out in accordance with the provisions of the Criminal Procedure Code.

19. Transitional provisions of the Draft Law mention that units to combat corruption and organized crime of the Security Service of Ukraine are to be abolished and transferred to the criminal police. In this context, it is important to highlight the importance of consistency between the Draft Law and the recent/ongoing legislative reforms pertaining to the institutional framework of Ukraine to prevent and combat corruption. In any case, in accordance with Article 6 par 2 and Article 36 of the UN Convention against Corruption, Ukraine is obliged to grant the body or bodies dealing with the prevention of corruption, as well as those specialized in combating corruption through law enforcement, “the necessary independence, in accordance with the fundamental principles of its legal system”, to enable it/them “to carry out its or their functions effectively and free from any undue influence”. This refers both to political as well as operational independence, which involves the ability to take decisions within one’s sphere of competence without undue interference from other actors. This means that actors within the executive branch should not have the possibility to exercise direct influence on the work of anti-corruption agents, including on investigations of corruption cases. Thus, the drafters and stakeholders should discuss further aspects relating to the anti-corruption institutional framework and the role of the police in

23 Cf. also Article 20 of the Council of Europe Criminal Law Convention on Corruption, and OSCE MC Decision 2/2012, Declaration on Strengthening Good Governance and Combating Corruption, Money-laundering and the Financing of Terrorism (hereinafter ‘OSCE MC Decision 2/2012’), par II: “those in charge of the prevention, identification, investigation, prosecution and adjudication of corruption offences should be free from improper influence”.
that respect, and ensure consistency with recent/ongoing legal reforms on anti-corruption.

20. The Draft Law is also seeking to amend the Law of Ukraine “On the Security Service of Ukraine” by supplementing it with new tasks relating to the security of certain high-ranking officials. While the review of legislation pertaining to security services falls outside the scope of the present Opinion, it appears that the government will thereby retain a security/intelligence service that is separate from the police. At the same time, the responsibilities and functions of the security services and of the police services respectively, as well as their reporting relationships and governance structures, remain unclear. This will need to be clarified to ensure that there are clear lines of accountability and to avoid overlap between the two organs. In this context, see pars 22 infra on surveillance measures, which are also part of the relevant powers exercised by security/intelligence services.

21. The final provisions of the Draft Law also state that the units combating cybercrime shall be transferred to the criminal police. In that respect, the recommendations made in OSCE/ODIHR’s Opinion on the draft Law on Combating Cybercrime should be taken into account. In particular, the Council of Europe Cybercrime Convention, to which Ukraine is a party, provides for certain types of new investigative instruments, which need to comply with international and regional human rights standards. Consequently, specific criminal investigations or proceedings relating to cybercrimes should be subject to certain conditions and minimum substantive and procedural safeguards. Additionally, legislation should also clearly identify the authorities competent to permit, carry out and supervise such investigations. Legal provisions should further specify the necessary authorization procedure, limit their scope; define the procedure to be followed for examining, using and storing the data obtained; and detail the circumstances in which data obtained may or must be erased, or the records destroyed.

22. If combating cybercrime will indeed be part of the mandate of the criminal police, the Draft Law should expressly provide for such competences, and include references to the respective provisions of the Criminal Procedure Code (which in turn should be in line with international human rights standards). It would also be advisable to clearly identify in the Draft Law which police authorities/units shall be assigned such responsibilities, and expressly define the nature, type, purpose and limits of their powers, as well as of multi-agency and cross-border co-operation mechanisms.


26 The Additional Protocol to the CoE Cybercrime Convention concerning the criminalization of acts of a racist and xenophobic nature committed through computer system (CETS No. 189) was signed by Ukraine on 8 April 2005, ratified on 21 December 2006 and entered into force in Ukraine on 1 April 2007.

27 See in particular the following provisions of the CoE Cybercrime Convention: Title 2 (Expedited preservation of stored computer data); Article 18 (Production order); Article 19 (Search and seizure of stored computer data); Article 20 (Real-time collection of traffic data); Article 21 (Interception of content data).

28 Article 15 of the CoE Cybercrime Convention specifies that “the establishment, implementation and application of the powers and procedures […] are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the [ECHR], the [ICCPR], and other applicable international human rights instruments, and which shall incorporate the principle of proportionality”.


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(see also comments regarding other specialized investigative units in par 53 infra). More generally, any legal provisions pertaining to surveillance measures should comply with the minimum requirements and safeguards provided for in the case law of the European Court of Human Rights (hereinafter “the ECtHR”).

23. Finally, it is noted that the Draft Law does not appear to deal with digital forensics (i.e. the branch of forensic science concerned with the recovery and investigation of material found in digital and computer systems). This is an indispensable element for ensuring successful investigations into cybercrimes (and other crimes). If not already provided for in other legislation, the drafters should discuss the option of establishing an expert digital forensics centre within the police that would employ specialized ICT experts. If part of the police, such a centre should also be included in the Draft Law (see also comments regarding other specialized investigative units in par 53 infra).

24. In this context, it is noted that the Criminal Procedure Code does not seem to regulate the identification, collection and analysis of electronic evidence through digital forensics. Legal frameworks effectively addressing electronic evidence, together with police/law enforcement and criminal justice capacity to identify, collect and analyse electronic evidence, are central to an effective response to crime. The Criminal Procedure Code should therefore be supplemented with provisions relating to electronic evidence and its lawful use before court, unless this is already provided for in other legislation.

2.2. Gender, Diversity and Non-Discrimination

25. Section 2 of the Draft Law regulates the appointments of the leadership of the administrative, criminal, financial and border police, as well as of local level police. It provides for eligibility criteria and outlines the procedure for appointment among the candidates selected through a competitive process (as per Article 47 and 49 of the Draft Law). Article 83 of the Draft Law also regulates the composition of the police commissions at the local and central levels, which are in charge of disciplinary proceedings against police officers, among others.

26. The appointment processes set out in the Draft Law do not include special provisions on how to ensure gender equality and diversity in the police force. At the same time, various recommendations at the international and regional level call for gender-balanced representation in all publicly-appointed positions. The 2009 OSCE Ministerial Council

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decision on Women’s Participation in Political and Public Life also calls upon OSCE participating States to consider specific measures to achieve the goal of gender balance in security services, such as police services, including measures for balanced recruitment, retention and promotion of men and women. More generally, in order to enjoy the confidence of the entire population, the police should be representative of the community as a whole.

27. Admittedly, certain provisions of the Draft Law may contribute to addressing the special needs of women (such as the possibility of working time arrangements, or considering individual family situations when deciding on transfers of police officers), which is positive. At the same time, while gender balance may be difficult to achieve when dealing with individual appointments, gender balance requirements could at least be provided for collective bodies such as the police commissions. Moreover, the drafters may consider introducing certain gender balance criteria in the nomination process to propose candidates for the positions, as well as regarding the rules governing appointment to the above-mentioned posts. This would be in line with the 2013 Concluding Observations of the UN Human Rights Committee on Ukraine where the underrepresentation of women in various areas of political and public life was noted. Further, in order to be effective, such provisions should indicate the consequences for infringement of the gender balance requirement (for instance, the annulment of the appointment, at least of members of the over-represented gender).

In this way, police bodies in Ukraine would better reflect all parts of Ukrainian society and
would be likely to adhere to the needs of both men and women. Article 11 of the Draft Law and/or other legislation, as appropriate, should be supplemented to that effect.

28. Furthermore, as noted in the 2014 OSCE Report on the Human Rights Assessment Mission in Ukraine, there are significantly few minority representatives in the executive and judiciary. More generally, as noted at the international level, one important step to winning the trust of minority communities is to integrate them into the police throughout all ranks and functions. In this context, the 2014 OSCE/ODIHR Situation Assessment Report on Roma in Ukraine also highlights the under-representation of Roma in the criminal justice system, including in the police force. Further, Roma women require particular support, as they are generally both under-represented, and have limited access to job opportunities within the police. The drafters should discuss whether to put some measures in place to pursue greater gender balance and diversity in the police forces. For instance, time-bound targets with a gradual increase of the target quota could be set for increasing the representation of women and minority communities in extraordinary circumstances, and for a limited time only, special recruitment measures might be considered in order to quickly redress an imbalance.

29. Finally, Article 3 of the Draft Law refers to the principles of police activity but does not include a clear anti-discrimination statement, either directly or by reference to other legislation. Given that the issue of discrimination or prejudice against Roma by law enforcement officials has been the subject of recent reports, it would be advisable to supplement Article 3 of the Draft Law by including such an anti-discrimination statement. Additionally, adequate training on human rights issues, gender equality, anti-discrimination and community policing, and more generally awareness-raising activities would be recommended, for all levels of the police force (see also par 72 infra on education and capacity development).

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46 See for reference op. cit. footnote 9, par 258 (Explanatory Report to the CoE Istanbul Convention).
2.3. Directly and Indirectly Discriminatory Provisions of the Draft Law

30. Certain provisions of the Draft Law appear to have a direct or indirect discriminatory effect. In particular, Article 23 par 3 and 4 of the Draft Law specifically refers to foreigners and stateless persons at state borders, and their registration at checkpoints across the state border. Such a provision constitutes direct discrimination as it specifically targets foreigners and stateless persons as opposed to any other person crossing the state border. Singling out foreigners and stateless persons in these circumstances may lead in practice to a situation where authorities target only persons with specific physical or ethnic characteristics, which contradicts international human rights standards. In that respect, the Council of Europe’s European Commission against Racism and Intolerance (hereinafter “ECRI”) recommends that member States clearly define and prohibit ‘racial profiling’ in legislation. Bearing this in mind, it is recommended to remove the reference to “foreigners” and “stateless persons” in Article 23, and replace it with general powers to conduct border checks, to ensure compliance with immigration/entry rules. Moreover, a clear statement defining and prohibiting racial profiling should also be included, either in the Draft Law or in other relevant legislation (with respective cross-references included in the Draft Law).

31. Article 26 of the Draft Law provides that “[t]he police is authorized to enter a home or other property without a substantiated court decision only in urgent cases related to the preservation of human life and valuable property”. While Article 26 par 3 of the Draft Law seems to adopt a broad understanding of the notion of “home or other property”, both definitions appear to refer to permanent or temporary “ownership” of such properties. While it is unclear whether this would require holding an official property title, this could lead to a situation where the entry into domiciles or other living spaces that are not the occupants’ property is perhaps not covered. Thus, a person who is an “owner” may be treated differently and be more protected than other persons otherwise occupying a home, land or other property with or without title. This is not in compliance with the non-discrimination principle. In particular, recommendations at the international and regional levels highlight that certain protection should not be conditional upon a person’s land/property tenure status and lawfulness of the occupation under domestic law. Further, as noted in recent OSCE Reports on the human rights

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55 i.e., a difference in the treatment of persons in analogous, or relevantly similar, situations, which is based on an identifiable characteristic (see e.g., par 61 of Carson and Others v. UK, ECtHR judgment of 16 March 2010 (Application no. 42184/05)).

56 ibid. where the Human Rights Committee held that “the physical or ethnic characteristics of the persons […] should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics”.

57 i.e. “[t]he use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”, see par 1 of ECRI’s General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf.


59 See Articles 2 and 26 of the ICCPR and Article 14 of, and Protocol 12 to, the ECHR.

60 See par 25 of the General Comment No. 20 of the Committee on Economic, Social and Cultural Rights on Non-Discrimination (10 June 2009). See also par 46 of McCann v. the United Kingdom, ECtHR judgment of 13 May 2008 (Application No 19009/04), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?%28%22appno%29:["19009/04"],%22itemid%29:["001-86233"])
situation in Ukraine, certain minority groups may not possess documents officially recognizing their property/land rights; especially, Roma often lack necessary documents relating to home ownership. Consequently, the provisions of the Draft Law, though drafted in a seemingly neutral manner, have the potential to adversely and disproportionately affect indigenous peoples, minorities and other vulnerable groups who do not own the property they live on, and as such may constitute indirect discrimination. Therefore, it is recommended to replace or supplement the reference to ownership with the term “occupation” which should be irrespective of the title to the property/land tenure status.

32. Finally, effective investigations into alleged cases of racial discrimination or racially motivated misconduct by the police, or other types of discriminatory conducts should be ensured and the perpetrators of these acts adequately punished. In this context, see comments relating to oversight and complaint mechanisms in pars 66-67 infra, as well as comments on addressing discrimination and harassment within the institution in par 56 infra. This should be accompanied by adequate training and awareness-raising for police and law enforcement officials against all forms of harassment or discriminatory behaviour, as recommended in recent human rights monitoring reports on Ukraine.

2.4. General Principles governing Police Activity

33. Article 3 of the Draft Law provides for a list of principles governing police activity, including a welcome protection of human rights and fundamental freedoms. However, some key principles seem to be missing. First, as mentioned above under par 29 supra, the provision does not mention the principle of non-discrimination or the principle of equality of gender, ethnic groups and minorities.

34. Second, references to integrity, professionalism, accountability, ethical behavior (compliance with Police Ethics/Code of Professional Conduct) and co-operation with other institutions of the Criminal Justice System would also be useful additions; at the international level, these are generally considered to be key principles which should guide the exercise of police activities.

35. International recommendations also highlight the importance of adopting a victim-centered approach to strengthen crime prevention and criminal justice responses,
particularly in relation to violence against women and domestic violence.\textsuperscript{67} Consequently, it may be advisable to state in Article 3 the \textit{assistance to victims and a victim-centered approach as a key principle guiding all police activity}; this would also imply adopting gender-sensitive and child-sensitive processes.

36. As regards more specifically the integrity of the police, Article 4 par 3 of the Draft Law states that “[c]ontrol over the activity of the police shall be realized in the form of inspection and secret inspection of police officers’ integrity”. However, while this provision does specify that 20% of the body exercising such oversight should consist of human rights defenders, it does not mention the nature of this body, nor its exact responsibilities, powers and structure. \textbf{Though this would probably be the subject of secondary legislation, to be approved by the Cabinet of Ministers, at least the above aspects and main principles guiding such inspections should be stated in the Draft Law.}

37. Regarding “integrity tests”, the ECtHR has acknowledged the necessity, in certain circumstances, to resort to certain under-cover/covert inquiries or investigations to identify and investigate offences.\textsuperscript{68} However, the Court has considered that the use of such proactive policing methods should be subject to certain limitations. In particular, when actively testing an individual’s integrity, the state must ensure that this method does not instigate the commission of a crime, more specifically, that the state officials did not persuade and talk the person into committing such crime and that the person was already ready and willing to commit the crime before his/her interaction with State agents.\textsuperscript{69} Moreover, the collection of information or recording by a state official of an individual without his or her consent would raise issues under the right to private life under Article 8 of the ECHR.\textsuperscript{70} While integrity tests have been introduced in several countries as important anti-corruption tools, adequate safeguards thus need to be provided. \textbf{If Article 4 par 3 of the Draft Law is indeed referring to these types of integrity tests, it should be supplemented to reflect the above-mentioned limitations when applying such tests.} At the same time, it is noted that Article 43, par 4 of the Draft Law states that the result of a secret integrity inspection cannot be a ground for “bringing a police officer to administrative or criminal responsibility”. \textbf{It is thus unclear what the exact purpose of these testing methods would be, if not to identify and prosecute wrongdoing. This should be clarified in the Draft Law.}

38. Further, while corruption is mentioned on several occurrences in the Draft Law, a \textbf{clear anti-corruption statement should also be included under Article 3 of the Draft Law.} It is important that police officers do not allow their private interests to interfere with their public position, and it is their responsibility to avoid such conflicts of interests.\textsuperscript{71}

39. Finally, another aspect currently missing in Article 3 of the Draft Law is the principle of confidentiality of information. Such a principle is important, since information gathered by the police could, if publicized, potentially compromise police investigations, as well as public security, victim and witness rights to privacy and confidentiality,\textsuperscript{72} or the

\textsuperscript{67} ibid., page 34 (2014 UNODC Blueprint for Action on VAW).


\textsuperscript{69} ibid. par 73 (Ramanauskas v. Lithuania, ECtHR judgment of 5 February 2008).

\textsuperscript{70} See Klass v. Germany, ECtHR judgment of 6 September 1978 (application no. 5029/71), pars 36-38. See also Vetter v. France, ECtHR judgment of 31 August 2005 (application no. 59842/00), par 27.


\textsuperscript{72} See Section VII 20(c) of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at
presumption of innocence. The drafters should consider whether to include the principle of confidentiality under Article 3 of the Draft Law.

3. Police Organization and Main Roles and Responsibilities

3.1. Overall Structure and Organization of the Police

40. Generally, the proposed police structure envisioned by the Draft Law seems to be quite complex and may become difficult to manage due to multilevel subordination and potential overlaps between individual ministries and police services, including at the regional, district and municipal levels.

41. Article 4 of the Draft Law provides that police activity shall be directed and coordinated by the Ministry responsible for state policy in the sphere of protection of public order and of persons, society and state from unlawful infringements (hereinafter “the Ministry of Public Order and Protection of Persons”) and by the Ministry of Finance. According to Article 11 par 1, the Ministry of Finance will have a management and coordinating role relating to the financial police. Pursuant to Article 11 par 2 of the Draft Law, the financial police shall investigate criminal offences in accordance with the Criminal Procedure Code (insofar as they touch on the sphere of finance).

42. It is unclear why such an arrangement has been introduced, since this would imply that the Ministry of Finance would oversee the investigations of criminal offences relating to financial matters, such as fraud, economic crimes, money laundering, and counterfeiting (though this is not clearly stated in the Draft Law), while other criminal investigations would be led by a different ministry. Moreover, the relationship between the financial police (and the Minister of Finance) and the criminal police (and the Minister of Public Order and Protection of Persons) is not clear. Since a number of financial crimes often tend to overlap with other criminal offences (for instance, drug trafficking, or trafficking in human beings), such separate competences could reduce the effectiveness of the police, unless they are accompanied by a clear intelligence- and information-sharing mechanism that allows them to co-ordinate action. While it may be helpful to have specialized ‘investigators’ deal with financial crimes, having two ministries in charge of investigations may over-complicate the overall police organization, strategic orientation and lines of accountability. It may also be helpful, to clarify the lines of responsibility, to specify that the responsibilities lie with the respective minister, and not with the ministry per se.

43. Consequently, it would be advisable to vest only one entity, namely the Minister (not the Ministry) of Public Order and Protection of Persons, with responsibility for the police, including for investigations of financial crimes. The Ministry of Finance (or, better, the Minister) could then still be responsible for investigating certain non-criminal offences, as in other countries (for instance the investigation of taxation or customs matters not falling under the Criminal Code); however, such competence should be set out in separate legislation. It is recommended to amend Article 4 of the Draft Law accordingly.


44. It is positive that Article 4 par 2 of the Draft Law provides that the responsible ministries shall define priority spheres of police activity development; this should help ensure coherence of the overall police system. It may be advisable, however, to further specify the form/content of this responsibility, for instance by stating that the Minister of Public Order and Protection of Persons shall define basic principles and priorities of the police in a policy document approved by the Government, covering a certain time period.\textsuperscript{74} This would then constitute the fundamental strategic document for all police entities, and should be developed in a participatory (see par 133 \textit{infra}) and evidence-based manner, with the use of statistics, research, assessments, and international and other developments, among others.

45. Section 2 of the Draft Law deals with the leadership of the different police forces in greater detail, but does not specify which body such leadership shall be accountable to\textsuperscript{75} (presumably it is the Ministry of Public Order and Protection of Persons, more specifically the Minister). The relevant lines of accountability should be expressly outlined in Section 2 of the Draft Law (see also comments on oversight mechanisms in par 63 \textit{infra}). Furthermore, the functions of the Ministry of Public Order and Protection of Persons (or, more specifically, the Minister) should be limited to a certain political responsibility for the police, including strategic and policy decisions, as well as oversight; the heads of the respective police forces should then be responsible for managing their respective part of the police force. This should be specified in the Draft Law.

46. Article 18 of the Draft Law specifies that the heads of the respective police forces shall devise their own strategic four-year activity programmes, as well as an annual activity programme. These programmes should be aligned with the priorities stratégic document defined by the Minister of Public Order and Protection of Persons in accordance with Article 4 of the Draft Law; Article 18 of the Draft Law should be supplemented accordingly. Such plans should mention anticipated financial and human resources as well as performance indicators to measure and report progress towards specified goals. Moreover, the four-year programmes should be updated on an annual basis to reflect emerging issues, organizational priorities and availability of resources. Further, the Draft Law does not provide for the modalities to measure police organizational performance, or for a clear accountability mechanism. While perhaps not all details would need to be mentioned in the Draft Law, Article 18 should nevertheless be supplemented accordingly to include the main parameters and criteria for such performance assessments, and an accountability system.

47. Article 5 of the Draft Law divides the overall structure of the police into six categories: local police, administrative police, criminal police, financial police, border police and the national guards of Ukraine. Subsequent articles further detail the respective organization and mandates of each category of police. In addition, these police forces are divided into regions and local areas, with some of them under the purview of local authorities and others not. In the current version of the Draft Law, it is difficult to clearly identify the respective roles and responsibilities of the different police forces in

\textsuperscript{74} See e.g., \textit{op. cit.}, footnote 65, page 89 (2013 OSCE Publication on Police Reform).

\textsuperscript{75} The 2011 UNODC Handbook on police accountability, oversight and integrity, available at http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf, which defines accountability as follows: “a system of internal and external checks and balances aimed at ensuring that police carry out their duties properly and are held responsible if they fail to do so. Such a system is meant to uphold police integrity and deter misconduct and to restore or enhance public confidence in policing” while “Police integrity” refers to “normative and other safeguards that keep police from misusing their powers and abusing their rights and privileges” (page iv).
such a multi-layered police system. This structure could also create potential competition between the respective police forces, which could dilute the effectiveness and efficiency of the police system.

48. The Draft Law details the mandate of the administrative police under Article 7 and that of the criminal police in Article 9. While administrative offences are habitually of lesser gravity than criminal offences, and thus subject to lower sanctions, there is often a potential or actual factual overlap between these offences, which in turn is likely to trigger competition between the administrative police and the criminal police. The lawmakers and stakeholders should therefore discuss whether these two distinct police forces (administrative and criminal) are needed, all the more given the additional expenses that this would imply. Ultimately, merging these two police forces would also considerably simplify the overall organization of the police system in Ukraine.

49. As it stands, Article 6 of the Draft Law provides that the local police ensure order through precaution, prevention, detection and termination of administrative and criminal offences on the territory of the relevant community. Further, the local police should “tak[e] part in the investigations of criminal offences” in accordance with the Criminal Procedure Code of Ukraine. Article 6 par 5 further states that jurisdiction of the local police shall be limited to the territory of the relevant community, “except for cases of direct prosecution by local police of a person suspected in committing administrative or criminal offence”. This provision does not, however, explain when direct prosecution by local police would be possible. Moreover, the local police mandate seems to overlap with Articles 7 par 3 (1) to (3) and 13 par 2 which are worded in exactly the same fashion to describe the roles and responsibilities of the administrative police and the border police, respectively.

50. Moreover, Article 9 of the Draft Law states that the criminal police “investigates criminal offences” according to the procedure defined by the Criminal Procedure Code. Article 11 par 2 of the Draft Law similarly provides that the financial police shall investigate criminal offences in accordance with the Criminal Code. However, it is not clear which criminal offences would be involved; for the financial police, this would presumably be those listed under Chapter VII pertaining to Economic Criminal Offenses (such as money laundering, financial fraud, violation of bank or trade secrets, or economic crimes).

51. In light of the above, it is not clear how these five police forces, which are all mandated to investigate or take part in criminal investigations, will interact and co-ordinate their efforts. It is recommended, therefore, to delineate more clearly the respective roles and responsibilities of the different parts of the police, particularly as concerns investigations of criminal offences (including by expressly cross-referencing the relevant chapter/provisions of the Criminal Code), to avoid overlap. One way to do this could be to specify that the criminal police shall in principle take the lead in terms of criminal investigations, with exceptions for certain types of criminal offences such as transnational crimes and economic crimes, for which the border police and the financial police could respectively take the lead.

52. Moreover, the hierarchy of the various police agencies should also be defined in the Draft Law, as well as their reporting and governance structures. The Draft Law should also seek to establish a co-ordination mechanism, detailing the interaction and support between these agencies and providing criteria for determining who will manage joint forces operations. Additionally, the Draft Law should specify the modalities for intelligence/information sharing between the different police forces.
Furthermore, particularly in the context of prevention and protection from violence against women and domestic violence, co-operation with a broader range of state and other entities/bodies (e.g., local government representatives, social and health service providers, education bodies, non-governmental organisations, child protection agencies) is critical to facilitating protection, support, and assistance for victims.76

53. More generally, apart from some references under the Transitional Provisions, the text of the Draft Law does not mention the specialization of police forces/specialized police investigative units.77 Good practices have shown that the specialization of police services, and focused training sessions, tend to increase reporting, trust and engagement of the victims, and more generally the efficiency and effectiveness of the criminal justice system.78 **The lawmakers and stakeholders should review the actual policing needs in greater detail, also by community/region, in order to define the priorities and decide on the required specialization of police forces** (i.e., well trained, competent investigators and support staff with specialized skills for addressing/investigating specific crimes). The possibility of having such specialized teams would also depend on the availability of funds (see also comments relating to regulatory and financial impact assessments in pars 131-132 infra). If separate specialized investigative units are in charge, it is also important to provide for clear co-ordination and intelligence/information-sharing mechanisms.

### 3.2. Status of Police Personnel

54. Article 40 of the Draft Law mentions that police personnel is subject to the provisions of the law on state service, unless otherwise provided for in the Draft Law (except for local police officers who are subject to the Law on Service in Local Authorities). This is welcome in that it clearly states that the Draft Law constitutes a *lex specialis* in this respect.

55. Article 43 of the Draft Law states the rights and duties of a police officer. It specifically provides for the right to healthy, safe and appropriate conditions for effective service. It would be advisable to *add a reference to the need for gender equality and a multicultural environment, in accordance with OSCE recommendations*.79

56. Moreover, it is important to highlight in the Draft Law that the working environment should be free from discrimination, harassment and sexual harassment (with relevant cross-references to applicable legislation as appropriate or, alternatively, a definition of “harassment”80 in the Draft Law itself). **Employees must have the right to file**

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77 Specialization could be envisioned regarding e.g., financial matters (see pars 41-43, and 50 supra), narcotics, domestic violence, child abuse, sexual violence, human trafficking, organized crime, homicide, robberies, digital forensics, traffic collision investigations.


79 See par 133 (2008 OSCE Guidebook on Democratic Policing).

80 See for instance the definition of “harassment” provided in Article 2 par 3 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter the
complaints and such cases should be promptly and adequately investigated; the Draft Law should be supplemented accordingly. If not already provided for by other legislation (in which case the Draft Law should include a respective cross-reference), the complaint mechanism and process should be clearly defined. While the Draft Law does not need to provide all details pertaining to the filing/receipt of complaints, the complaints procedure and responsible complaints body, the outcome of such procedures and the possibility to appeal, it should at least state that these aspects will be outlined further in secondary legislation.

57. Article 44 of the Draft Law deals with the independence of police officers and mentions the possibility for heads of the respective police services to impose mandatory orders and instructions on them. However, this Article and the Draft Law in general do not rule out the possibility for the executive branch to issue instructions, which could risk the politicization of police activities. Article 44 of the Draft Law should be supplemented in that respect by specifying that the executive branch (apart from the heads of the respective police services) shall not issue instructions. Furthermore, Article 44 of the Draft Law should exhaustively list the circumstances when internal regulations/instructions may be issued.

58. While Article 44 par 3 of the Draft Law states that a police officer is obliged to comply with orders from superiors, par 4 of the same provision states that police officers shall not execute orders that are clearly criminal. However, certain orders, while not being necessarily criminal, may still be unlawful; in principle, a police officer shall not be bound by orders to perform any unlawful activities. This should be clearly stated under Article 44 of the Draft Law.

59. Moreover, Article 44 par 4 provides that in case such an order is confirmed in writing (which shall also be communicated to the Police Commission), the police officer shall be obliged to comply with the order. This should, however, not apply in cases involving acts of torture and other cruel, inhuman or degrading treatment or punishment. It is important to highlight in this context that the prohibition of torture and of ill-treatment is recognized as absolute and non-derogable. The non-derogability of this prohibition also means that an order by a superior or public authority can never be invoked as a justification for such acts: subordinates will be held to account individually. Article 44 should thus also expressly state that in cases of torture and other cruel, inhuman or degrading treatment or punishment, a police officer should never execute superior orders, even where they are confirmed in writing.

“EU Employment Equality Directive”) defines “harassment” as “unwanted conduct related to any of the grounds referred to in Article 1 [which] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Article 2 of EU Gender Equality Directives defines “sexual harassment” as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature [which] occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. In par 18 of General Recommendation No. 19 of CEDAW Committee (1992), sexual harassment is defined as “such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions”.


See Article 2 of UNCAT and par 26 of the General Comment No. 2 of the UNCAT Committee.
60. In addition, it is reiterated that Article 4 of the UN Convention against Torture has been interpreted as covering acts such as incitement, instigation, superior order or instruction; consequently, superior officials providing orders/instructions are criminally liable for torture in the same manner as the direct perpetrator(s). Article 44 does not expressly state that superiors are prohibited from giving unlawful orders and shall be held liable when doing so. This provision should be supplemented accordingly.

61. Finally, Article 15 of the Draft Law pertaining to the Police Secretariat lists certain functions of this body, but does not mention education/capacity development, human resources management, financial management, as well as infrastructure, information and technology and equipment management; these are key functions which should typically be undertaken by such bodies. It is recommended to include these tasks in the above provision.

3.3. Monitoring, Oversight and Complaint Mechanism

62. In terms of monitoring police activities, while Article 28 of the Draft Law mentions the maintenance of records regarding detainees, nothing is said about monitoring police activities in general. The Draft Law should require the recording of all police activities, including time, date, location and specifics of any incidents as well as actions taken.

63. As regards oversight, it is generally recognized that for an oversight system to be effective, there should be at least six interdependent pillars of oversight and control across the criminal justice system: internal oversight, executive control (policy control, financial control and horizontal oversight by government agencies), parliamentary oversight (members of parliament, parliamentary commissions of enquiry), judicial review, and independent bodies such as national human rights institutions and civil society oversight. Such mechanisms should be able to effectively investigate allegations of wrongdoing, and as appropriate, recommend disciplinary sanctions or refer cases for criminal prosecution. Furthermore, the media can play an important role in providing the public with information on police activities. Without external oversight mechanisms, police leaders would have the freedom not to investigate or punish misconduct, which would render internal control ineffective; an external oversight mechanism would also improve public trust in police services. Internal and external oversight mechanisms should generally complement one another.

64. Currently, the Draft Law does not specifically include such a range of external oversight mechanisms. Unless already provided by other legislation (in which case relevant cross-references should be included in the Draft Law), these aspects

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83 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “UNCAT”), adopted by the UN General Assembly by resolution 39/46 of 10 December 1984. The UNCAT was ratified by Ukraine on 24 February 1987 and its Optional Protocol on 19 September 2006.
85 See par 84 (2008 OSCE Guidebook on Democratic Policing).
87 See par 86 (2008 OSCE Guidebook on Democratic Policing).
88 See par 87 (2008 OSCE Guidebook on Democratic Policing).
should be addressed in the Draft Law. It is noted that Chapter 4 of Section 4 of the Draft Law specifies in detail the disciplinary responsibility of police officers and provides for a system of complaints and notification by “citizens, officials [and the] media” (Article 69). While the reference to the media is positive, complaint mechanisms should be initiated by submissions from any individual,\(^89\) not only citizens; Article 69 of the Draft Law should be amended accordingly (see also comments on disciplinary proceedings in paras 123-124 \textit{infra}).

65. Moreover, there are no provisions specifying the conditions and modalities of the public complaints system; the Draft Law should further detail these aspects, particularly regarding the receipt and processing of complaints, to ensure that the complaint mechanism is transparent and accessible to all.\(^90\)

66. Also, as stated by the Council of Europe Commissioner for Human Rights, “[a] complaints system [against the police] must be capable of dealing appropriately and proportionately with a broad range of allegations against the police in accordance with the seriousness of the complainant’s grievance and the implications for the officer complained against”\(^91\).

67. While the Draft Law envisions the establishment of police commissions (the composition of which should ensure a certain degree of independence, see par 123 \textit{infra}), these are only mandated to conduct disciplinary proceedings against police officers. An effective oversight mechanism should, however, not be limited to disciplining police officers, but should rather also inquire about their responsibility (including criminal), as well as ensure oversight of the police system in general. The drafters should therefore consider the establishment of an overall Independent Police Complaint Body with comprehensive oversight responsibilities of the entire police system that would be competent to handle complaints in all cases (not only disciplinary ones). In particular, such body should investigate all allegations of discriminatory behaviour, or of abuse of power by the police. The Draft Law should specify that where there is a suspicion of criminal acts having been committed, this body should refer such cases to criminal prosecution.

68. International and regional standards recommend that the complaint system be independent, adequate, prompt, subject to public scrutiny (open and transparent), and that it should ensure the victim’s/complainant’s involvement in the process.\(^92\) The Draft Law could be supplemented in this respect and should also clarify the arrangements for possible co-operation between such a body and the police, in accordance with the independence principle, seriousness of the complaint and resource management implications.\(^93\) The Opinion of the Council of Europe

\(^89\) See pages 69-70 of the UNODC Handbook on Police Accountability, Oversight and Integrity.

\(^90\) See Section I B(4) of the UN Economic and Social Council Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials (1989) available at

https://wcd.coe.int/ViewDoc.jsp?id=1417857.

\(^92\) ibid. See also par 61 of the Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics which states that “[p]ublic authorities shall ensure effective and impartial procedures for complaints against the police”.

https://wcd.coe.int/ViewDoc.jsp?id=1417857.
Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (2009)\textsuperscript{94} may serve as useful guidance in this respect.

69. The police should also be required by law to report all deaths of individuals that took place in police custody or due to police action to a certain oversight body; penalties should be applied for the failure to do so, or delays in reporting. Complaints and reports of torture or ill-treatment should also be promptly and effectively investigated; even in the absence of an express complaint, an investigation shall take place if there are other indications that torture or ill-treatment may have occurred.\textsuperscript{95} The Draft Law should be amended to include such requirements.

70. In any case, in order to fulfil their oversight mandate effectively, internal and external oversight institutions require sufficient resources, legal powers and need to be independent from executive influence.

\textbf{3.4. Education and Capacity Development}

71. While it is positive that the Draft Law attempts to regulate police school systems in Articles 85 and 86, this section contains very little information. For instance, there is no mention of the subjects being taught, admission processes, examination, the duration of specialized education, job description of trainers, or any references to specific secondary legislation/regulation on the police school system. While not every detail of education and capacity development needs to be provided in the Draft Law, it should at least specify the overarching principles and then provide that another law, or secondary legislation will further elaborate these aspects.

72. More specifically, human rights and fundamental freedoms should be an integral part of all types of basic, advanced and specialized training courses or educational programmes for criminal justice system staff.\textsuperscript{96} The Draft Law could be supplemented to ensure adequate training/evaluation on gender and human rights aspects. These should ideally include non-discrimination and equality, gender-specific needs and rights of victims,\textsuperscript{97} prevention and detection of cases of violence, the specific needs of children, the issue of “secondary victimization”, as well as multi-agency co-ordination and co-operation.\textsuperscript{98}

73. Finally, certain provisions of the Draft Law relating to the education of police officers seem to contradict each other. For instance, while Article 60 par 2 states that relations arising in connection with the further training of police officers are governed by the laws on education, Article 85 par 2 states that legislation on education does not apply to police schools. This point should be clarified.


\textsuperscript{95} See par 2 of the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by the UN General Assembly resolution 55/89 of 4 December 2000.

\textsuperscript{96} See page 23 of the 2013 OSCE TTD/SPMU Publication on “Police Reform within the Framework of Criminal Justice System Reform”, July 2013, available at \url{http://www.osce.org/secretariat/109917/download=true}.


4. Police Powers

4.1. Police Measures

74. Overall, despite some positive examples to ensure transparency and accountability of the police, the language of certain articles of the Draft Law suggests a greater focus on the powers of the police, than on the rights of the individual. For instance, Article 26 of the Draft Law starts out with the statement “[t]he police is authorized to enter a home or other property without a substantiated court decision only in urgent cases related to the preservation of human life and valuable property”. This already implies that entering a home or property is an exception, not the norm, but it would nevertheless be advisable to specify this more clearly; thus, Article 26 should first state that in principle, the police is not authorized to enter a home or other property, followed by the exceptions to the principle (and related conditions).

75. Article 24 of the Draft Law provides that the police, within the mandate and in the manner foreseen by the Draft Law, can limit access to certain places, enter a home or other property, take someone under custody or put him/her into a police jail, and take measures of coercion. While the following articles further detail the content of such powers, they also provide overly broad prerogatives, without listing adequate substantive and procedural safeguards to ensure that such powers are not abused (see, for example, pars 76, 79-80, 82-83, and 86 infra).

76. First, Article 27 of the Draft Law provides for custody measures (i.e., deprivation of liberty without detention). However, the Draft Law speaks only of general powers in this respect, without providing more information as to the circumstances of such custody measures and the principles guiding them. As noted by the ECtHR, when a broad range of discretion is granted to police officers, there is a clear risk of arbitrariness. The law must therefore indicate with sufficient clarity the scope of any discretion conferred on the competent authorities, and the manner of its exercise. To comply with such requirements, the Draft Law should indicate that such measures shall only be taken where necessary and proportional to a legitimate aim, should indicate whether an effective oversight mechanism is in place and whether the measure is subject to effective judicial review. Further, the modalities for carrying out the measure should be specified, in order to limit the scope of police officers’ discretion.

77. Moreover, nothing is said in Article 27 of the Draft Law as to the issue of separation of minors from adults and of women from men while in custody, although this is mentioned when addressing police detention (Article 28 par 3 of the Draft Law). This same distinction should be inserted into Article 27 accordingly.

78. Article 27 par 3 of the Draft Law specifies that a policeman is authorized to take away weapons or other items with which a person in custody may harm him/herself or others, regardless of whether their use is forbidden or not. However, the next sentence states that it is forbidden for a policeman to search a person to whom police custody is applied, which would make it difficult for possible weapons or other potentially harmful objects to be detected.

100 ibid, par 77.
101 ibid, pars 80-83.
79. More generally, aside from this ban on searching persons in police custody, nothing is said as to the potential powers of search of the police in general (except those of the border police, see pars 98–100 infra). In principle, a police search may be justified, so long as it is prescribed by law, necessary and proportionate, and respects human dignity. In that respect, the ECtHR generally analyses whether (i) search measures are necessary and proportional to the legitimate aim, (ii) there is an effective oversight mechanism in place, (iii) the authorization to conduct such searches is subject to effective judicial review and action for damages, (iv) there are temporal and geographical restrictions to the said powers of search, (v) the modalities for carrying out stop and search measures are clearly stated, and (vi) there are any caveats to the decision to stop and search individuals (for instance, the necessity to demonstrate reasonable suspicion).

Police searches of individuals should also be undertaken by a police officer of the same gender. Article 28 of the Draft Law covers placement in police detention (“police jail”) but does not specify whether a search may be carried out – even though in such circumstances searches may be legitimate. Unless this is regulated by other legislation, in which case a cross-reference should be included, it may be advisable to supplement the Draft Law in this respect (including by adding reference to the above-mentioned substantive and procedural safeguards).

80. As regards searches and seizures in general, outside of custody or detention, they shall in principle be based on court orders. However, the police should also have the authority to seize certain objects without a court order in certain circumstances, provided that the above mentioned safeguards are provided.

81. Article 28 of the Draft Law regulates police detention. As regards the procedure and conditions of such detention, it is welcome that Article 28 mentions certain rights of detainees and safeguards that are in line with international standards. This is important since both the UN Human Rights Committee and the UN Committee Against Torture recognize that conditions of detention may themselves constitute ill-treatment or, in extreme cases, torture; the wider detention system may also create conditions conducive to torture or ill-treatment, or, on the contrary, an environment in which such acts are not tolerated.

82. At the same time, Article 28 does not specify the maximum duration of such detention; in that respect, it is noted that the ECtHR has held that the maximum duration should be clearly provided in the legislation. The Draft Law should provide this, or should

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103 See pars 80-83 of Gillan and Quinton v. United Kingdom, ECtHR judgment of 12 January 2010 (Application no. 4158/05), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96585&"itemid":[]}.

104 See Rule 19 of the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (“Bangkok Rules”), 22 July 2010, available at http://www.un.org/en/acosoc/docs/2010/res%202010-16.pdf, which underline the need for searches to respect the individual’s dignity and to be carried out by trained staff of the same gender.

105 E.g., immediate registration of the detainee; proper recording of all information relating to actions during detention into the file of the detainee; separation of women and men, of minors, of persons suspected to have committed serious criminal offences from others; the right to meet a relative, etc.

106 The standards specifically referred to in the General Comment are: the Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Code of Conduct for Law Enforcement Officials (1978); and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982). HRC, General Comment No. 21, 1992, §5.

107 Torture in International Law: A guide to jurisprudence, Jointly published in 2008 by the Association for the Prevention of Torture and the Center for Justice and International Law (CEJIL).

include a cross-reference to applicable legislation (presumably the Criminal Procedure Code or the Code of Administrative Offences).

83. Moreover, to avoid being branded as arbitrary, detention under Article 5 of the ECHR must be carried out in good faith, and shall be closely connected to the ground of detention invoked by the government authorities. Furthermore, the place and conditions of detention should be appropriate; and its length should not exceed what is reasonably required for the purpose pursued.\(^{109}\) The date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting the detention should also be recorded.\(^{110}\) Based on Article 5 par 2 of the ECHR, a detainee must be told the legal and factual grounds for his arrest or detention in simple, non-technical language that he/she can understand so as to be able to, if he/she sees fit, challenge its lawfulness in court in accordance with Article 5 par 4 of the ECHR.\(^{111}\)

84. Article 28 mentions some aspects of these rights, e.g. it states that the police shall clarify to the detainee the grounds for detention, and his/her rights and obligations (par 2 (4)), and sets out details on the standards and size of detention conditions and facilities (par 4). At the same time, while the contents of police protocols are specified in Article 27 on police custody, they are not outlined in Article 28. Moreover, Article 27 is much more explicit in stating that an individual arrested shall be informed, in a language that he/she understands, of the reasons for his/her arrest (in comparison, Article 28 par 2 (4) is rather vague). It is recommended to amend Article 28 of the Draft Law on detention to adequately reflect the safeguards set out in Article 5 of the ECHR.

85. Additionally, this provision should include the obligation of the police to notify individuals of a decision on their detention or of their appeal rights.

86. Furthermore, according to Article 5 par 3 of the ECHR, the detainees should have the right to have the lawfulness of their detention reviewed promptly by a court; this involves the ability to contact a lawyer.\(^{112}\) Pursuant to recommendations at international and regional levels, for this remedy to be effective, legal assistance should also be provided.\(^{113}\) The Draft Law should be enhanced accordingly. Additionally, Article 5 of the ECHR does not simply require access to a judge to obtain a prompt decision on the legality of detention, but also requires that relevant legislation shall allow anyone detained by court order to have access to proceedings whereby the lawfulness of the continued detention is reviewed (Article 5 par 4); this should be expressly provided in the Draft Law or in other relevant legislation (such as the Criminal Procedure Code). Moreover, in fulfilling the latter obligation, it is recommended to consider

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\(^{113}\) See par 91 of Pishchalnikov v. Russia, ECtHR judgment of 24 September 2009 (Application no. 7025/04), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94293#itemid:["001-94293"]
introducing periodic, automatic review of detention by a court, unless this is already provided in other relevant legislation.

87. Finally, the Draft Law does not foresee the possibility for police officers to issue immediately, on the spot, protection or restraining orders (including the removal of perpetrators from their home irrespective of the ownership title to the property),\footnote{See Section 3.10.3 of the 2012 Handbook for Legislation on Violence against Women issued by UN Women.} when the circumstances so require, subject to later confirmation by a court. Such protective measures are particularly important in the context of protection and assistance to victims of domestic violence.\footnote{See par 69 of the OSCE/ODIHR Opinion on the Draft Law of Ukraine on Preventing and Combating Domestic Violence, DV-UKR/232/2013, issued on 31 July 2013, available at http://www.legislationline.org/download/action/download/id/5048/file/232_DV_UKR_31%20July%202013_en.pdf.} Including such a possibility would be in line with earlier recommendations made by the OSCE/ODIHR pertaining to preventing and combating domestic violence in Ukraine.\footnote{Op. cit. footnote 114, Section 3.10.7 (2012 UN Women Handbook for Legislation on VAW).} Good practices at the international level suggest that live testimony or a sworn statement of the complainant/survivor should constitute sufficient evidence for the issuance of a protection order and that no further evidence should be required from the victim/survivor.\footnote{See par 7 of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf.} It is recommended to enhance the Draft Law accordingly. The nature and scope of these measures could include the confiscation of weapons,\footnote{See Section 3.10.7 of the 2011 UN Women Handbook for Legislation on Violence against Women (Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice).} the order that the perpetrator should keep a specified distance from the residence, school, workplace or any other specified place of the victim, children of the victim or other family members, granting temporary custody of children to the non-violent parent,\footnote{Op. cit. footnote 119, page 41 (2014 UNODC Blueprint for Action on VAW).} and/or requiring the payment of certain costs and fees.\footnote{See op. cit. footnote 116, par 99 (2013 OSCE/ODIHR Opinion on the Draft Law of Ukraine on Preventing and Combating Domestic Violence). See also par 29, Part IV, “A Framework for Model Legislation on Domestic Violence”, Report of the Special Rapporteur on violence against women, its causes and consequences (1996) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/104/75/PDF/G9610475.pdf?OpenElement. This could include e.g., regulating the offender’s access to dependent children, compelling the offender to pay the victim’s medical bills, restricting the unilateral disposal of joint assets, prohibiting the perpetrator from using or possessing firearms or other specified weapons; granting the victim possession or use of an automobile, or other essential personal effects; granting temporary custody of children to the non-violent parent with due consideration for the safety of the children; denying visitation rights, or specifying visitation under supervision; requiring the payment of certain costs and fees.} If such measures are introduced, then it would be useful to include relevant information on them in the police database. This would allow the police or other criminal justice officials to quickly determine whether a protection order is in force (or whether other orders have been issued in the past), and take immediate action upon its infringement.\footnote{See par 16 (h) of the 2011 UN Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/RES/65/228, 31 March 2011, available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_Crime_Prevention_and_Criminal_Justice.pdf.} For instance, some countries oblige courts to notify a special entity in charge of a central and unified database about all issued orders, which is accessible to all criminal justice actors.\footnote{See e.g., Article 34 of the Law on Domestic Violence Protection of Montenegro, available at http://www.legislationline.org/topics/country/57/topic/7.} It is unclear whether this exists already; in any case, Article 36 of the Draft Law should refer to such a database for protection/restraining orders.
4.2. **Coercive Measures**

89. Chapter 3 (Sub-Chapter 2) of Section 3 of the Draft Law details the coercive measures/use of force that may be taken by the police. As such, they should comply with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). Regarding the types of permissible coercive measures, Article 29 of the Draft Law lists a wide range of means and Article 30 further states the key principles guiding the use of force, which are overall in line with international standards.

90. However, the above provisions do not expressly provide that the illegal or disproportionate use of force by the police will trigger criminal liability; this should be expressly stated while providing a cross-reference to the relevant provisions of the Criminal Code (if they so exist). Moreover, instances of the use of force must be investigated independently to determine whether they met the strict guidelines mentioned above. The Draft Law should be supplemented accordingly.

91. As to the use of firearms, Article 35 of the Draft Law does not mention the obligation to report the use of firearms promptly to the competent authorities, as required by Article 6 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and Article 3 (c) of the UN Code of Conduct for Law Enforcement Officials. This obligation should be added to Article 35, along with the requirement to have such incidents investigated independently.

92. Article 32 of the Draft Law talks about the use of service dogs and horses, but does not specify the principles guiding their use; these are of particular importance since dogs will be used to search persons (Article 23 par 1) and service horses will be used in the context of policing assemblies (Article 34). In certain countries, the legislation states, for instance, that service horses shall be used exclusively to regulate the movement of persons or forbid their passage.

93. Article 7 par 4 of the Draft Law states that “the Rapid Response Service of the Administrative Police shall have the power to take immediate measures on mass riots termination” (‘riots’ being understood as implying a violent assembly). Article 33 par 1 (1) of the Draft Law provides for the use of impact munitions “to stop a group violation of public order and riot”. The use of the term “group violation of public order” is quite vague and could potentially also imply a peaceful but illegal assembly; to ensure proportionate police responses, it would be advisable to specify what is meant by “group violation of public order”. In this context, it should be borne in mind that impact ammunition should never be applied towards wholly or largely peaceful assemblies (see also par 97 infra).

94. Article 34 of the Draft Law addresses the issue of policing assemblies. However, nothing is said in this provision or in the Draft Law in general about the positive duty to take reasonable and appropriate measures to enable peaceful assemblies to take place. The OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly reiterate the positive duty of the state in that respect and recommend that this should be expressly stated in any relevant domestic legislation pertaining to

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123 See par 74 of the OSCE Guidebook on Democratic Policing.
freedom of assembly and police powers. It is recommended to supplement the Draft Law in that respect.

95. Article 34 further mentions certain “coercive measures” (service horses and means of active defense) which may be used against participants of a peaceful assembly. Apart from the general principles guiding the use of any coercive measures (Article 30), these measures of policing assemblies are described in relatively vague terms. It is recalled, in this context, that in principle, the policing of assemblies shall be informed by the principles of legality, necessity, proportionality and non-discrimination.

96. Moreover, it would be advisable to supplement the Draft Law by expressly including some overarching principles to ensure that the policing of assemblies is carried out in accordance with international standards. First, Article 34 does not specify which body of the police will be in charge of policing assemblies (presumably the local or the administrative police); the Draft Law should include this information. In this context, international good practices suggest the need for clearly defined law-enforcement command structures to ensure accountability for operational decisions in the context of policing assemblies.

97. As regards the use of force in the context of assemblies, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that “[i]n the dispersal of assemblies that are unlawful but nonviolent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary [...] [i]n the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary”. If dispersal is deemed necessary, the assembly organizers and participants should be clearly and audibly informed about the order to disperse prior to any intervention by law enforcement personnel; participants should also be given reasonable time to disperse voluntarily; only if they then fail to disperse may law enforcement officials further intervene. Moreover, under no circumstances should force be used against peaceful demonstrators who are unable to leave the scene. Article 34 mentions that

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129 See e.g., Nisbet Özdemir v. Turkey, ECtHR judgment of 19 January 2010 (Application no. 23143/04), where the applicant was arrested while on her way to an unauthorized demonstration at Kadıköy landing stage in Istanbul in February 2003 to protest against the possible intervention of United States forces in Iraq (Article 11 of the ECHR was considered to have been violated).


only service horses and means of active defence (anti-shock shield and armoured shield) can be used during an assembly. It is noted that international standards concerning the use of firearms are equally applicable to the use of other potentially harmful techniques of crowd management, such as horses.\footnote{ibid pars 176-177 (2010 Guidelines on Freedom of Peaceful Assembly).} The Draft Law should thus specify under which circumstances and criteria the use of service horses would be considered lawful in the context of policing assemblies. Moreover, the above-mentioned principles relating to the policing of assemblies should be reflected in the Draft Law in general; this would be particularly relevant given the findings of the 2014 Report on the OSCE Human Rights Assessment Mission.\footnote{See page 14, OSCE/ODIHR and OSCE High Commissioner on National Minorities (HCNM) Report on the Human Rights Assessment Mission in Ukraine (May 2014), available at http://www.osce.org/odihr/118476?download=true.}

4.3. Special Mandate of the Border Police

a) Border Checks

98. Article 23 of the Draft Law lists the powers of border police officers. These include, among others, the powers to check documents and examine persons, vehicles and cargoes. Moreover, Article 14 par 5 of the Draft Law states that “[t]he jurisdiction of the border police covers all the territory of the state”, which means that such measures may potentially be carried out anywhere on the territory of Ukraine and at any time.

99. Overall, police checks and examinations/searches shall be exercised consistently with ECHR obligations; particularly, such examination/searches shall be carried out in full respect of human dignity and the principles of proportionality and non-discrimination.\footnote{See par 67 of Abdulaziz, Cabales and Balkandali v. the United Kingdom, ECtHR judgment of 28 May 1985 (Application nos. 9214/80 9473/81 9474/81) available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{"itemid":"001-57416"}. See also par 8 of UN Human Rights Committee General Comment No. 16: Article 17 (Right to Privacy), 8 April 1988, available at http://www.refworld.org/docid/453883922.html; pars 4 and 4.5 of OSCE Ljubljana Document (2005), “Border Security and Management Concept: Framework for Co-operation by the OSCE Participating States”; and par 340 of the OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders (2014), available at http://www.osce.org/odihr/119633?download=true.} The ECtHR has considered that the use of coercive powers “to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life”, and that the public nature of a search may “compound the seriousness of the interference because of an element of humiliation and embarrassment”.\footnote{See par 63 of Gillan and Quinton v. United Kingdom, ECtHR judgment of 12 January 2010 (Application no. 4158/05), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96585#{"itemid":"001-96585"}.} Such interference is therefore justified only if it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society in order to achieve that aim.

100. Certain powers listed in Article 23 of the Draft Law are explicitly limited to the state border,\footnote{i.e., checking that foreigners and stateless persons observe immigration, entry/exit and transit rules as well as registering them as well as their passport details (Article 23 par 2 (3) and (4)).} while others are not.\footnote{For example, checking documents and examining persons, vehicles, or cargoes (Article 23 par 2 (1) and (2)).} Also, the Draft Law does not mention the circumstances (e.g., the behaviour of an individual, or the specific circumstances giving rise to a risk of breach of the public order) which would lead to the exercise of powers of search and/or checking of documents, nor does it state in which timeframe and...
conditions such powers may be exercised. While crossing a border, a person will know that he/she, along with his/her belongings, may be searched/check before crossing and thus may be seen as implicitly consenting to such a search; this is qualitatively different from powers of search exercised anywhere and at any time, without notice and without leaving individuals any choice as to whether or not to submit to such search.

101. As mentioned above (see par 76 supra), when broad discretion is granted to police officers, there is a clear risk of arbitrariness; the legislation must therefore indicate with sufficient clarity the scope of such discretion and the manner of its exercise. OSCE participating States have also committed to “remove all legal and other restrictions with respect to travel within their territories for their own nationals and foreigners” and “to keep such restrictions to a minimum”. In order to limit the risk of arbitrariness in the exercise of such wide powers of search/checking by the border police, these powers should be more clearly circumscribed and above-mentioned substantive and procedural safeguards (see pars 75-86 supra) should be expressly stated in the Draft Law.

b) Expulsion/Return

102. Article 23 par 5 of the Draft Law states that the border police “forcefully returns to the country of origin or a third country foreigners and stateless persons detained within controlled border areas during or after trying to illegally cross the state border of Ukraine”. It does not state any conditions or limitations to this power. However, there are many circumstances where such expulsion would violate international human rights standards.

103. First, while there is no right to asylum as such, turning away or expelling an individual, whether at the border or elsewhere within a state’s jurisdiction, and thereby putting him/her at risk of torture or inhuman or degrading treatment or punishment if expelled, is prohibited by Article 3 of the ECHR, and may also raise issues under the right to life under Article 2 of the ECHR. As per the well-established case law of the ECtHR, a state is required to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Articles 2 and 3 of the ECHR in the event of repatriation or transfer to another state; this implies an obligation not to expel the individual to that country. This should be clearly stated in the Draft Law (or, if already specified in other laws, cross-references to these laws should be added).

104. Such dangers are particularly relevant in the cases of refugees and asylum-seekers. Moreover, the authorities should also review whether the said persons are potential or identified victims of trafficking in human beings.

142 ibid par 64.
143 ibid par 65.
144 ibid par 77.
146 See par 114 of Hirsi Jamaa and Others v. Italy, ECtHR judgment of 23 February 2012 (Application no. 27765/09), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?=001-109231#/"itemid":"001-109231"].
147 Pursuant to Article 33 par 1 of the 1951 Convention relating to the Status of Refugees, to which Ukraine acceded on 10 Jun 2002, “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a...
105. Regarding stateless persons, Article 31 of the 1954 UN Convention relating to the Status of Stateless Persons, to which Ukraine is party, prohibits the expulsion of stateless persons who are lawfully on the territory of a state. The ECtHR, on the other hand, takes into account the stateless status of a person as one of the criteria to assess whether there exists a violation of Article 3 of the ECHR. More generally, the removal of a person from a country where close family members are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 par 1 of the ECHR.  

106. Moreover, the Draft Law should provide some substantive and procedural safeguards circumscribing the expulsion measures, which should at a minimum include the review of whether the person would be under a real risk of being subjected to torture and inhuman or degrading treatment, or to death, or other forms of persecution in the target state. In any case, the assessment of the situation must be individualised, and should take into account all evidence and circumstances, including whether the persons has established family ties in Ukraine.

107. It is noted that Article 6 of the ECHR, which guarantees the right to a fair hearing before a court, has been held to be inapplicable to asylum and immigration cases; in such cases, Article 13 of the ECHR is therefore applicable, which provides the right to an effective remedy before a national authority. This means that the persons subject to expulsion/return measures should be able to effectively challenge such measures; any such review should automatically have suspensive effect. According to recommendations made at international and regional levels, legal assistance should be provided, in order to ensure the effectiveness of this remedy.

c) Conditions of Detention at Controlled Border Areas

108. The detention of non-nationals, if accompanied by adequate safeguards for the persons concerned, is generally considered acceptable, for instance to prevent unlawful

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109. The Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE has published a handbook on police and police activities, available at http://fra.europa.eu/sites/default/files/handbook_en.pdf. This handbook provides detailed guidelines on the detention of non-nationals, including the right to legal assistance, the necessity of individual assessment, and the provision of adequate safeguards. According to the OSCE/ODIHR, the detention of non-nationals should be considered acceptable, provided it is accompanied by adequate safeguards and legal assistance.

110. Moreover, the Draft Law should provide for individualised assessment of the situation, taking into account all evidence and circumstances, including whether the persons has established family ties in Ukraine. In any case, the assessment of the situation must be individualised, and should take into account all evidence and circumstances, including whether the persons has established family ties in Ukraine. This means that the persons subject to expulsion/return measures should be able to effectively challenge such measures; any such review should automatically have suspensive effect. According to recommendations made at international and regional levels, legal assistance should be provided, in order to ensure the effectiveness of this remedy.

111. The detention of non-nationals should be considered acceptable, provided it is accompanied by adequate safeguards and legal assistance. According to the OSCE/ODIHR, the detention of non-nationals should be considered acceptable, provided it is accompanied by adequate safeguards and legal assistance. In any case, the assessment of the situation must be individualised, and should take into account all evidence and circumstances, including whether the persons has established family ties in Ukraine. This means that the persons subject to expulsion/return measures should be able to effectively challenge such measures; any such review should automatically have suspensive effect. According to recommendations made at international and regional levels, legal assistance should be provided, in order to ensure the effectiveness of this remedy.
immigration. However, international obligations need to be complied with, in particular the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights.\textsuperscript{156} “Controlled border areas” where persons are detained fall under Ukrainian jurisdiction and as such are subject to the guarantees provided by the ECHR.\textsuperscript{157} More specifically, detention at controlled border areas is subject to Article 5 par 1 of the ECHR as this implies a person's confinement in a particular restricted space for a potentially not negligible length of time, without the person having validly consented to such confinement.\textsuperscript{158}

109. The Draft Law does not clearly specify whether the safeguards provided under Article 28 of the Draft Law for police detention would also apply to the detention at controlled border areas. In any case, to avoid being branded as arbitrary, detention of non-nationals under Article 5 par 1 (f) of the ECHR must be carried out in compliance with the above-mentioned safeguards regarding detention (see pars 82-86 supra). It must be highlighted that immigration legislation should allow ordinary courts to review the conditions under which non-nationals are held, impose a limit on the duration of their detention and provide for legal, humanitarian and social assistance.\textsuperscript{159} The legislation should also clearly establish the procedure for ordering and extending detention with a view to deportation, setting time-limits for such detention and obliging national authorities to communicate the reasons for the detention to the detainee.\textsuperscript{160} In addition, if possible, the border police should be encouraged to replace detention with a less drastic measure, particularly in cases where the detainee is a minor.\textsuperscript{161} The authorities should also be diligent and regularly review whether it is realistically possible to effect expulsion into another country\textsuperscript{162}; should this not be possible, e.g. due to some of the human rights consideration mentioned in pars 102-105 supra, then the person should be released. The Draft Law should be supplemented to include such substantive and procedural safeguards, unless they are already provided in other legislation (in which case the Draft Law should include cross-references to such provisions).

110. Finally, as in all cases of detention, but even more so due to the nature of the persons being detained in controlled border areas, the detention in such areas should fulfil minimum criteria so as not to be considered as constituting inhuman and degrading treatment. These include, at a minimum, having an external area for walking or taking physical exercise; internal catering facilities; the possibility for contact with the outside world,\textsuperscript{163} for instance a telephone; access to blankets or clean

\textsuperscript{156} See pars 216-218 of M.S.S. v. Belgium and Greece, ECtHR judgment of 21 January 2011 (Application no. 30696/09).
\textsuperscript{160} See Abdolkhani and Karimnia v. Turkey, ECtHR judgment of 22 September 2009 (Application no. 30471/08), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94127#itemid:"001-94127"].
\textsuperscript{163} See par 104, Riad and Idiab v. Belgium, ECtHR judgment of 24 January 2008 (Application no. 29787/03 29810/03) available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108395#itemid:"001-108395"].
sheets or sufficient hygiene products/facilities; and access to natural light. Detention facilities should also not be overcrowded. Other criteria such as the vulnerability of the person (due for instance to the asylum seeker status, the fact for a woman to be pregnant, or a person with disabilities), have to be taken into account by the authorities. Moreover, when children are involved, while they should not be separated from their parents, they should still be placed in a facility that is specifically adapted to their needs and suited for their age, and separate from other adults. The Draft Law should ensure that the above detention criteria are reflected, or, should at least contain references to relevant other legislation, as applicable.

4.4. Assistance to Victims

111. The Draft Law does not specifically mention the police’s duty to assist victims, including informing them of their rights. Unless provided by other legislation or by the Criminal Procedure Code (in which case a cross-reference should be included in the Draft Law), this general principle should be reflected. More specifically, such provisions should oblige the police to inform the victims/injured parties not only of their rights, but also about available social and legal protection and support services at their disposal (including legal aid and shelters/accommodation); the possibility and procedure to seek protective measures and to obtain full and effective reparation; the progress of their complaint, investigations and judicial proceedings; and finally, about the temporary or definite release or escape of the perpetrator, at least in cases where this puts the victims and their families, and others in potential danger. The Draft Law should be supplemented accordingly.

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166 See M.S.S. v. Belgium and Greece, ECtHR judgement of 21 January 2011 (Application no. 30696/09).


171 As defined in par 8 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted by General Assembly resolution 67/187 of 20 December 2010, available at http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf, which state that “the term ‘legal aid’ includes legal advice, assistance and representation […] for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.”


112. Children should also be able to express their views in every decision that affects them, as stated in Article 12 of the UN Convention on the Rights of the Child. The fact that a child is very young or in a particularly vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, is stateless etc.) does not deprive him or her of this right, nor should it reduce the weight given to a child’s views in determining his or her best interests. Child-sensitive provisions should in particular specify that the police shall keep the child informed about the process and seek his/her views regarding the way forward at all stages of the criminal investigations/proceedings. Moreover, any decision concerning a child must be duly and explicitly motivated, and include all factual circumstances, elements relevant for the best-interest assessment, and how these elements have been weighed in the given case. The Draft Law should be supplemented to that effect and the police should be adequately and systematically trained on and sensitized about children’s rights.

4.5. Data Collection and Processing

113. Article 21 of the Draft Law provides a description of the general police mandate, which includes “data processing”. In this context, it is important that the storage and use of personal data respects international standards on personal data protection. This includes the police’s obligation to maintain the privacy and confidentiality of victims’ data.

114. According to Article 36 of the Draft Law, the processing of information shall be carried out in accordance with the provisions of the law on personal data protection of Ukraine. However, such legislation should also be compliant with international standards, particularly the conditions provided for by the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

115. The Draft Law does not specify the guiding principles for data collection, retention and sharing. Unless provided by other legislation, it would be advisable to revert to good practices in terms of data collection in criminal cases. These state that generally, data should, at a minimum, be disaggregated by sex (of the victim and of the perpetrator), age, and type of criminal offences and should indicate the relationship between the perpetrator and the victim, for instance in cases of domestic violence. This is also key to ensuring that functional mechanisms for storing and sharing information and...
tracking cases of criminal offences are in place to aid investigations and avoid delays in criminal proceedings.\textsuperscript{181}

5. Working Environment, Police Career and Disciplinary Responsibility

5.1. Selection, Appointment and Career Management

116. Articles 43 to 48 refer to principles guiding the selection of police officers. It would be advisable to add under Article 43 par 4 that promotion shall be based on experience, education and performance, to ensure that objective criteria are considered in that process. Also, Article 45 of the Draft Law should clearly state the pre-conditions that qualify applicants for a position within the police.

117. Article 52 of the Draft Law regulates the ranking system. Article 53 provides that “the term of being in each special rank is eight years” which seems to suggest that there is an automatic promotion after eight years. This should not be the case. Rather, promotion should be merit-based and dependent upon a proper performance evaluation; similarly, rank should be based on the level of responsibility required in a position. Article 53 should be supplemented accordingly. Article 61 of the Draft Law seems to imply that performance appraisals only take place every four years, with no other performance appraisals being conducted in the meantime. Such an overly long period would not allow for the early detection of cases of bad performance, or ongoing opportunities to develop and improve competency. The drafters should re-consider such lengthy time intervals in the appraisal process.

118. As to the procedure for evaluation, Article 62 of the Draft Law provides that interviews shall be organized before the Attestation Commission. However, there is no mention as to the content of such interviews or clear performance indicators which would be linked to the specific job description (or better, based on job analysis/defined requirements for each post). Article 62 should be supplemented in that respect.

119. Article 62 of the Draft Law does not provide the possibility for police officers to appeal the decision of the Attestation Commission to another body (even though it may have grave consequences, including their dismissal according to Article 62 par 4). Moreover, the Article does not provide for any form of warning. It would be better if any decision of the Attestation Commission amounting to a “sanction”, for instance dismissal, would be adopted by another body, such as the one in charge of disciplining police officers (see also comments on disciplinary proceedings in pars 123-124 infra). Alternatively, at a minimum, such measure should be subject to review by an independent body or a court.

120. Article 65 of the Draft Law provides for a system of monetary reward “for impeccable and efficient service”. This could potentially create increased opportunities for corruption; the drafters should re-consider the adoption of such a system.

121. As mentioned in pars 26-27 supra, it is important that gender is mainstreamed in the policies and regulations and organizational culture with regard to recruitment, career advancement, working conditions and retention of staff, especially women and ethnic minorities.\textsuperscript{182} Moreover, regular assessments should be conducted to determine the


impact of policies and practices on women and men, as well as minorities, within the organization and in the community, to determine necessary adjustments to ensure equitable application.

5.2. Disciplinary Proceedings

122. It is welcome that the Draft Law provides for the disciplinary responsibility of police officers in cases of misconduct. International and regional documents recommend that disciplinary measures brought against police staff shall be subject to review by an independent body or a court.\(^{183}\)

123. Article 83 of the Draft Law envisions the establishment of police commissions in charge of conducting disciplinary proceedings; they are composed of five members, including at least two civil society representatives (human rights defenders), appointed by different entities from the executive and legislative branches, as well as bar associations. Particularly, one human rights defender shall be appointed by the relevant local entity, and another by the Ukrainian Parliament Commissioner for Human Rights. Such composition should in principle ensure the independence of the commissions, provided that the selection of the members from civil society and from the bar association is made through a fair, professional, public and transparent process to limit politicization, corruption or other private arrangements.\(^{184}\) The Draft Law could be supplemented in that respect, for instance by providing for a public call for applications and detailing the criteria and procedure for such a selection.

124. Article 70 of the Draft Law seems to suggest that the police unit chief also plays a role in terms of investigating disciplinary cases and deciding disciplinary sanctions; however, the various mandates of the police commissions and of the police unit chief in this respect are not clear. While not provided for in the Draft Law, it is acknowledged at the regional and international levels that an overall Independent Police Complaint Body should be in charge of receiving all complaints or starting inquiries ex officio, if needed, including in matters of disciplinary proceedings; such a body should also co-operate with the police.\(^{185}\) The drafters should discuss the institutional framework relating to oversight, including complaint mechanisms as well as disciplinary proceedings, and clarify the respective roles and responsibilities of entities involved.

125. Article 66 par 6 of the Draft Law provides that disciplinary liability is incurred in cases of non-compliance with legislation on preventing and combating corruption, including the illegal acquisition of property or services from individuals and legal entities for the purpose of financial, technical or other support for the police. Corruption cases, however, fall under the scope of the Criminal Code.\(^{186}\) They should thus be removed as

\(^{183}\) See par 33 of European Code of Police Ethics (2001). See also par 143 of the 2008 OSCE Guidebook on Democratic Policing.


\(^{186}\) E.g., criminal offences related to bribery (Articles 368.3 and 368.4 and Article 369 of the Criminal Code), undue influence (Article 369.2 of the Criminal Code), laundering of proceeds from crime (Articles 209 and 306 of the Criminal Code).
grounds for disciplinary responsibility from Article 66, while another provision should specify that cases of corruption of police officers are subject to criminal responsibility.

126. The Draft Law does not mention the possibility of having disciplinary decisions reviewed (despite the potentially grave impact they may have on the career of the police officer, i.e., dismissal). While Article 6 of the ECHR is usually not applicable to such cases, it would be advisable to provide for some type of review process given the serious consequences that such a decision may have.

127. Finally, Article 72 of the Draft Law refers to the rights of the police officers subject to official investigations. These should include the right to assistance of an attorney or other authorized representative.

6. Final Comments

6.1. Gender Neutral Legislative Drafting

128. It is noted positively that overall, the Draft Law uses gender neutral drafting. However, certain individual provisions still use only the male gender. This is not in line with general international practice, which normally requires legislation to be drafted in a gender neutral manner, by referring to both genders equally. Unless they are the result of inaccurate translation, it is recommended to review the respective provisions and replace the words “policemen” by “police officer” and as appropriate “his” by “his or her” or other gender neutral formulation.

6.2. Final Provisions

129. Regarding the final provisions, it is laudable that the Draft Law expressly repeals various existing legislative acts and other pieces of legislation. However, it is not clear whether this is the result of a full impact assessment, which would have helped identify an exhaustive list of all legal acts which should be amended or repealed.

130. It is also welcome that the Draft Law expressly refers to the development of secondary legislation or other tools, which should help ensure the effective implementation of the Draft Law. At the same time, it may be beneficial to prepare/develop a list of secondary legislation and other relevant documents, which could be appended to the Draft Law with a specific and realistic adoption schedule. Such secondary legislation and documents should ideally be ready for adoption at the same time as the Draft Law.

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187 The Human Rights Committee has considered that civil proceedings are compatible with the ICCPR, as long as the said decisions are capable of review on at least one occasion (see par 18 of General Comment No. 32 of the Human Rights Committee). See also e.g. in the case of a decision on disciplinary responsibility taken by a Bar Council, par 53 of H. v. Belgium, ECHR Judgment of 30 November 1987 (Application No. 8950/80), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57501#("itemid":"001-57501").

188 For instance, disciplinary proceedings against military personnel, Suküt v. Turkey, ECtHR decision of 11 September 2007 (Application no. 59773/00).

189 E.g., procedures for running inspections/secret inspections to be approved by the Cabinet of Ministers (Article 4 par 3), approval of the number of police officers by the Cabinet of Ministers (Article 5 par 3), unified standards of organization of work of local police (Article 6 par 7).
6.3 Financial Impact Assessment and Participatory Approach

131. Aside from a few articles of the Draft Law referring to the sources of funding/budgeting,\(^{190}\) the modalities for funding its implementation are not clear, nor are relevant sources of funding identified for actions undertaken by other entities under Article 6 of the Draft Law. **It is essential that adequate funding be procured for implementation of the law, once passed.** Moreover, Article 18 of the Draft Law specifically provides for the preparation of a “police activity programme” but does not mention the amount of financial or human resources required for implementing the programme; this provision should be amended, to ensure that such information is also included in the programme.

132. Further, it is not clear whether a full financial impact assessment has been carried out to analyze the funding needed to ensure the implementation of the Draft Law, including the financial and human costs.\(^{191}\) **More generally, policy-makers and other stakeholders should carry out a full impact assessment of planned legislation**, including a gender and social impact assessment, addressing specifically the impact of such laws, particularly on indigenous peoples, and minorities, including Roma and other ethnic, linguistic or religious minorities, or internally displaced persons.

133. Moreover, it is worth reiterating that OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1). Particularly legislation that may affect a wide array of human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes, including with the general public, and the most vulnerable and marginalized groups.\(^{192}\) **These groups of people should be fully consulted, informed, and able to submit their views prior to the adoption of the Draft Law.** Public discussion and an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institution. **Community and civil society participation in any future amendment process will also be essential.**

134. Finally, given the inter-dependency of the work of all entities of the criminal justice system, the adoption of the Draft Law alone is unlikely to be sufficient if not complemented and synchronized with reform in other sectors of the Criminal Justice System,\(^{193}\) in particular as regards criminal and criminal procedure codes.

\[^{190}\text{Article 41 of the Draft Law (Uniform and police badges), Article 60 of the Draft Law (Professional training of a police officer) and Article 64 pars 5 and 6 relating to disability, death and burial of a police officer.}\]

